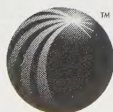


THE
ALL ENGLAND
LAW REPORTS
2001

Volume 3

Editor

CRAIG ROSE Barrister



Butterworths
A Member of the LexisNexis Group

Members of the LexisNexis Group worldwide

United Kingdom	Butterworths Tolley, a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, LONDON, WC2A 1EL, and 4 Hill Street, EDINBURGH EH2 3JZ
Argentina	Abeledo Perrot, Jurisprudencia Argentina and Depalma, BUENOS AIRES
Australia	Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales
Austria	ARD Betriebsdienst and Verlag Orac, VIENNA
Canada	Butterworths Canada Ltd, MARKHAM, Ontario
Chile	Publitecsa and Conosur Ltda, SANTIAGO DE CHILE
Czech Republic	Orac sro, PRAGUE
France	Editions du Juris-Classeur SA, PARIS
Hong Kong	Butterworths Asia (Hong Kong), HONG KONG
Hungary	Hvg Orac, BUDAPEST
India	Butterworths India, NEW DELHI
Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Giuffré, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand, WELLINGTON
Poland	Wydawnictwa Prawnicze PWN, WARSAW
Singapore	Butterworths Asia, SINGAPORE
South Africa	Butterworths Publishers (Pty) Ltd, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
USA	LexisNexis, DAYTON, Ohio

© Reed Elsevier (UK) Ltd 2001

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright owner except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under the terms of a licence issued by the Copyright Licensing Agency Ltd, 90 Tottenham Court Road, London, England W1P 0LP. Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorised act in relation to a copyright work may result in both a civil claim for damages and criminal prosecution.

Any Crown copyright material is reproduced with the permission of the Controller of Her Majesty's Stationery Office. Any European material in this work which has been reproduced from EUR-lex, the official European Communities legislation website, is European Communities copyright.

A CIP Catalogue record for this book is available from the British Library.

Printed and bound in Great Britain by William Clowes Ltd, Beccles and London

ISBN for the complete set of volumes: 0 406 85159 X
for this volume:

ISBN 0-406-93444-4



Visit Butterworths LexisNexis *direct* at www.butterworths.com

REPORTERS

Gillian Crew Barrister
Celia Fox Barrister
Manjit Gheera Barrister
Martyn Gurr Esq Barrister
Alexander Horne Esq Barrister
Melanie Martyn Barrister
Neneh Munu Barrister
Kate O'Hanlon Barrister
Victoria Parkin Barrister
Sanchia Pereira Barrister
Dilys Tausz Barrister
Lynne Townley Barrister
James Wilson Esq Barrister (NZ)

DEPUTY EDITOR

Paul Hardy Esq LLM

SUB-EDITORS

Tanja Clarke LLM
Anne-Marie Forker LLB
Rukhsana Hasnain LLB
Carl Troman Esq Barrister

PRODUCTION EDITOR

Catherine Lauder BSc

PRODUCTION / ADMIN ASSISTANT

Isabella Winter BA

House of Lords

The Lord High Chancellor of Great Britain: Lord Irvine of Lairg

Lords of Appeal in Ordinary

Lord Bingham of Cornhill
Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead

Lord Clyde
Lord Hutton
Lord Saville of Newdigate
Lord Hobhouse of Woodborough
Lord Millett
Lord Scott of Foscote

Court of Appeal

The Lord High Chancellor of Great Britain

The Lord Chief Justice of England: Lord Woolf
(President of the Criminal Division)

The Master of the Rolls: Lord Phillips of Worth Matravers
(President of the Civil Division)

The President of the Family Division: Dame Elizabeth Butler-Sloss

The Vice-Chancellor: Sir Robert Andrew Morritt

Lords Justices of Appeal

Sir Paul Joseph Morrow Kennedy
(Vice-President of the Queen's
Bench Division)
Sir Simon Denis Brown
Sir Christopher Dudley Roger Rose
(Vice-President of the Criminal Division)
Sir Peter Leslie Gibson
Sir Denis Robert Maurice Henry
Sir Robin Ernest Auld
Sir Malcolm Thomas Pill
Sir William Aldous
Sir Alan Hylton Ward
Sir Konrad Hermann Theodor Schiemann
Sir Mathew Alexander Thorpe
Sir Mark Howard Potter
Sir Henry Brooke
Sir Igor Judge (Senior Presiding Judge for England
and Wales)
Sir George Mark Waller
Sir John Frank Mummery

Sir Charles Barrie Knight Mantell
Sir John Murray Chadwick
Sir Robert Walker
Sir Richard Joseph Buxton
Sir Anthony Tristram Kenneth May
Sir Simon Lane Tuckey
Sir Anthony Peter Clarke
Sir John Grant McKenzie Laws
Sir Stephen John Sedley
Sir Jonathan Hugh Mance
Dame Brenda Marjorie Hale
Sir David Nicholas Ramsey Latham
Sir John William Kay
Sir Bernard Anthony Rix
Sir Jonathan Frederic Parker
Dame Mary Howarth Arden
Sir David Wolfe Keene
Sir John Anthony Dyson
Sir Andrew Centlivres Longmore

High Court of Justice

The Lord High Chancellor of Great Britain

The Lord Chief Justice of England

The President of the Family Division

The Vice-Chancellor

The Senior Presiding Judge for England and Wales

The puisne judges of the High Court

Chancery Division

The Lord High Chancellor of Great Britain

The Vice-Chancellor

Sir Francis Mursell Ferris

Sir John Edmund Frederic Lindsay

Sir Edward Christopher Evans-Lombe

Sir Robin Raphael Hayim Jacob

Sir William Anthony Blackburne

(Vice-Chancellor of the County Palatine
of Lancaster)

Sir Gavin Anthony Lightman

Sir Robert John Anderson Carnwath

Sir Colin Percy Farquharson Rimer

Sir Hugh Ian Lang Laddie

Sir Timothy Andrew Wigram Lloyd

Sir David Edmund Neuberger

Sir Andrew Edward Wilson Park

Sir Nicholas Richard Pumfrey

Sir Michael Christopher Campbell Hart

Sir Lawrence Anthony Collins

Sir Nicholas John Patten

Sir Terrence Michael Elkan Barnet Etherton

Queen's Bench Division

The Lord Chief Justice of England

Sir Patrick Neville Garland

Sir Michael John Turner

Sir Francis Humphrey Potts

Sir Richard George Rougier

Sir Stuart Neil McKinnon

Sir Thomas Scott Gillespie Baker

Sir Douglas Dunlop Brown

Sir Michael Morland

Sir Roger John Buckley

Sir Anthony Brian Hidden

Sir John Michael Wright

Sir John Christopher Calthorpe Blofeld

Sir Peter John Cresswell

Dame Ann Marian Ebsworth

Sir Christopher John Holland

Sir Richard Herbert Curtis

Dame Janet Hilary Smith

Sir Anthony David Colman

Sir John Thayne Forbes

Sir Michael Alexander Geddes Sachs

Sir Stephen George Mitchell

Sir Rodger Bell

Sir Michael Guy Vicat Harrison

Dame Anne Heather Steel

Sir William Marcus Gage

Sir Thomas Richard Atkin Morison

Sir Andrew David Collins

Sir Maurice Ralph Kay

Sir Anthony Hooper

Sir Alexander Neil Logie Butterfield

Sir George Michael Newman

Sir David Anthony Poole

Sir Martin James Moore-Bick

Sir Gordon Julian Hugh Langley

Sir Roger John Laugharne Thomas

Sir Robert Franklyn Nelson

Sir Roger Grenfell Toulson

Sir Michael John Astill

Sir Alan George Moses

Sir Timothy Edward Walker

[continued on next page]

Queen's Bench Division *(continued)*

Sir David Eady
Sir Jeremy Mirth Sullivan
Sir David Herbert Penry-Davey
Sir Stephen Price Richards
Sir David William Steel
Sir Rodney Conrad Klevan
Sir Charles Antony St John Gray
Sir Nicolas Dusan Bratza
Sir Michael John Burton
Sir Rupert Matthew Jackson
Dame Heather Carol Hallett
Sir Patrick Elias
Sir Richard John Pearson Aikens
Sir Stephen Robert Silber
Sir John Bernard Goldring
Sir Peter Francis Crane
Dame Anne Judith Rafferty

Sir Geoffery Douglas Grigson
Sir Richard John Hedley Gibbs
Sir Richard Henry Quixano Henriques
Sir Stephen Miles Tomlinson
Sir Andrew Charles Smith
Sir Stanley Jeffrey Burnton
Sir Patrick James Hunt
Sir Christopher John Pitchford
Sir Brian Henry Leveson
Sir Duncan Brian Walter Ouseley
Sir Richard George Bramwell McCombe
Sir Raymond Evan Jack
Sir Robert Michael Owen
Sir Colin Crichton Mackay
Sir John Edward Mitting (appointed 3 April 2001)
Sir David Roderick Evans (appointed 23 April 2001)

Family Division

The President of the Family Division

Sir Robert Lionel Johnson
Dame Joyanne Winifred Bracewell
Sir Michael Bryan Connell
Sir Jan Peter Singer
Sir Nicholas Allan Roy Wilson
Sir Nicholas Peter Rathbone Wall
Sir Andrew Tristram Hammett Kirkwood
Sir Hugh Peter Derwyn Bennett
Sir Edward James Holman

Dame Mary Claire Hogg
Sir Christopher John Sumner
Sir Anthony Philip Gilson Hughes
Sir Arthur William Hessin Charles
Sir David Roderick Lessiter Bodey
Dame Jill Margaret Black
Sir James Lawrence Munby
Sir Paul James Duke Coleridge

Official Judgment Numbers and Paragraph References

Since 11 January 2001, official judgment numbers have been given to all judgments delivered in the House of Lords, Privy Council, both divisions of the Court of Appeal and the Administrative Court. All such judgments have fixed paragraph numbering, as do judgments delivered on or after 11 January 2001 in divisions of the High Court which have not yet adopted the system of official judgment numbers (see Practice Note (judgments: neutral citation) [2001] 1 All ER 192 for the Court of Appeal and the High Court). We have adopted the following practice in respect of judgments with official judgment numbers and official paragraph numbering:

- The official judgment number is inserted immediately beneath the case name;
- Official paragraph numbers are in bold in square brackets;
- Holding references in the headnotes, and any other cross-references, are to an official paragraph number, not to a page of the report;
- When such a judgment is subsequently cited in another report,
 - (i) the official judgment number is inserted before the usual report citations in the case lists and on the first occasion when the case is cited in the text. Thereafter, only the report citations are given;
 - (ii) All 'at' references are to the official paragraph number rather than to a page of a report, with the paragraph number in square brackets but not in bold;
 - (iii) The 'at' reference is only given in conjunction with the first report cited; eg [2001] 4 All ER 159 at [16], [2001] AC 61. If an 'at' reference is included on the first occasion when the case is cited, it also appears alongside the official judgment number.

For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

CITATION

These reports are cited thus:

[2001] 3 All ER

REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) para 9 refers to paragraph 9 on page 24 of the 1996 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 26 *Halsbury's Statutes* (4th edn) 734 refers to page 734 of volume 26 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (1997 reissue) 269 refers to page 269 of the 1997 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

Halsbury's Statutory Instruments

The reference 14 *Halsbury's Statutory Instruments* (1999 issue) 201 refers to page 201 of the 1999 issue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

Cases reported in volume 3

	Page		Page
A v National Blood Authority [QBD]	289	DPP (on the application of), R v Havering Magistrates' Court [QBD DC]	997
A, R v [HL]	1	Dodson v Peter H Dodson Insurance Services (a firm) [CA]	75
A Ltd, Governor & Company of the Bank of Scotland v [CA]	58	Ebert v Official Receiver [CA]	942
Abacha (as personal representatives of Sani Abacha (decd)), Attorney General of the Federal Republic of Nigeria v [QBD]	513	Evans, Mander v [Ch D]	811
Abacha (as personal representatives of Sani Abacha (decd)), Compagnie Noga D'Importation et D'Exportation SA v [QBD]	513	First County Trust Ltd, Wilson v [CA]	229
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [CA].. .. .	393	Five Star General Trading LLC, Raiffeisen Zentralbank Österreich AG v [CA]. ..	257
Attorney General, Royal Society for the Prevention of Cruelty to Animals v [Ch D]	530	Fletcher v Midland Bank [HL]	947
Attorney General of the Federal Republic of Nigeria v Abacha (as personal representatives of Sani Abacha (decd)) [QBD]	513	Gray, Callery v [CA]	833
Banca Carige SpA Cassa Di Risparmio Genova E Imperia v Banco Nacional De Cuba [Ch D].	923	Goode v Martin [QBD]	562
Banco Nacional De Cuba, Banca Carige SpA Cassa Di Risparmio Genova E Imperia v [Ch D]	923	Governor & Company of the Bank of Scotland v A Ltd [CA]	58
Bettison v Langton [HL]	417	Gunn, ex p, R v Secretary of State for the Home Dept [CA]	481
Bond Pearce (a firm), Corbett v [CA]. ..	769	Havering Magistrates' Court, R (on the application of the DPP) v [QBD DC] ..	997
British Waterways Board v Severn Trent Water Ltd [CA]	673	Hume, Rall v [CA]	248
Bulger (on the application of), R v Secretary of State for the Home Dept [QBD DC]	449	Infantino v MacLean [QBD]	802
Callery v Gray [CA]	833	K, R v [HL]	897
Capital Trust Investments Ltd v Radio Design TJ AB [Ch D]	756	Kane v New Forest DC [CA]	914
Carlson v Townsend [CA]	663	Kelly (on the application of), R v v Secretary of State for the Home Dept [CA]	481
Chief Constable of Derbyshire Constabulary, Costello v [CA]	150	Khan (on the application of), R v Secretary of State for the Home Dept [CA]	481
Chief Constable of Leicestershire Constabulary, Kuddus v [HL] . ..	193	KLM Royal Dutch Airlines, Morris v [CA].	126
Comr of Inland Revenue, Lewis v [CA] ..	499	Koshy, DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v [CA]..	878
Compagnie Noga D'Importation et D'Exportation SA v Abacha (as personal representatives of Sani Abacha (decd)) [QBD]	513	Kuddus v Chief Constable of Leicestershire Constabulary [HL].. ..	193
Corbett v Bond Pearce (a firm) [CA]	769	Lambert, R v [HL]	577
Costello v Chief Constable of Derbyshire Constabulary [CA]	150	Langton, Bettison [HL]	417
Daly, ex p, R v Secretary of State for the Home Dept [HL]	433	Leadenhall Residential 2 Ltd, Stirling v [CA]	645
DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy [CA]	878	Lewis v Comr of Inland Revenue [CA] ..	499
Derby, Scottish Equitable plc v [CA]	818	Lord Chancellor, Patten (t/a Anthony Patten & Co) v [QBD]	886
		MacLean, Infantino v [QBD]	802
		McBains Cooper (a firm), Prudential Assurance Co Ltd v [CA]	1014
		McKeown (on the application of), R v Wirral Borough Magistrates' Court,[QBD DC]	997
		Mander v Evans [Ch D]	811
		Marcic v Thames Water Utilities Ltd [QBD]	698
		Marks and Spencer plc, Newspaper Licensing Agency Ltd v [HL] . ..	977
		Marks & Spencer plc, Vinos v [CA]	784
		Martin, Goode v [QBD]	562
		Midland Bank, Fletcher v [HL]	947
		Morris v KLM Royal Dutch Airlines [CA]..	126
		Nangleman v Royal Free Hampstead NHS Trust [CA]	793
		National Blood Authority, A v [QBD] ..	289

	Page		Page
National Westminster Bank v		Rall v Hume [CA]	248
Utrecht-America Finance Co [CA] ..	733	Royal Free Hampstead	
New Forest District Council, Kane v [CA]	914	NHS Trust, Nangleman v [CA]	793
Newspaper Licensing Agency Ltd v Marks		Royal Masonic Hospital v Pensions	
and Spencer plc [HL]	977	Ombudsman [Ch D]	408
Norris, Re [HL]	961	Royal Society for the Prevention of Cruelty	
Official Receiver, Ebert v [CA].. ..	942	to Animals v Attorney General [Ch D]	530
Pal Pak Corrugated Ltd, Russell v [CA] ..	833	Russell v Pal Pak Corrugated Ltd [CA] ..	833
Parkinson v St James and Seacroft		St James and Seacroft University	
University Hospital NHS Trust [CA] ..	97	Hospital NHS Trust, Parkinson v [CA]	97
Patten (t/a Anthony Patten & Co) v		Scottish Equitable plc v Derby [CA] ..	818
Lord Chancellor [QBD]	886	Secretary of State for the Environment,	
Pensions Ombudsman, Royal Masonic		Transport and the Regions,	
Hospital v [Ch D]	408	Trevelyan v [CA].. .. .	166
Peter H Dodson Insurance		Secretary of State for the Home Dept,	
Services (a firm), Dodson v [CA] ..	75	R v (on the application of Bulger)	
Practice Note (Court of Appeal, Civil		[QBD DC]	449
Division: hear-by dates and listing		Secretary of State for the Home	
windows) [CA]	479	Dept, R, v, ex p Daly [HL]	433
Practice Note (deceased Lloyd's		Secretary of State for the Home	
names: applications to distribute		Dept, R v, ex p Gunn [CA]	481
estates) [Ch D]	765	Secretary of State for the Home Dept,	
Practice Note (Magistrates' court:		R v, (on the application of Kelly) [CA]	481
contempt in face of court) [QBD]. ..	94	Secretary of State for the Home Dept,	
Practice Note (trust proceedings:		R v, (on the application of Khan) [CA]	481
prospective costs orders) [Ch D]. ..	574	Severn Trent Water Ltd, British Waterways	
Preston v Wolverhampton Healthcare NHS		Board v [CA]	673
Trust [HL]	947	Trustor AB v Smallbone, Trustor AB v	
Prudential Assurance Co Ltd v McBains		(No 2) [Ch D]	987
Cooper (a firm) [CA]	1014	Smith (decd), Re [Ch D].. .. .	552
R v A [HL]	1	Smith v Smith [Ch D]	552
R v K [HL]	897	Smith v White Knight Laundry Ltd [CA]	862
R v Lambert [HL]	577	Solicitors Disciplinary Tribunal, R v (on the	
R v Secretary of State for the Home		application of Toth) [QBD].. .. .	180
Dept, ex p Daly [HL]	433	Stirling v Leadenhall Residential 2 Ltd [CA]	645
R v Secretary of State for the Home		Thames Water Utilities Ltd, Marcic v [QBD]	698
Dept, ex p Gunn [CA]	481	Togher, R v [CA]	463
R v Togher [CA].	463	Toth (on the application of Toth), R v	
R (on the application of Bulger) v		Solicitors Disciplinary Tribunal [QBD]	180
Secretary of State for the		Townsend, Carlson v [CA]	663
Home Dept [QBD DC]	449	Trevelyan v Secretary of State for the	
R (on the application of the DPP) v		Environment, Transport and the	
Haverling Magistrates' Court [QBD DC]	997	Regions [CA]	166
R (on the application of Kelly) v		Trustor AB v Smallbone (No 2) [Ch D]..	987
Secretary of State for the		Utrecht-America Finance Co, National	
Home Dept [CA]	481	Westminster Bank v [CA]	733
R (on the application of Khan) v		Vinos v Marks & Spencer plc [CA] ..	784
Secretary of State for the		Wallbank, Aston Cantlow and Wilmcote	
Home Dept [CA]	481	with Billesley Parochial Church	
R (on the application of McKeown) v Wirral		Council v [CA]	393
Borough Magistrates' Court [QBD DC]	997	White Knight Laundry Ltd, Smith v [CA]	862
R (on the application of Toth) v		Wilson v First County Trust Ltd [CA] ..	229
Solicitors Disciplinary Tribunal [QBD].	180	Wirral Borough Magistrates' Court, R v (on	
Radio Design TJ AB, Capital Trust		the application of McKeown)[QBD DC]	997
Investments Ltd v [Ch D]	756	Wolverhampton Healthcare NHS Trust,	
Raiffeisen Zentralbank Österreich AG v		Preston v [HL]	947
Five Star General Trading LLC [CA] ..	257		

Digest of cases reported in volume 3

ARBITRATION – Application for summary judgment in event that application for stay unsuccessful – Whether step in proceedings									
Capital Trust Investments Ltd v Radio Design TJ AB	..	..	..	..	..	..	..	Jacob J	756
BANK – Bank fearing that it would be unable to defend client’s proceedings without exposing itself to risk of prosecution for breaching statutory provision against ‘tipping-off’ – Guidance on steps to be taken by bank to protect its position in such circumstances									
Governor & Company of the Bank of Scotland v A Ltd.	..	..	..	..	..	..	..	CA	58
CARRIAGE BY AIR – International convention imposing liability on carrier for ‘bodily injury’ to passenger arising from ‘accident’ – Fellow passenger indecently assaulting claimant while sleeping – Whether claimant suffering ‘accident’ – Whether ‘bodily injury’ including mental injury									
Morris v KLM Royal Dutch Airlines	..	..	..	..	..	..	..	CA	126
CHARITY – Association wishing to adopt membership policy to exclude certain persons and proposing administrative scheme to implement membership policy – Whether membership policy and scheme permissible									
Royal Society for the Prevention of Cruelty to Animals v Attorney General	..	..	..	..	..	..	..	Lightman J	530
CLAIM FORM – Service – Whether court having general power to extend time for service of claim form where application for extension made after expiry of time prescribed for service									
Vinos v Marks & Spencer plc	..	..	..	..	..	..	..	CA	784
—Service – Whether court having power to dispense with service of claim form in circumstances of case									
Infantino v MacLean	..	..	..	..	..	..	..	Douglas Brown J	802
—Service – Whether rules requiring claimant to serve claim form on solicitors nominated by defendant to accept service									
Nanglegan v Royal Free Hampstead NHS Trust	..	..	..	..	..	..	..	CA	793
COMMONS – Common of grazing – Whether right of common of pasturage for fixed number of animals severable from land to which it was appurtenant – Whether registration capable of transforming non-severable right of pasturage into severable right									
Bettison v Langton	..	..	..	..	..	..	..	HL	417
COMMUNITY LEGAL SERVICE FUNDING – Unassisted person’s costs out of community legal service fund – Whether proper for trial court to determine in principle whether costs order should be made against commission – Whether court having jurisdiction to make costs order against commission in favour of other body financed from public funds									
R v Secretary of State for the Home Dept, ex p Gunn, R (on the application of Kelly) v Secretary of State for the Home Dept, R (on the application of Khan) v Secretary of State for the Home Dept	..	..	..	..	..	..	..	CA	481

COMPANY – Lifting corporate veil – Circumstances in which company's receipt to be treated as individual's receipt											
Trustor AB v Smallbone (No 2)	..	..	..	..	..	..	..	..	..	Sir Andrew Morritt V-C	987
—Liquidator wishing to bring proceedings for wrongful trading and preferences against former directors of company – Whether liquidator automatically entitled to recoup costs of proposed litigation from company's assets											
Lewis v Comr of Inland Revenue	..	..	..	..	..	..	..	..	..	CA	499
—Registrar restoring company to register and directing that period of dissolution be discounted for limitation purposes – Circumstances in which such a direction may be given											
Smith v White Knight Laundry Ltd	..	..	..	..	..	..	..	..	..	CA	862
CONFLICT OF LAWS – Assignment of insurance policy with French insurers governed by English law – Claimant seeking proprietary and contractual declarations – Whether French law or English law governing assignee's claim											
Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC	..	..	..	..	..	..	..	..	..	CA	257
—Foreign proceedings – Whether injunction should be granted restraining defendant from continuing foreign proceedings											
National Westminster Bank v Utrecht-America Finance Co	..	..	..	..	..	..	..	..	..	CA	733
CONSUMER CREDIT – Statutory provision rendering improperly-executed regulated agreement unenforceable if debtor not signing document containing all prescribed terms of agreement – Whether provision compatible with right to fair trial and right to property under human rights convention											
Wilson v First County Trust Ltd	..	..	..	..	..	..	..	..	..	CA	229
CONTEMPT OF COURT – Magistrates' court – Procedure and sentencing											
Practice Note (Magistrates' court: contempt in face of court).	..	..	..	..	..	..	..	..	..	QBD	94
CONVERSION – Possession – Whether thief or receiver of stolen property acquiring possessory title to that property protected by law											
Costello v Chief Constable of Derbyshire Constabulary	..	..	..	..	..	..	..	..	..	CA	150
COPYRIGHT – Typographical arrangement – Whether copyright in typographical arrangement of newspaper in whole newspaper or in individual articles											
Newspaper Licensing Agency Ltd v Marks and Spencer plc	..	..	..	..	..	..	..	..	..	HL	977
COSTS – After-the-event (ATE) insurance premium – Whether ATE insurance premium recoverable in costs-only proceedings											
Callery v Gray, Russell v Pal Pak Corrugated Ltd	..	..	..	..	..	..	..	..	..	CA	833
COURT OF APPEAL – Practice – Hear-by dates and listing windows											
Practice Note (Court of Appeal, Civil Division: hear-by dates and listing windows)	..	..	..	..	..	..	..	..	..	CA	479
CRIMINAL EVIDENCE – Sexual offence – Test for admissibility of evidence of complainant's sexual conduct for purposes of defendant's right to fair trial when evidence relevant to issue of consent											
R v A	..	..	..	..	..	..	..	..	..	HL	1

CRIMINAL LAW – Indecent assault by man on girl under 16 – Whether prosecution having to prove absence of genuine belief that girl was 16 or over

R v K **HL** **897**

—Unsafe conviction – Approach to be adopted in determining whether conviction unsafe

R v Togher **CA** **463**

—Appeal – Whether person convicted of offence before implementation of human rights legislation entitled to rely in post-implementation appeal on breach of convention right by trial court

R v Lambert **HL** **577**

—Proceedings to determine whether bailed defendant should be remanded in custody following breach of bail condition – Whether such proceedings subject to right to fair hearing in determination of criminal charge under human rights convention – Whether breach of bail condition having to be proved by oral or other admissible evidence and to criminal standard of proof

R (on the application of the Director of Public Prosecutions) v Havering Magistrates' Court, R (on the application of McKeown) v Wirral Borough Magistrates' Court **QBD DC** **997**

DAMAGES – Exemplary damages – Whether exemplary damages only available in respect of causes of action attracting such damages before 1964

Kuddus v Chief Constable of Leicestershire Constabulary **HL** **193**

—Hospital negligently performing sterilisation operation on woman – Whether damages recoverable for cost of rearing disabled child conceived as a result of negligently-performed sterilisation – Whether damages limited to costs of special needs and care attributable to child's disabilities

Parkinson v St James and Seacroft University Hospital NHS Trust .. **CA** **97**

DRUGS – Prosecution alleging in Crown Court confiscation order proceedings that husband was true owner of property registered in wife's name – Crown Court judge rejecting wife's evidence that she was owner and concluding that husband was true owner – Whether abuse of process for wife to reassert claim in High Court proceedings to enforce order

Re Norris **HL** **961**

ECCLESIASTICAL LAW – Liability of lay impropiators to contribute to repair of chancel – Whether enforcement by Parochial Church Council of liability to repair chancel breaching lay impropiators' right to peaceful enjoyment of possessions under human rights convention

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank **CA** **393**

EUROPEAN COMMUNITY – Occupational pension schemes excluding part-time workers from membership in contravention of Community law – National legislation requiring claims to be brought within six months of termination of employment – Whether legislation compatible with Community law

Preston v Wolverhampton Healthcare NHS Trust, Fletcher v Midland Bank plc **HL** **947**

EUROPEAN COMMUNITY CONT'D – Product liability – Whether unavoidability of risk relevant in determining whether product defective – Whether unavoidable risk falling within development risks defence if producer unable to discover defect in particular product by means of accessible information									
A v National Blood Authority	..	..	..	..	..	..	..	Burton J	289
HIGHWAY – Definitive map – Whether inspector having power to confirm Secretary of State's order deleting bridleway subject to modification replacing bridleway with footpath – Whether inspector required to give special weight to entry of right of way on definitive map when determining whether it existed in fact									
Trevelyan v Secretary of State for the Environment, Transport and the Regions	..	..	..	..	..	..	..	..	CA 166
INSOLVENCY – Discharge – Whether undue influence constituting 'fraud' for purposes of fraud exception to release of bankruptcy debts by discharge									
Mander v Evans	..	..	..	..	..	..	..	..	Ferris J 811
JUDGMENT – Judge sending draft judgment to parties' lawyers – Parties compromising dispute before judgment formally handed down – Whether judge having discretion to hand down judgment notwithstanding settlement agreement									
Prudential Assurance Co Ltd v McBains Cooper (a firm)	..	..	..	..	..	..	..	CA	1014
—Judge's power to recall and change judgment – Whether exercise of power dependent on existence of exceptional circumstances									
Compagnie Noga D'Importation et D'Exportation SA v Abacha (as personal representatives of Sani Abacha (decd)), Attorney General of the Federal Republic of Nigeria v Abacha (as personal representatives of Sani Abacha (decd))	..	..	..	..	..	..	..	..	Rix LJ 513
JUDICIAL REVIEW – Sufficient interest – Whether member of victim's family having standing to apply for judicial review of Lord Chief Justice's decision on appropriate tariff for juvenile detainees									
R (on the application of Bulger) v Secretary of State for the Home Dept	..	..	..	..	..	..	..	..	QBD DC 449
LANDLORD AND TENANT – Landlord obtaining order for possession together with payment of arrears and mesne profits – Tenant offering to pay off arrears in monthly instalments – Whether landlord's acceptance of tenant's proposal creating new assured tenancy									
Stirling v Leadenhall Residential 2 Ltd	..	..	..	..	..	..	..	CA	645
LEGAL AID – Order for costs – Whether court having jurisdiction to vary costs order against assisted person whose legal aid certificate was subsequently revoked									
DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy	..	..	..	..	..	..	..	CA	878
—Taxation of costs – Criminal proceedings – Whether High Court judge having power on appeal from costs judge to permit solicitor to make new claims – Whether appeal from decision of costs judge restricted to principle of general importance certified									
Patten (t/a Anthony Patten & Co) v Lord Chancellor	..	..	..	..	..	..	..	Leveson J	886
LIMITATION OF ACTION – Accrual of cause of action – Whether cause of action against dissolved company accruing only on order restoring company to register									
Smith v White Knight Laundry Ltd	..	..	..	..	..	..	..	CA	862

MOTOR INSURANCE – Insured being covered to drive another’s car with permission
 – Whether insured covered to drive another’s car with permission having sold own car without replacement

Dodson v Peter H Dodson Insurance Services (a firm) **CA 75**

NEGLIGENCE – Duty of local planning authority – Whether local planning authority having blanket immunity for anything done in exercise of planning functions – Whether authority liable for danger on highway which it had created

Kane v New Forest DC **CA 914**

NUISANCE – Statutory sewerage undertaker failing to take steps to prevent flooding of claimant’s property – Whether failure infringing claimant’s right to respect for private life and right to peaceful enjoyment of possessions under human rights convention

Marcic v Thames Water Utilities Ltd **Judge Richard Harvery QC 698**

PENSION – Part-time employees’ retrospective claims time-barred and restricted by national legislation – Whether legislation compatible with Community law

Preston v Wolverhampton Healthcare NHS Trust, Fletcher v Midland Bank plc **HL 947**

–Unfunded scheme – Whether statutory preservation requirements applying to unfunded private sector occupational pension schemes

Royal Masonic Hospital v Pensions Ombudsman **Rimer J 408**

PLEADING – Claimant unable to rely on facts pleaded in defence but not in statement of case on application for post-limitation amendment to add new claim – Unsatisfactory nature of rule prohibiting such reliance

Goode v Martin **Colman J 562**

PRACTICE – Application by executors of deceased Lloyd’s name for permission to distribute estate – Procedure

Practice Note (deceased Lloyd’s names: applications to distribute estates) **Ch D 765**

–Applications in relation to administration of trusts – Prospective costs orders

Practice Note (trust proceedings: prospective costs orders) **Ch D 574**

–Personal injuries action – Pre-action protocol requiring party to provide other party with names of proposed experts before instructing an expert – Whether defendant’s failure to object to expert nominated by claimant transforming expert into single joint expert whose report was available to both parties – Whether refusal to disclose report of expert to whom no objection made by other side constituting non-compliance with protocol

Carlson v Townsend **CA 663**

–Service out of the jurisdiction – Claim whose whole subject matter relates to property within the jurisdiction – Whether claim having to be claim to property within the jurisdiction or some interest in it

Banca Carige SpA Cassa Di Risparmio Genova E Imperia v Banco Nacional De Cuba **Lightman J 923**

–Video evidence – Principles governing use of video evidence for purposes of cross-examination in personal injury cases

Rall v Hume **CA 248**

PRISON – Secretary of State introducing new policy requiring prison officers to examine prisoner's legal correspondence in absence of prisoner – Whether policy unjustifiably infringing prisoners' common law right to confidentiality in legal correspondence and right to respect for correspondence under human rights convention									
R v Secretary of State for the Home Dept, ex p Daly	..	..	..	..	..	..	..	..	HL 433
PUBLIC HEALTH – Drainage – Whether sewerage undertakers having implied power to discharge water onto another's land or watercourse									
British Waterways Board v Severn Trent Water Ltd	..	..	..	..	..	..	..	..	CA 673
RESTITUTION – Life assurance company mistakenly making overpayment to policyholder – Whether policyholder entitled to rely on defence of change of position									
Scottish Equitable plc v Derby	..	..	..	..	..	..	..	..	CA 818
SOLICITOR – Costs – Modest and straightforward claims for personal injuries arising from road traffic accidents – Whether in such cases success fee uplift and after-the-event insurance premium recoverable from defendant as reasonable costs if claimant entering into conditional fee agreement and paying premium at outset – Maximum reasonable success fee uplift in such cases									
Callery v Gray, Russell v Pal Pak Corrugated Ltd.	..	..	..	..	..	..	..	..	CA 833
—Disciplinary tribunal – Whether tribunal having power to refer case to Office for the Supervision of Solicitors before certifying that prima facie case established									
R (on the application of Toth) v Solicitors Disciplinary Tribunal	..	..	..	..	..	..	..	..	Stanley Burnton J 180
—Duty of care – Whether negligent solicitors having liability to testatrix's estate for costs of proceedings challenging validity of will									
Corbett v Bond Pearce (a firm)	..	..	..	..	..	..	..	..	CA 769
VEXATIOUS PROCEEDINGS – Leave to institute or continue proceedings – Whether High Court judge's refusal to grant vexatious litigant leave to apply to Court of Appeal for permission to appeal infringing right of access to court under human rights convention									
Ebert v Official Receiver	..	..	..	..	..	..	..	..	CA 942
WILL – Disclaimer – Whether voluntary disclaimer before death of estate owner effective									
Smith (decd), Re, Smith v Smith	..	..	..	..	..	..	..	..	Anthony Mann QC 552

R v A
[2001] UKHL 25

c

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD CLYDE AND LORD HUTTON

26, 27 MARCH, 17 MAY 2001

d

Criminal evidence – Sexual offence – Cross-examination of complainant about previous sexual experience – Restrictions on evidence – Statutory provision restricting admissibility of evidence or questions about complainant’s previous sexual history – Test for admissibility of evidence of complainant’s sexual conduct for purposes of defendant’s right to fair trial when evidence relevant to issue of consent – Human Rights Act 1998, s 3, Sch 1, Pt I, art 6 – Youth Justice and Criminal Evidence Act 1999, s 41(3).

e

The defendant, A, was charged with rape. His defence was that sexual intercourse had taken place with the complainant’s consent, or, alternatively, that he had believed that she had consented. At a preparatory hearing, A’s counsel applied

f

for leave to cross-examine the complainant about an alleged sexual relationship between her and A during the three weeks before the alleged rape. The judge ruled that the complainant could not be cross-examined, nor could any evidence be led, about the alleged sexual relationship. In so ruling, the judge relied on s 41^a of the Youth Justice and Criminal Evidence Act 1999 which precluded the court

g

from giving leave to adduce evidence of the complainant’s sexual behaviour, or allow cross-examination on it, unless the court was satisfied that sub-s (3) or (5) applied, and that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or the court on any relevant issue. Sub-s (3) applied if the evidence or question related to a relevant issue which fell within one of the paragraphs of that subsection. The qualifying condition in para (c) was that the

h

issue was one of consent and the sexual behaviour of the complainant, to which the evidence or question related, was alleged to have been, in any respect, so similar to any such behaviour of the complainant which took place as part of the event which was the subject matter of the charge against the accused, or to any other sexual behaviour of the complainant which took place at or about the same

j

time as that event, that the similarity could not reasonably be explained as a coincidence. On A’s appeal, the Court of Appeal held that the alleged previous sexual relationship was admissible, as the Crown conceded, in relation to A’s belief in consent, but not in relation to the issue of consent itself. The court was

a Section 41, so far as material, is set out at [29], below

of the view, however, that a direction to the jury that the evidence was relevant to the question of A's belief as to consent, but not to the question of consent itself, might result in a breach of A's right to a fair trial under art 6^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). On the Crown's appeal, their Lordships considered, inter alia, the impact of s 3^c of the 1998 Act on the application of s 41 of the 1999 Act. Under s 3, the court was required, so far as it was possible to do so, to read and give effect to primary legislation in a way that was compatible with convention rights.

Held – Under s 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under s 3 of the 1998 Act, and always paying due regard to the importance of seeking to protect the complainant from indignity and humiliating questions, the test of admissibility was whether the evidence, and questioning relating to it, was nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under art 6 of the convention. If that test were satisfied, the evidence should not be excluded. In the instant case the permissibility of questioning the complainant about the alleged recent sexual relationship between her and A, and the admissibility of evidence on that point, were matters for the trial judge to decide at the resumed trial. Accordingly, the appeal would be dismissed (see [13], [16], [46]–[48], [110], [112], [137], [140], [163], [164], below).

Notes

For the right to a fair trial, see 8(2) *Halsbury's Laws* (4th edn reissue) para 134.

For the Human Rights Act 1998, s 3, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 502, 523.

For the Youth Justice and Criminal Evidence Act 1999, s 41, see 17 *Halsbury's Statutes* (4th edn) (1999 reissue) 334.

Cases referred to in opinions

Ashingdane v UK (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.

Boardman v DPP [1974] 3 All ER 887, [1975] AC 421, [1974] 3 WLR 673, HL; *affg sub nom R v Boardman* [1974] 2 All ER 958, [1975] AC 421, [1974] 3 WLR 673, CA.

Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2001] 2 WLR 817, PC. *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97, [1999] 1 WLR 2093, HL.

De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.

Dickie v HM Advocate (1897) 24 R (J) 82.

DPP v Morgan [1975] 2 All ER 347, [1976] AC 182, [1975] 2 WLR 913, HL.

Fayed v UK (1994) 18 EHRR 393, [1994] ECHR 17101/90, ECt HR.

Jamieson v HM Advocate (No 1) 1994 JC 88, HC of Just.

Khan v UK (2000) 8 BHRC 310, ECt HR.

Lithgow v UK (1986) 8 EHRR 329, [1986] ECHR 9006/80, ECt HR.

Love v HM Advocate 2000 JC 1, HC of Just.

b Article 6, so far as material, provides: '(1) In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ...'

c Section 3, so far as material, is set out at [11], below

- a* *Missouri (State of) v Murray* (1992) 842 SW 2d 122, Missouri Ct of Apps.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
Poplar Housing and Regeneration Community Association Ltd v Donaghue [2001] EWCA Civ 595, [2001] 19 EGCS 141.
R v Butler (1986) 84 Cr App R 12, CA.
- b* *R v Darrach* (2000) 191 DLR (4th) 539, Can SC.
R v DPP, ex p Kebeline [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
R v Forbes [2001] 1 All ER 686, [2001] 2 WLR 1, HL.
R v Holmes (1871) LR 1 CCR 334.
R v Morin [1988] 2 SCR 345, Can SC.
R v P [1991] 3 All ER 337, sub nom *DPP v P* [1991] 2 AC 447, [1991] 3 WLR 161, HL.
- c* *R v R (rape: marital exemption)* [1991] 4 All ER 481, [1992] 1 AC 599, [1991] 3 WLR 767, HL.
R v Riley (1887) 18 QBD 481, CCR.
R v Seaboyer, R v Gayme [1991] 2 SCR 577, Can SC.
R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195, [2001] 2 WLR 15, HL.
- d* *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
Rayware Ltd v Transport and General Workers' Union [1989] 3 All ER 583, [1989] 1 WLR 675, CA.
- e* *Schenk v Switzerland* (1988) 13 EHRR 242, [1988] ECHR 10862/84, ECt HR.
Sporrong v Sweden (1982) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.

Appeal

- The Crown appealed with leave from the order of the Court of Appeal (Rose LJ, Hooper and Goldring JJ) on 15 January 2001 allowing an appeal by A, the defendant to proceedings for rape, from the ruling of Judge Goldstein at a preparatory hearing at the Central Criminal Court on 8 December 2000 refusing him leave to cross-examine the complainant about an alleged sexual relationship between her and A. The Court of Appeal certified that a point of law of general public importance, set out at [24] below, was involved in its decision. The Secretary of State for the Home Department intervened on the appeal. The facts are set out in the opinion of Lord Steyn.
- f*
- g*

David Perry and Patricia Lees (instructed by the Crown Prosecution Service) for the Crown.

- h* *David Pannick QC and Johannah Cutts* (instructed by the Treasury Solicitor) for the Secretary of State.
Peter Rook QC and Emma Lowry (instructed by *Soni & Kaur*, Brentford) for A.

Their Lordships took time for consideration.

- j* 17 May 2001. The following opinions were delivered.

LORD SLYNN OF HADLEY.

[1] My Lords, in recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the

woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape.

[2] That such questioning about sex with another or other men than the accused should be disallowed without the leave of the court is well established. It was recognised in s 2 of the Sexual Offences (Amendment) Act 1976 which provided that without the leave of the judge there should be no evidence or cross-examination by or on behalf of the defendant of a complainant's sexual experience with a person other than the accused. Leave was only to be given by the judge 'if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked'.

[3] Such a course was necessary in order to avoid the assumption too often made in the past that a woman who has had sex with one man is more likely to consent to sex with other men and that the evidence of a promiscuous woman is less credible.

[4] Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent. That is far from being necessarily true and the question must always be whether there was consent to sex with this accused on this occasion and in these circumstances.

[5] But the accused is entitled to a fair trial and there is an obvious conflict between the interests of protecting the woman and of ensuring such fair trial. Such conflict is more acute since the Human Rights Act 1998 came into force. The question is whether one of these interests should prevail or whether there must be a balance so that fairness to each must be accommodated and if so whether it has been achieved in current legislation. That is essentially the question which arises in this case. I gratefully adopt the statement of the facts and the relevant statutory provisions set out in the text of the speech prepared by my noble and learned friend Lord Steyn.

[6] The question certified by the Court of Appeal which gave leave to appeal to your Lordships' House is:

'May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under s 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?'

[7] Section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits the giving of evidence and cross-examination about any sexual behaviour of the complainant except with leave of the court. Leave may be given where (a) consent is an issue and where the sexual behaviour of the complainant is alleged to have taken place 'at or about the same time as the event which is the subject matter of the charge against the accused' (s 41(3)(b) of that Act) and (b) where the sexual behaviour of the complainant to which the question or evidence relates is alleged to have been 'in any respect, so similar' to the sexual behaviour which is shown by evidence to have taken place as part of the event which is the subject matter of the charge or to any other sexual behaviour of the complainant which took place at or about the same time as that event 'that the similarity cannot reasonably be explained as a coincidence' (s 41(3)(c)).

[8] Such questions are not to be allowed if their purpose is to establish material to impugn the credibility of the complainant as a witness. Leave may also be

a given if the evidence of the complainant's sexual behaviour goes no further than to rebut prosecution evidence.

[9] It is apparent that *prima facie* the restriction placed on the court's power to give leave seriously limits the opportunities for cross-examination or the adducing of evidence on behalf of the accused. The limitation in s 41(3)(b) of the 1999 Act to conduct 'at or about the same time' as the event charged would
b *prima facie* prohibit questions as to a continuous period of cohabitation or sexual activity, or as to individual events more than a very limited period before the event, the subject matter of the charge. The requirement that the sexual behaviour relied on must be so similar to the sexual activity which took place as part of the event charged or be so similar to any other sexual behaviour which took place 'at or about the same time' as the event charged that the similarity cannot 'reasonably
c be explained as a coincidence' is on the face of it very restrictive.

[10] The need to protect women from harassment in the witness box is fundamental. It must not be lost sight of but I suspect that the man or woman in the street would find it strange that evidence that two young people who had lived together, or regularly as part of a happy relationship had had sexual acts
d together, must be wholly excluded on the issue of consent unless it is immediately contemporaneous. The question whether such evidence should be believed and whether it is sufficient to establish consent or even belief in consent are different matters. The man and woman in the street might also find it strange that evidence may be given and cross-examination allowed as to belief in consent but not to consent itself when the same evidence was being relied on.
e That distinction has been recognised in the cases but without in any way resiling from a strong insistence on the need to protect women from humiliating cross-examination and prejudicial but valueless evidence, it seems to me clear that these restrictions in s 41 *prima facie* are capable of preventing an accused person from putting forward relevant evidence which may be evidence critical to his
f defence, whether it is as to consent or to belief that the woman consented. If thus construed s 41 does prevent the accused from having a fair trial then it must be declared to be incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998) (the convention).

g [11] But the *prima facie* let alone the literal readings are not the end of the inquiry. Section 3 of the 1998 Act requires that: 'So far as it is possible to do so, primary legislation ... must be read and given effect in a way which is compatible with the Convention rights.'

[12] I was initially tempted to think that the words 'at or about the same time
h as the event' could be given a wide meaning—certainly a few hours perhaps a few days when a couple were continuously together. But that meaning could not reasonably be extended to cover a few weeks which are relied on in the present case and I consider in the event that even if read with art 6 of the convention they must be given a narrow meaning which would not allow the evidence or
j cross-examination in the present case or in other than cases where the acts relied on were really contemporaneous.

[13] Section 41(3)(c) of the 1999 Act raises a different issue. Although if read literally or even perhaps purposively this provision is very restrictive, I think disproportionately restrictive, it is less precise than s 41(3)(b). The section must be read and given effect in a way 'which is compatible with the Convention

rights' in so far as it is possible to do so. It seems to me that your Lordships cannot say that it is not possible to read s 41(3)(c) together with art 6 of the convention rights in a way which will result in a fair hearing. In my view s 41(3)(c) is to be read as permitting the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers is necessary to make the trial a fair one. a

[14] I do not consider that the provisions of s 41(5) admitting rebuttal evidence are sufficient in themselves to avoid unfairness. They are limited in their effect. b

[15] I agree with the statement of Lord Steyn's speech (at [46]) as to the effect of the decision today.

[16] Despite the somewhat unusual procedural route which this case has taken, I think that the right course is to dismiss the appeal. The case should now be referred back to the trial judge for him to continue the case in the light of the present decision. c

LORD STEYN.

I. The judge's preliminary rulings d

[17] My Lords, in December 2000 the respondent (the defendant) was due to stand trial in the Crown Court on an indictment charging him with an offence of rape, the particulars being that on 14 June 2000 he raped the complainant. The defendant's defence is that sexual intercourse took place with the complainant's consent. It appears that he will alternatively rely on the defence that he believed that she consented. e

[18] The Crown's case is that the complainant first met the defendant together with a friend on or about 26 May 2000. The complainant and the defendant's friend formed a sexual relationship. The complainant visited the friend at the flat which he was then sharing with the defendant. At about 9 p m on 13 June 2000 the complainant and the friend had sexual intercourse at the flat when the defendant was not there. Later, when the defendant returned, the complainant, the friend and the defendant went for a picnic on the riverbank of the Thames. The friend and the defendant drank whisky and beer. When they got back to the flat the friend collapsed. An ambulance was called and the friend was taken to hospital. Later, in the early hours of 14 June 2000, the defendant and the complainant left the flat intending to walk to the hospital. The defendant led the way and chose a route which took them close to the river. As they walked along the towpath the defendant fell down. The complainant's account is that she tried to help him to his feet, whereupon he pulled her to the ground and had sexual intercourse with her. Later that day the complainant made a complaint of rape to the police. The police interviewed the defendant. Following the advice of his solicitor he declined to answer questions. He read a prepared statement in which he asserted in very general terms that 'she was never against this sexual relationship that we were having'. f g h

[19] According to the statement of facts and issues it is the defendant's case that— j

'on the occasion in question, [viz 14 January 2000] the complainant initiated consensual sexual intercourse and that this was part of a continuing sexual relationship. The consensual sexual relationship covered a period of approximately three weeks prior to 14th June 2000; and in particular he had

a consensual sexual relations with her, including sexual intercourse, at his flat on occasions between 26th May 2000 and 14th June 2000. The last instance was approximately one week before 14th June 2000.'

b [20] On 8 December 2000 a preparatory hearing took place pursuant to s 29 of the Criminal Procedure and Investigations Act 1996. Counsel for the defendant applied for leave to cross-examine the complainant about the alleged previous sexual relationship between them and to lead evidence about it. Relying on the provisions of s 41 of the Youth Justice and Criminal Evidence Act 1999 the judge ruled: (i) that the act of consensual sexual intercourse with the friend could be put to the complainant in cross-examination; (ii) that the complainant could not be cross-examined, nor could evidence be led, about her alleged sexual relationship with the defendant; and (iii) that the prepared statement could not be put in evidence.

c [21] The judge observed that this ruling would prima facie result in a breach of the right to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998) (the convention). Pursuant to s 35 of the 1996 Act the judge gave leave to the defendant to appeal to the Court of Appeal. The defendant exercised that right.

II. *The decision of the Court of Appeal*

e [22] The defendant appealed against the judge's rulings. In giving the judgment of the Court of Appeal ([2001] EWCA Crim 4, sub nom *R v Y* (2001) Times, 13 February) Rose LJ pointed out that the judge's first ruling, viz giving leave to cross-examine the complainant about sexual intercourse with the friend of the defendant, was made in error. No such leave had been sought.

f [23] The judgment was, however, principally concerned with the rulings by the judge that the complainant could not be asked whether, nor could the defendant give evidence that, she had sexual intercourse with the defendant on occasions during the previous three weeks. Rose LJ recorded a concession by the Crown, rightly made in his view, that the questioning and evidence in relation to the complainant's alleged prior sexual activity with the defendant was admissible under s 41(3)(a) of the 1999 Act in relation to the defendant's belief in the complainant's consent (see s 1 of the Sexual Offences (Amendment) Act 1976). It followed that the judge's ruling in entirely excluding such evidence was wrong. On the other hand, Rose LJ concluded that the effect of the Act is that the alleged previous sexual relationship is inadmissible on the issue of consent. On this supposition Rose LJ further stated that the Crown accepted that the trial judge will, in due course, have to direct the jury that the evidence of the complainant's consensual activity with the defendant during the period before the alleged rape is solely relevant to the question of the defendant's belief as to consent and is not relevant to the question of whether the complainant in fact consented. However, Rose LJ was of the view that such a direction might lead to an unfair trial because a previous sexual relationship may be relevant to the issue of consent as well as belief in consent.

j [24] Allowing the appeal the Court of Appeal observed:

'Whether if, following a trial with such a direction, the appellant were to be convicted, it would be possible to argue, by way of appeal, that his trial had not been fair, in the light of art 6, remains for consideration on some

future occasion. Clearly, if those events occur, that will be the time, if the point has not previously been resolved following some other trial, for the Home Secretary to be joined as a party with a view to the possibility of a declaration of incompatibility between the provisions of s 41(3)(b) of the Youth Justice and Criminal Evidence Act 1999 (in so far as they preclude reference, in relation to consent, to the complainant's prior consensual sexual activity with the defendant) and art 6.' (See [2001] EWCA Crim 4 at [37].)

On 31 January 2001 the Court of Appeal certified the following question:

'May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under s 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?'

At the same time the Court of Appeal granted the Crown leave to appeal to the House of Lords.

III. *The Secretary of State's intervention*

[25] Counsel for the defendant indicated that on the appeal to the House he would invite the House to read down s 41 of the 1999 Act in accordance with s 3 of the 1998 Act so that s 41 could be given effect in a way that was compatible with the fair trial guarantee under art 6 of the convention, and if that was not possible, he would invite the House to make a declaration of incompatibility. In these circumstances the Secretary of State for the Home Department applied for leave to intervene at this stage. An Appeal Committee recommended that leave be given to the Secretary of State to intervene. In its thirty-first report of 7 March 2001 ([2001] 1 WLR 789) drafted by Lord Hope of Craighead the Appeal Committee observed (at 792–793):

'11 As a general rule a question as to whether the admission or exclusion of evidence at a criminal trial is incompatible with the right to a fair trial under article 6 of the Convention is best considered after the trial has been completed. This is so that the question of fairness can be considered in the context of the trial as a whole. The trial in this case has yet to take place. But the headnote to Chapter III Part II of the 1999 Act indicates that section 41 was enacted for the protection of complainants in proceedings for sexual offences. It is undesirable that vulnerable witnesses such as the complainant in a rape trial who have already given evidence should be exposed to the risk of having to give evidence again at a new trial. This is what would happen if the verdict at the first trial were to be set aside on the ground that the respondent did not receive a fair trial. So it is in the best interests of all parties that the issues which have been raised in this case about a possible incompatibility between section 41 and article 6 should be determined before the trial. Moreover, as the issue about incompatibility is an issue of general public importance which is likely to affect other trials, it should be determined as soon as possible. 12 For these reasons the Appellate Committee will wish to hear argument on the question whether section 41 of the Act is incompatible with the article 6 and, if so, whether the House should make a declaration of incompatibility. As Mr Pannick said, it would be unsatisfactory for the appeal to commence on the day that has been set down for it and for

- a the appeal then to be adjourned so that the notification contemplated by Direction 30.2 could be given. The efficient way to proceed is to grant leave to the Crown now to avoid this delay.'

In the result the House has had the advantage of submissions not only on behalf of both the Director of Public Prosecutions (DPP) and the defendant but also on behalf of the Secretary of State. On the hearing of the appeal counsel for the Secretary of State referred to parts of the preceding Parliamentary debates but he made clear that he was not doing so as an aid to construction of the statutory language under the rule in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593. Instead he used this material, together with other materials, to identify the mischief which led to the enactment of the statute.

- c [26] On the hearing of the appeal counsel for the DPP informed the House that the same issue arises in 13 other criminal cases. It is therefore a matter of some urgency.

IV. The context of s 41

- d [27] Following the 1939–45 war the general principle of the equality of men and women in all spheres of life has gradually become established. In the aftermath of the sexual revolution of the sixties the autonomy and independence of women in sexual matters has become an accepted norm. It was this change in thinking about women and sex which made possible the decision of the House of Lords in *R v R (rape: marital exemption)* [1991] 4 All ER 481, [1992] 1 AC 599 that the offence of rape may be committed by a husband upon his wife. It was a dramatic reversal of old-fashioned beliefs. Discriminatory stereotypes which depict women as sexually available have been exposed as an affront to their fundamental rights. Nevertheless, it has to be acknowledged that in the criminal courts of our country, as in others, outmoded beliefs about women and sexual matters lingered on. In recent Canadian jurisprudence they have been described as the discredited twin myths, viz 'that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief' (see *R v Seaboyer, R v Gayme* [1991] 2 SCR 577 at 604, 630 per McLachlin J). Such generalised, stereotyped and unfounded prejudices ought to have no place in our legal system.
- e But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape cases.

- g [28] In *DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182 the House of Lords held that in a trial for rape a subjective belief by the defendant that the victim consented to sexual intercourse afforded a defence. Following this decision the Advisory Group on the Law of Rape was established. It produced the so-called Heilbron Report (Cmnd 6352 (1975)). It treated previous sexual association between the complainant and the accused as potentially relevant but advised that in general the previous sexual history of the complainant with other men was irrelevant. Parliament enacted legislation which subjected the admission of evidence of the previous sexual experience of a complainant with third parties to a leave requirement. It did not touch on prior sexual contact between the complainant and the accused (s 2(1) of the 1976 Act). Section 2(2) of that Act provides that the judge shall only give leave 'if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked'. The statute did not achieve its object of preventing
- h
- j

the illegitimate use of prior sexual experience in rape trials. In retrospect one can now see that the structure of this legislation was flawed. In respect of sexual experience between a complainant and other men, which can only in the rarest cases have any relevance, it created too broad an inclusionary discretion. Moreover, it left wholly unregulated questioning or evidence about previous sexual experience between the complainant and the defendant even if remote in time and context. There was a serious mischief to be corrected.

V. *Section 41 of the Youth Justice and Criminal Evidence Act 1999*

[29] Sections 41 to 43 of the 1999 Act imposed wide restrictions on evidence and questioning about a complainant's sexual history. These provisions are contained in Ch III of Pt II of the statute and appear under the heading 'Protection of Complainants in Proceedings for Sexual Offences'. The material part of s 41 reads:

'(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—(a) no evidence may be adduced, and (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—that subsection (3) or (5) applies, and (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—(a) that issue is not an issue of consent; or (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual

- a behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).’

Section 41 imposes the same exclusionary provisions in respect of a complainant’s sexual experience with the accused as with other men. This is the genesis of the problem before the House. There are differences which need to be explored.

b In this task I have been greatly assisted primarily by the careful and incisive arguments of counsel but also by an as yet unpublished comprehensive review of the literature, comparative jurisprudence, and different legislative models and proposals for reform prepared by Neil Kibble of the Department of Law, University of Wales Aberystwyth ‘The Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases’ (February 2001, unpublished). My understanding is that in revised form it will be published in the *Cambrian Law Review*. It amplifies his earlier paper ‘The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammelled judicial discretion’ [2000] *Crim LR* 274.

- c
- d VI. *Sexual experience with the accused contrasted with sexual experience with other men*

[30] Although not an issue before the House, my view is that the 1999 Act deals sensibly and fairly with questioning and evidence about the complainant’s sexual experience with other men. Such matters are almost always irrelevant to the issue whether the complainant consented to sexual intercourse on the occasion alleged in the indictment or to her credibility. To that extent the scope of the reform of the law by the 1999 Act was justified. On the other hand, the blanket exclusion of prior sexual history between the complainant and an accused in s 41(1) of that Act, subject to narrow categories of exception in the remainder of s 41, poses an acute problem of proportionality.

- e
- f [31] As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant’s state of mind. It cannot, of course, prove that she consented on the occasion in question. Relevance and sufficiency of proof are different things. The fact that the accused a week before an alleged murder threatened to kill the deceased does not prove an intent to kill on the day in question. But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion. Accordingly, a prior relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular occasion.
- g
- h

- j [32] In a balanced review of the voluminous critical literature in the United Kingdom between 1975 and 1999 Mr Kibble has shown that the principal focus throughout has been on the irrelevance and prejudicial impact of sexual experience of the complainant with other men. The target of the literature was the 1976 Act. When the issue of the relevance of sexual experience between a complainant and a defendant was raised there was broad agreement that such evidence is sometimes relevant (eg an ongoing relationship) and sometimes

irrelevant (eg an isolated episode in the past). There was no case made out in the literature for the blanket exclusionary scheme incorporated in s 41 of the 1999 Act in respect of prior sexual experience between a complainant and accused. Not surprisingly the legislative technique adopted in s 41 has been criticised. Professor Diane Birch 'A Better Deal for Vulnerable Witnesses?' [2000] Crim LR 223 at 248–249 trenchantly commented:

'Under section 41, the complainant's sexual behaviour (including behaviour with the accused) has relevance to consent only where it took place at or about the same time as the event of the subject-matter of the charge, or where it is strikingly similar to behaviour of the subject-matter of the charge or to any other sexual behaviour alleged to have taken place at or about that time. All that can be revealed, it would seem, is evidence such as that the complainant was seen in a passionate embrace with the accused just before (or just after) the alleged offence; bizarre and unusual conduct like the much-discussed propensity to re-enact the balcony scene from *Romeo and Juliet*, and (perhaps) evidence that the complainant was picking up clients as a prostitute (if it is D's defence that he was so picked up). Along with all the complainant's other sexual doings, the remainder of the history of any sexual relationship the complainant has had with the accused will, it seems, have to be concealed from the jury or magistrates. It is not clear how this is to be done in a case where, for example the parties are living together: is the jury simply to be told what happened in the bedroom without any idea of whether D was a trespasser or an invitee? Presumably there will have to be some concept of background evidence that it is necessary for the jury to know in order to make sense of the evidence in the case. Section 41 is well-intentioned, but the constraints laid on relevance go too far.'

It is difficult to dispute this assessment. After all, good sense suggests that it may be relevant to an issue of consent whether the complainant and the accused were ongoing lovers or strangers. To exclude such material creates the risk of disembodiment of the case before the jury. It also increases the danger of miscarriages of justice. These considerations raise the spectre of the possible need for a declaration of incompatibility in respect of s 41 of the 1999 Act under s 4 of the 1998 Act.

[33] Counsel for the Secretary of State submitted that s 41 was based on the decision of the Supreme Court of Canada in *R v Seaboyer*, *R v Gayme* [1991] 2 SCR 577. In that case a first attempt to introduce 'rape-shield' provisions directed against the admissibility of sexual history evidence in rape cases was held to be invalid under s 7 of the Canadian Charter of Rights and Freedoms. By a majority the Supreme Court indicated what kind of provisions would be lawful. Following *R v Seaboyer* s 276 of the Criminal Code (the code) was amended. Subsequently the Supreme Court held that s 276 as amended was valid. As amended it was not viewed as a blanket exclusion (see *R v Darrach* (2000) 191 DLR (4th) 539). Unfortunately, the Secretary of State's understanding of the Canadian position was flawed. *R v Seaboyer* is largely concerned with the irrelevance of sexual experience between the complainant and third parties. In her leading judgment McLachlin J placed general reliance upon an article of Professor Galvin 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade' (1986) 70 Minn L Rev 763, who emphasises the probative value of prior sexual conduct between a complainant and an accused to the issue of consent. Moreover, McLachlin J made a telling comment on prior sexual history with the

a accused. It is to the following effect (at 633): 'I question whether evidence of other sexual conduct with the accused should automatically be admissible in all cases; sometimes the value of such evidence might be little or none.' *R v Seaboyer* does not justify the breadth of the exclusionary provisions of s 41 of the 1999 Act in respect of previous sexual experience between a complainant and a defendant. The amended s 276 of the code is also in more flexible terms than s 41. Section

b 276 reads:

(1) In proceedings in respect of [certain sexual offences], evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines ... that the evidence (a) is of specific instances of sexual activity; (b) is relevant to an issue at trial; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (a) the interests of justice, including the right of the accused to make a full answer and defence ...'

It will be observed that sub-s (1) is directed at impermissible uses of the evidence. It is not a blanket prohibition. It has an inbuilt flexibility as appears from the balancing provision of sub-s (2) and particularly the words of para (c). The Canadian model is therefore in substantially less restrictive terms than s 41 of the 1999 Act. Moreover, it is noteworthy that a law reform proposal in New South Wales explicitly accepts that the fact that the complainant engaged in sexual activity with the accused in the past *may* be relevant to the question whether she consented to sexual activity on the occasion in question: Law Reform Commission of New South Wales *Report on the Review of Section 409B of the Crimes Act 1900* (LRC 87 (1998)). A similar flexible approach is reflected in a discussion paper of the Law Commission of New Zealand *Evidence Law: Characters and Credibility* (Preliminary Paper 27 (1997)) published in February 1997. Commonwealth developments do not support the breadth of the exclusionary provisions of s 41 in respect of the potential relevance of the sexual experience of a complainant with an accused.

VII. *The interpretation of s 41 of the 1999 Act*

j [34] In order to assess whether s 41 of the 1999 Act is incompatible with the convention right to a fair trial, it is necessary to consider what evidence it excludes. The mere fact that it excludes some relevant evidence would not by itself amount to a breach of the fair trial guarantee. On the other hand, if the impact of s 41 is to deny the right to accused in a significant range of cases from putting forward full and complete defences it may amount to a breach.

[35] Counsel for the Secretary of State has argued that unfairness to an accused will rarely arise because evidence of sexual experience between a complainant and an accused will almost always be admissible on the basis of the defence that the accused thought that the complainant consented. His argument has assumed that in practice an accused will almost invariably be able to put forward both defences. Counsel for the defendant has persuaded me that the defence of belief in consent would often have no air of reality and would in practice not be available, eg in cases where there are diametrically opposite accounts of the circumstances of the alleged rape, with the complainant insisting that it was perpetrated with great violence and the accused saying that the complainant took the initiative in an act of consensual intercourse. In any event, it does not meet the difficulty that the judge's direction to the jury would always have to be to the effect that the past experience between the complainant and the accused is irrelevant to the issue of consent. I would reject the submissions of counsel for the Secretary of State on this point. In these circumstances counsel for the Secretary of State accepts that, despite the interlocutory nature of the proceedings, the House must now grapple with the problem whether, measured against the guarantee of a fair trial, the breadth of the exclusionary provisions of s 41 in respect of sexual experience between a complainant and the defendant are justified and proportionate. The position of counsel for the Secretary of State on this point is realistic. To postpone the decision until after the conclusion of a number of pending trials, which raise the issue, would be unfair to individuals and contrary to the public interest.

[36] Counsel for the Secretary of State further relied on the principle that, in certain contexts, the legislature and the executive retain a discretionary area of judgment within which policy choices may legitimately be made (see *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2001] 2 WLR 817). Clearly the House must give weight to the decision of Parliament that the mischief encapsulated in the twin myths must be corrected. On the other hand, when the question arises whether in the criminal statute in question Parliament adopted a legislative scheme which makes an excessive inroad into the right to a fair trial the court is qualified to make its own judgment and must do so.

[37] The methodology to be adopted is important. In a helpful paper under the title 'The Act of the Possible—Interpreting Statutes under the Human Rights Act' [1998] EHRLR 665 at 674 Lord Lester of Herne Hill QC has summarised the correct approach:

'The first question the courts must ask is: does the legislation interfere with a Convention right? At that stage, the purpose or intent of the legislation will play a secondary role, for it will be seldom, if ever, that Parliament will have intended to legislate in breach of the Convention. It is at the second stage, when the Government seeks to justify the interference with a Convention right, under one of the exception clauses, that legislative purpose or intent becomes relevant. It is at that stage the principle of proportionality will be applied.'

See also Bertha Wilson J 'The Making of a Constitution: Approaches to Judicial Interpretation' (1988) PL 370 at 371–372, and David Feldman 'Proportionality and The Human Rights Act 1998' in *The Principle of Proportionality in the Laws of Europe* (ed E Ellis) (1999) pp 117, 122–123.

a [38] It is well established that the guarantee of a fair trial under art 6 is absolute: a conviction obtained in breach of it cannot stand: *R v Forbes* [2001] 1 All ER 686 at 697, [2001] 2 WLR 1 at 13 (para 24). The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play. The criteria for determining the test of proportionality have been analysed in similar terms in the case law of the Court of Justice of the European Communities and the European Court of Human Rights. It is not necessary for us to re-invent the wheel. In *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684 Lord Clyde adopted a precise and concrete analysis of the criteria. In determining whether a limitation is arbitrary or excessive a court should ask itself—

d ‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.’

The critical matter is the third criterion. Given the centrality of the right of a fair trial in the scheme of the convention, and giving due weight to the important legislative goal of countering the twin myths, the question is whether s 41 of the 1999 Act makes an excessive inroad into the guarantee of a fair trial.

e [39] Subject to narrow exceptions s 41 is a blanket exclusion of potentially relevant evidence. Section 41 must, however, be construed in order to determine its precise exclusionary impact on alleged previous sexual experience between the complainant and the accused. Two processes of interpretation must be distinguished. First, ordinary methods of purposive and contextual interpretation may yield ways of minimising the prima facie exorbitant breadth of the section. Secondly, the interpretative obligation in s 3(1) of the 1998 Act may come into play. It provides that ‘So far as it is possible to do so, primary legislation ... must be read and given effect in a way which is compatible with the Convention rights’ (my emphasis). It is a key feature of the 1998 Act.

g [40] Three possible ways of minimising the excessive breadth of s 41 of the 1999 Act must be considered. The first possible gateway is to be found in s 41(3)(b), viz:

h ‘... it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused ...’

j An example covered by this provision would be where it is alleged that the complainant invited the accused to have sexual intercourse with her earlier in the evening. In my opinion, however, neither ordinary methods of interpretation nor the interpretative obligation under s 3 of the 1998 Act enables one to extend the temporal restriction to days, weeks or months. Section 41(3)(b) acknowledges by its own terms that previous sexual experience between a complainant and an accused may be relevant but then restricts the admission of such evidence by an extraordinarily narrow temporal restriction.

[41] The second gateway suggested by counsel for the DPP is the provision in s 41(5)(b) of the 1999 Act enabling evidence adduced by the prosecution to be rebutted or explained by or on behalf of the defence. The suggestion is that the Crown could adduce evidence which will enable the defence to lead evidence of previous sexual experience in rebuttal. This is not a coherent and satisfactory solution. It depends on the goodwill and co-operation of the prosecutor. A defendant has the right in a criminal trial to offer a full and complete defence. I would reject this suggested solution.

[42] The third gateway is s 41(3)(c). It permits evidence where—

‘it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused ... that the similarity cannot reasonably be explained as a coincidence.’

This gateway is only available where the issue is whether the complainant consented and the evidence or questioning relates to behaviour that is so similar to the defence’s version of the complainant’s behaviour at the time of the alleged offence that it cannot reasonably be explained as a coincidence. An example would be the case where the complainant says that the accused raped her; the accused says that the complainant consented and then after the act of intercourse tried to blackmail him by alleging rape; and the defence now wishes to ask the complainant whether on a previous occasion she similarly tried to blackmail the accused.

[43] Rightly none of the counsel appearing before the House were prepared to argue that on ordinary methods of interpretation s 41(3)(c) can be interpreted to cover, for example, cases similar to the one before the House where it is alleged that there was a previous sexual experience between the complainant and the accused on several occasions during a three-week period before the occasion in question. Let me consider ordinary methods of interpretation in a little more detail. One could say that s 41(3)(c) is a statutory adoption of the ‘striking similarity’ test enunciated in *Boardman v DPP* [1974] 3 All ER 887, [1975] AC 421. So interpreted s 41(3)(c) is a narrow gateway, which will only be available in rare cases. Alternatively, one could argue that s 41(3)(c) involves the test of high probative force of the evidence, which makes it just to admit it, in accordance with the principle stated in *R v P* [1991] 3 All ER 337, sub nom *DPP v P* [1991] 2 AC 447. Even if this approach was consistent with the language of s 41, the threshold requirement would be too high: often the evidence will be relevant but not capable of being described as having ‘high probative value’. These ways of interpreting s 41(3)(c) cannot solve the problem of the prima facie excessive inroad on the right to a fair trial. It is important to concentrate in the first place on the language of s 41. Making due allowance for the words ‘in any respect’ in s 41(3)(c), the test ‘that the similarity cannot reasonably be explained as a coincidence’ is inapt to allow evidence to be admitted or questioning to take place that, for example, (i) the complainant invited the accused at an office party on a Friday to come to her flat on the Sunday to make love to her, or (ii) that the complainant and the accused had sexual relations on several occasions in the previous month. While common sense may rebel against the idea that such evidence is

a never relevant to the issue of consent, that is the effect of the statute. In my view ordinary methods of purposive construction of s 41(3)(c) cannot cure the problem of the excessive breadth of s 41, read as a whole, so far as it relates to previous sexual experience between a complainant and the accused. Whilst the statute pursued desirable goals, the methods adopted amounted to legislative overkill.

[44] On the other hand, the interpretative obligation under s 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature (see *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 831, 837, [2000] 2 AC 326 at 366, 373 per my judgment and that of Lord Cooke of Thorndon respectively). The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the convention into account in resolving any ambiguity in a legislative provision (see *Rights Brought Home: The Human Rights Bill* (Cm 3782 (1997)) para 2.7). The draftsman of the 1998 Act had before him the slightly weaker model in s 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 of the 1998 Act places a duty on the court to strive to find a possible interpretation compatible with convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: s 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: s 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it; compare, for example, arts 31 to 33 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, TS 58 (1980); Cmnd 7964). Section 3 of the 1998 Act qualifies this general principle because it requires a court to find an interpretation compatible with convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that 'in 99 per cent of the cases that will arise, there will be no need for judicial declarations of incompatibility' (see 585 HL Official Report (5th series) col 840) and the Home Secretary said 'We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention' (see 306 HC Official Report (6th series) col 778). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of s 3 of the 1998 Act *against* the executive ('*Pepper v Hart*; A Re-examination' (2001) 21 OJLS 59). In accordance with the will of Parliament as reflected in s 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. h A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on convention rights is stated in terms, such an impossibility will arise (*R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 413, [2000] 2 AC 115 at 132 per Lord Hoffmann). There is, however, no limitation of such a nature in the present case.

j [45] In my view s 3 of the 1998 Act requires the court to subordinate the niceties of the language of s 41(3)(c) of the 1999 Act, and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and commonsense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence

by advancing truly probative material. It is therefore possible under s 3 of the 1998 Act to read s 41 of the 1999 Act, and in particular s 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under art 6 of the convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under s 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, s 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in s 3 of the 1998 Act. That is the approach which I would adopt.

VIII. *The task of trial judges*

[46] It is of supreme importance that the effect of the speeches today should be clear to trial judges who have to deal with problems of the admissibility of questioning and evidence on alleged prior sexual experience between an accused and a complainant. The effect of the decision today is that under s 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under s 3 of the 1998 Act, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under art 6 of the convention. If this test is satisfied the evidence should not be excluded.

IX. *Application of the interpretation adopted*

[47] The appeal before the House concerns a concrete case. It involves the permissibility of questioning a complainant about an alleged recent sexual relationship between her and the defendant, and the admissibility of evidence on that point. These are matters for the trial judge to rule on at the resumed trial. But in my view he must do so on the broader interpretation of s 41(3)(c) of the 1999 Act required by s 3 of the 1998 Act.

X. *Disposal*

[48] I would decline to make the rulings sought by the DPP and the Secretary of State. Given the terms of this speech it is unnecessary to answer the certified question. I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD.

[49] My Lords, rape is the most humiliating, distressing and cynical of crimes. It presents itself in various ways to the prosecutor. Sometimes it is accompanied by acts of extreme violence. In such cases proof that the crime has been perpetrated will be little more than a formality and the more difficult task is likely to be to prove the identity of the perpetrator. But more often than not very little, if any, violence is used, identity is not in issue as the parties were known to each other, and the defendant admits that on the occasion in question he had sexual intercourse. The sole issue for the prosecutor in these cases will be whether it can

- a be proved that the complainant did not consent to the sexual intercourse. The crime is constituted by proof of the fact of sexual intercourse with a person who at the time of the intercourse did not consent to it, accompanied by proof that at the time the defendant either knew that the person did not consent to the intercourse or was reckless as to whether that person consented to it: Sexual Offences Act 1956, s 1, as substituted by s 142 of the Criminal Justice and Public Order Act 1994. The absence of consent is, in these cases, the crucial issue. This is a question of fact, which must be resolved in the light of the evidence.
- b

- [50] It is notorious that proof that the complainant did not consent to an admitted act of sexual intercourse raises difficult questions which, in the typical case, resolve themselves into issues of credibility. In its modern form the definition of the crime recognises that every woman has the right, on each and every occasion, to say 'No'. As Gonthier J put it in *R v Darrach* (2000) 191 DLR (4th) 539 at 568, actual consent must be given for each instance of sexual activity. The crime has now been extended to the rape of a man by another man (s 1(1) of the 1956 Act, as substituted by s 142 of the 1994 Act). So every man also has that right. But it is one thing for the law to recognise these essential facts. It is quite another for the law to put its principles into practice. That, in the final analysis, is what this case is about.
- c
- d

Background

- [51] It is plain a balance must be struck between the right of the defendant to a fair trial and the right of the complainant not to be subjected to unnecessary humiliation and distress when giving evidence. The right of the defendant to a fair trial has now been reinforced by the incorporation into our law of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) by the Human Rights Act 1998 (as set out in Sch 1 of that Act). But the principles which are enshrined in that article have for long been part of our common law. The common law recognises that a defendant has the right to cross-examine the prosecutor's witnesses and to give and lead evidence. The guiding principle as to the extent of that right is that *prima facie* all evidence which is relevant to the question whether the defendant is guilty or innocent is admissible. As the fact that the act of sexual intercourse was without the consent of the complainant is one of the essential elements in the charge which the prosecutor must establish, the defendant must be given an opportunity to cross-examine the prosecutor's witnesses and to give and lead evidence on that issue. That is an essential element of his right to a fair trial.
- e
- f
- g

- [52] But the extent to which a defendant may go in the exercise of his right to be given that opportunity is a matter to which the common law has failed to provide a satisfactory answer. The problem is at its most acute in cases where the parties to the alleged rape are known to each other and have had some kind of a relationship in the past. In their joint written intervention the Rape Crisis Federation of England and Wales, the Campaign to End Rape, the Child and Woman Abuse Studies Unit and Justice for Women state that the evidence is that this is the most frequent type of rape, the least likely to be reported to the police and, when proceedings are brought, the least likely to result in a conviction. The statistics to which they refer bear out this statement.
- h
- j

[53] K Painter 'Wife Rape, Marriage and Law: Survey Report, Key Findings and Recommendations' (1991) 5 CJM (Women and Crime) 18, reporting on a

sample of 1007 women in 11 cities, stated that 1 in 4 of those interviewed said that they had been the victims of rape or attempted rape, that the most common perpetrators were current and ex-partners and that 91% of those interviewed had told no one. Home Office statistics quoted in *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office, June 1998) indicated that, while in 1985 35% of reported rapes occurred within an intimate relationship and 30% were by strangers, by 1997 these percentages had altered to 43% and 12% respectively. On the other hand the conviction rate for rape had decreased markedly over the same period. In 1985 24% of rapes reported to the police resulted in a conviction. By 1996 the number of rape complaints to the police had trebled but the conviction rate had fallen to 9%. Unpublished research for the Home Office in 1997 concluded that there was a link between the increased number of complaints involving intimates and former intimates and the decrease in the conviction rate (Jessica Harris 'The Processing of Rape Cases by the Criminal Justice System' (1997, unpublished)).

[54] To a substantial extent these studies may be thought to confirm what is already obvious. In an as yet unpublished paper 'The Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (February 2001, University of Wales Aberystwyth), in which he conducted a review of the critical and reform literature on this subject in the United Kingdom between 1975 and 1999, Neil Kibble (at p 23) observed that the literature was concerned almost exclusively with the problems surrounding the admissibility of prior sexual history with third parties and that little systematic attention had been paid to the question of the relevance and admissibility of prior sexual history with the accused. But it is well known that women in general are deterred from making complaints that they have been raped by a person with whom they have or previously had a relationship. It is distressing enough for women to have to give evidence in these cases. They are unwilling to face the prospect of being further humiliated by questions directed to their previous or subsequent sexual history. The low conviction rate acts as a further deterrent. The humiliation for the woman is much increased if no conviction results after she has been subjected to that kind of questioning.

[55] These and studies undertaken in other countries, many of which were referred to by L'Heureux-Dubé and Gonthier JJ in their partial dissent in *R v Seaboyer*, *R v Gayme* [1991] 2 SCR 577, indicate that the balance between the rights of the defendant and those of the complainant is in need of adjustment if women are to be given the protection under the law to which they are entitled against conduct which the law says is criminal conduct. As McLachlin J (at 609) said, in the judgment which she delivered on behalf of the majority in that case, it is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues in the case. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence runs counter to our fundamental conceptions of justice and what constitutes a fair trial. But there is a risk that juries may be diverted from the real issues in the trial by evidence about the complainant's sexual behaviour which is not directly relevant to the offence charged (*R v Seaboyer* [1991] 2 SCR 577 at 634, *R v Darrach* (2000) 191 DLR (4th) 539 at 560-561, Kibble, p 41). A balance must be struck between the probative value of the evidence and its potential prejudice.

a [56] Section 41 of the Youth Justice and Criminal Evidence Act 1999 has been designed to achieve that adjustment. It is clear from the background against which that section was enacted and from its own terms that this is the mischief which it was intended to address. It is also clear from what has been happening in other jurisdictions where similar provisions have been introduced that there was a choice to be made as to how far the balance should be adjusted in favour of the public interest while preserving the right to a fair trial. A wide variety of measures to which I shall refer later, commonly known as 'rape-shield' provisions, have been enacted to restrict the right of a defendant who is on trial for a sexual offence to cross-examine and lead evidence of the complainant's sexual conduct on other occasions.

c [57] Section 2 of the Sexual Offences (Amendment) Act 1976 left this matter to the discretion of the trial judge. The original Bill had contained complicated provisions which were designed to restrict the admissibility of such evidence, but these were removed and replaced by a general test of unfairness to the defendant. Section 2(2) of that Act provided that the judge should give leave if, and only if, he was satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked. But the statistics showed that the object of that measure, which was to protect complainants against unnecessary evidence and questions about their previous sexual experience, was not being achieved. They raised doubts as to whether it was satisfactory, in this very difficult and sensitive area, to leave the decision whether leave should be given entirely to the trial judge. The question which has been raised in this case is whether the new legislation, which greatly restricts the discretion given to the trial judge, is compatible with the defendant's convention right to a fair trial.

f [58] I would take, as my starting point for examining s 41 of the 1999 Act, the proposition that there are areas of law which lie within the discretionary area of judgment which the court ought to accord to the legislature. As I said in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 843–844, [2000] 2 AC 326 at 380–381, it is appropriate in some circumstances for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society (see also *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 114, 121, [2001] 2 WLR 817 at 835, 842 per Lord Bingham of Cornhill and Lord Steyn respectively). I would hold that prima facie the circumstances in which s 41 was enacted bring this case into that category. As I shall explain in more detail later (see [90], below), the right to lead evidence and the right to put questions with which that section deals are not among the rights which are set out in unqualified terms in art 6 of the convention. They are open to modification or restriction so long as this is not incompatible with the right to a fair trial. The essential question for your Lordships, as I see it, is whether Parliament acted within its discretionary area of judgment when it was choosing the point of balance that is indicated by the ordinary meaning of the words used in s 41. If it did not, questions will arise as to whether the incompatibility that results can be avoided by making use of the rule of interpretation in s 3 of the 1998 Act, failing which whether a declaration of incompatibility should be made. But I think that the question which I have described as the essential question must be addressed first. As Lord Woolf CJ said in *Poplar Housing and Regeneration Community Association Ltd v Donaghue* [2001] EWCA Civ 595 at [75], [2001] 19 EGCS 141, unless the legislation would otherwise be in breach of the convention s 3 of the 1998 Act can be ignored. So the courts

should always ascertain first whether, absent s 3, there would be any breach of the convention. a

The facts

[59] I shall need to look at s 41 of the 1999 Act in more detail. But I must first set out briefly the facts which have given rise in this case to the question whether a sexual relationship between a defendant and a complainant may be relevant to the issue of consent so as to render its exclusion by that section a contravention of the defendant's right to a fair trial. The facts are important, because it is to the facts of the particular case as alleged by the defendant that any issues about any possible incompatibility with his convention right to a fair trial must be directed. b

[60] The incident in which the respondent is alleged to have raped the complainant took place in the early hours of 14 June 2000 beside the River Thames as they were walking along the towpath. As they walked along the path the respondent fell down. The complainant states that when she tried to help him to his feet he pulled her to the ground and had sexual intercourse with her without her consent. The respondent's case is that on the occasion in question the complainant initiated consensual intercourse. He states that this was part of a consensual sexual relationship which covered a period of about three weeks prior to 14 June 2000 during which he had sexual relations with her, including sexual intercourse, in his flat on various occasions. The last of these was about one week before the alleged rape. In short, the respondent's case is that he did not rape the complainant because she consented to the act of intercourse. He seeks leave to cross-examine her and lead evidence about their previous relationship to support his defence that this was an act of consensual intercourse. No doubt any cross-examination which is directed to that relationship will tend to undermine her credibility on this vital issue. c
d
e

[61] The history is complicated by the fact that the respondent was sharing his flat with another man with whom the complainant is said to have formed an intimate relationship. It is said that she used to visit the other man at the flat, and that at about 9 pm on 13 June 2000 she had sexual intercourse with him in the flat when the respondent was not there. On the occasion of the alleged rape the respondent and the complainant were walking from the flat to a hospital where the other man had been taken after collapsing on his return from a picnic with the complainant that evening close to the river bank. f
g

[62] The case came before the trial judge for a preliminary hearing under ss 29 to 31 of the Criminal Procedure and Investigations Act 1996 on 8 December 2000. He was asked to rule on the extent to which cross-examination of the complainant would be permitted in the light of s 41 of the 1999 Act. He held that the complainant could be cross-examined about the act of sexual intercourse which took place between her and the other man a few hours before the occasion of the alleged rape and about any other sexual activity she may have had with other men at or about the same time under s 41(3)(b) of the 1999 Act. But he said that cross-examination about her previous relationship with the respondent would not be permitted to any extent under either paras (b) or (c) of s 41(3). h
j

[63] The respondent appealed against this ruling to the Court of Appeal (Criminal Division) ([2001] EWCA Crim 4, sub nom *R v Y* (2001) Times, 13 February) under s 35(1) of the Criminal Procedure and Investigations Act 1996 with the leave of the trial judge. At the hearing of the appeal the respondent's counsel, Mr Rook QC, who did not appear in the court below, raised for the first time the

- a question whether cross-examination and evidence directed to the complainant's prior sexual activity with the respondent would be admissible under s 41 of the 1999 Act in relation to a further defence that he honestly believed that she was consenting to intercourse (see *DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182). The Crown conceded that cross-examination and evidence directed to this issue would be admissible under s 41(3)(a) of that Act ([2001] EWCA Crim 4 at [34]).
- b For his part, Mr Rook did not seek to suggest that there was such a degree of similarity in the present case as would permit questions to be asked under s 41(3)(c) ([2001] EWCA Crim 4 at [19]).

[64] As to the merits of the appeal, the Court of Appeal held ([2001] EWCA Crim 4 at [34]) that the judge was right to conclude that cross-examination and evidence about the complainant's recent consensual sexual activity with the respondent would not be admissible under s 41(3)(b). But the court held ([2001] EWCA Crim 4 at [35]) that the judge was wrong in saying that questions and evidence about the complainant's sexual behaviour with the respondent's friend or with other third parties on the night of the alleged rape would be admissible under s 41(3)(b) because the court was of the opinion that this material was not relevant. The appeal was allowed, however, on the ground that the judge was wrong to hold that evidence and questions about the complainant's sexual behaviour with the respondent was inadmissible. This was because, as the Crown conceded, that evidence was permissible under s 41(3)(a) in relation to the defence of belief as to consent ([2001] EWCA Crim 4 at [35]).

- e [65] However, Rose LJ ([2001] EWCA Crim 4 at [30], [33]) said that the court respectfully differed from the view that previous recent consensual intercourse between the complainant and the defendant was irrelevant to whether she consented on the occasion said to give rise to rape, and that it might be that a fair trial would not be possible if there could not be adduced, in support of the defence of consent, evidence as to the complainant's recent consensual activity
- f with the defendant. It is those observations that have led to this appeal by the Crown, for which the Court of Appeal granted leave. On 7 March 2001 the House gave leave to the Secretary of State for the Home Department to be joined as a party to the appeal for the reasons given in the thirty-first report from the Appeal Committee of that date ([2001] 1 WLR 789).

- g [66] Your Lordships are not being asked in this case to reconsider the decision in *DPP v Morgan*. The proper limits of that defence currently under examination by the government following an independent review, the results of which are set out in a consultation paper entitled *Setting the Boundaries, Reforming the Law on Sex Offences* (Home Office, July 2000) para 2.13. For the time being it may be noted, as it was pointed out in *Jamieson v HM Advocate (No 1)* 1994 JC 88 at 93 by the High
- h Court of Justiciary, that as the law stands difficult questions of fact may arise as to whether, if he can give no reasonable grounds for his belief, the accused genuinely believed at the time that the woman was consenting or was reckless or indifferent as to the matter of consent. For the purposes of this case it must be assumed that cross-examination and evidence which is directed to that issue will
- j be permitted at the trial, in accordance with the concession by the Crown, under reference to s 41(3)(a) of the 1999 Act. The issue as to the respondent's honest belief that the complainant was consenting to intercourse is not an issue of consent.

[67] All that needs to be said about this part of the respondent's case is that the extent to which the complainant may be cross-examined about her previous

relationship with the respondent, and the extent to which the respondent may give evidence about it, for the purposes of the defence of honest belief will be subject at all times to control by the court under s 41(2)(b) of the 1999 Act. The court has an overriding duty under that paragraph to ensure that any evidence or question for which leave is given is permitted only to the extent that to refuse leave would render a conclusion on any relevant issue in the case unsafe.

[68] But the facts which the respondent wishes to elicit by cross-examination and to adduce in evidence in support of the defence of consent bring into sharp focus the following questions: (a) whether the questions and evidence will be admissible under s 41 of the 1999 Act when that section is construed according to ordinary common law principles; and (b) if not, whether to exclude them would be compatible with his convention right to a fair trial. If both of these questions are answered in the negative, two further questions will arise. The first is whether the critical parts of s 41 can be given a different meaning by using the techniques of statutory interpretation indicated by s 3 of the 1998 Act, which requires that the legislation must be read and given effect to, so far as it is possible to do so, in a way which is compatible with the respondent's convention right. If that cannot be done, consideration will have to be given to the question whether to make a declaration of incompatibility under s 4 of the 1998 Act.

[69] It may be noted in passing that a statement of compatibility was attached to the Bill before second reading that its provisions were compatible with the 1998 Act. Statements to that effect are now required by s 19 of the Act, which was brought into force on 24 November 1998 (Human Rights Act 1998 (Commencement) Order 1998, SI 1998/2882). But Mr Pannick QC for the Secretary of State did not seek to rely on this statement in the course of his argument. I consider that he was right not to do so. These statements may serve a useful purpose in Parliament. They may also be seen as part of the parliamentary history, indicating that it was not Parliament's intention to cut across a convention right (see Lord Irvine of Lairg LC 'The Development of Human Rights in Britain under an Unincorporated Convention on Human Rights' [1998] PL 221 at 228). No doubt they are based on the best advice that is available. But they are no more than expressions of opinion by the minister. They are not binding on the court, nor do they have any persuasive authority.

The ordinary meaning of s 41 of the Youth Justice and Criminal Evidence Act 1999

[70] I propose in this section to examine in detail only those provisions of s 41 that are directly in issue in this case. It is not possible in this case to solve all the problems that may arise. But it may be helpful for me to state what I understand to be its basic structure.

[71] Section 41 of the 1999 Act contains the following essential elements: (a) it applies to any trial at which a person is charged with a sexual offence (see sub-s (1) which extends, among other things, to a wide range of sexual offences involving children as well as those involving women who complain that they have been raped); (b) it contains a general prohibition against the adducing by the accused of evidence or his asking of questions in cross-examination about any sexual behaviour of the complainant except with the leave of the court (see sub-s (1), which is to be read with the definition of 'sexual behaviour' in s 42(1)(c)); (c) it provides a requirement that leave be given only on an application made by or on behalf of the accused (see sub-s (2), as to which s 43 lays down the procedure); (d) it places a duty on the court to grant leave only if it is satisfied that

a the evidence or question falls within one or other of the two qualifying subsections (see sub-s (2)(a), and sub-ss (3) and (5)); and (e) it places an overriding duty on the court to grant leave only if to refuse to do so might have the result of rendering a conclusion on a relevant issue unsafe (see sub-s (2)(b), which is to be read with the definition of 'relevant issue' in s 42(1)(a)).

b [72] It is clear that this structure has been designed in such a way as to balance the competing interests of the complainant who seeks protection from the court and the accused's right to a fair trial. The section leans towards the protection of the complainant. The protection extends to questions and evidence about sexual behaviour after, as well as before, the event giving rise to the charge. It ends the assumption, widely held hitherto, that the complainant's prior sexual behaviour with the defendant is always relevant and admissible. The admissibility of the complainant's sexual behaviour with the defendant is to be determined under c the same procedural provisions as those which apply to the admissibility of such behaviour with third parties. But the court is enabled, in the defendant's interest, to give leave in any case which falls within one or other of the two qualifying subsections where to do otherwise might render a conclusion on any issue falling d to be proved in the trial by the prosecution or the defence unsafe.

[73] Of the two qualifying subsections, the only one that is in play in this case is sub-s (3) of s 41 of the 1999 Act. Subsection (5) applies where the purpose of the evidence or question is to rebut or explain evidence adduced by the prosecution. It was not suggested that the respondent's application was made in reliance upon this subsection. I would prefer not to speculate on the circumstances in which the e subsection might be invoked. But it is reasonable to think that it was included with a view to the accused's right to a fair trial. The section places no restrictions on the evidence which may be led by the prosecutor. It would plainly be unfair if the prosecutor were, for example, to lead similar fact evidence to support the Crown's case of the kind described in *R v P* [1991] 3 All ER 337, sub nom *DPP v P* f [1991] 2 AC 447 and the accused were not to be given an opportunity in cross-examination or by adducing evidence to rebut that evidence. Subsection (5) avoids this unfairness.

[74] Subsection (3), which is the critical subsection in this case, comprises three qualifying conditions which are stated in the alternative. It requires careful analysis. First there are the opening words of the subsection. They provide that g the subsection applies only if the evidence or question relates to a relevant issue in the case—that is, any issue falling to be proved by the prosecution or the defence at the trial (see s 42(1)(a) of the 1999 Act). The wording of this part of the subsection reflects the general tenor of s 41, which is to protect the complainant against evidence or questions about his or her sexual behaviour other than as part h of the event which is the subject matter of the charge. Put the other way round, the evidence or question will cross the threshold of sub-s (3) if it relates to an issue which falls to be proved by the prosecutor or by the defence. In this respect at least the subsection has been designed to avoid the unfairness which would result if the accused were to be denied the opportunity to lead evidence or put questions j directed to issues that were relevant at the trial. Thus far it does not infringe the defendant's right to make a full answer and defence to the charge.

[75] But the threshold which is set by the opening words of sub-s (3) is further qualified by sub-s (4), which provides that for the purposes of sub-s (3)—but not, it should be noted, for the purposes of the rebuttal provisions in sub-s (5)—no evidence or question shall be regarded as relating to a relevant issue in the case if

it appears to the court to be reasonable to assume that the purpose or the main purpose for which it would be adduced or asked would be to impugn the credibility of the complainant as a witness. At first sight this is a serious intrusion on the accused's right to a fair trial. In cases where the accused who is on trial for rape admits that he had sexual intercourse with the complainant on the occasion in question but says that it was with her consent the credibility of the two parties is likely to be the critical issue.

[76] But the definition of 'sexual behaviour' in s 42(1)(c) of the 1999 Act excludes for this purpose anything alleged to have taken place as part of the event which is the subject matter of the charge. It appears that sub-s (4) of s 41 of the 1999 Act is designed to address one of the two evils which lie at the heart of the mischief which forms the background to the enactment. These are the leading of evidence of sexual behaviour other than that which took place as part of the event which is the subject matter of the charge for the sole or main purpose of showing that, by reason of such sexual behaviour, the complainant (a) was more likely to have consented to the sexual conduct which is at issue in the trial, or (b) was an unreliable or less than credible witness. These were described by McLachlin J in *R v Seaboyer, R v Gayme* [1991] 2 SCR 577 at 630 as the twin myths that may still inform the thinking of many but have no place in a rational and just system of law. As she put it, evidence of such behaviour cannot in itself be regarded as logically probative of either the complainant's credibility or consent. The evil which this subsection addresses in uncompromising terms is the drawing of impermissible inferences as to the complainant's credibility. I shall deal in the next section of this judgment (see [90] et seq, below) with the question whether by choosing to deal with this issue in this way the section has infringed the accused's convention right to a fair trial.

[77] Section 41 of the 1999 Act does not distinguish between evidence or questions about the complainant's sexual behaviour with the accused and the complainant's behaviour with persons other than the accused. The extent to which these two situations ought to be approached differently is left to the determination of the trial judge. There are strong reasons for imposing a narrower prohibition on the complainant's sexual behaviour with third parties. Evidence or questions about sexual behaviour with third parties is likely to be much harder to justify on grounds of relevancy than evidence about sexual behaviour with the defendant. Nevertheless I think that the draftsman was right to avoid laying down an absolute rule on this point. To have done so would have been to risk incompatibility with the accused's right to a fair trial. It is worth noting that the absolute prohibition in the original version of s 276(1) of the Canadian Criminal Code (the code) which was held in *R v Seaboyer* to be incompatible with the defendant's rights under the Canadian Charter of Rights and Freedoms was directed solely to evidence about the sexual activity of the complainant with persons other than the accused. The section, in its original version, placed no restriction on the admissibility of evidence about sexual activity with the accused himself. Much of the discussion in that case is about the relevance or otherwise of the complainant's sexual activity with third parties. But McLachlin J (at 633) questioned whether evidence about other sexual activity with the accused should be automatically admissible, and in its revised form s 276(1) of the code treats both kinds of sexual activity in the same way. In this respect, as counsel for the Secretary of State pointed out (in my view correctly), s 41 of the 1999 Act follows the Canadian example.

a [78] It was suggested during the hearing that questions about sexual behaviour with the accused would be less distressing and humiliating than questions about such behaviour with third parties. But to assent to that proposition would, I think, risk developing rules by reference to stereotypes. Each case is different, and there are sound reasons for thinking that complainants are likely to find evidence and questions about their sexual history distressing or humiliating b whatever their subject matter. The only proper test is whether the evidence and questions relate to a relevant issue in the case.

[79] Paragraph (a) of s 41(3) sets out the first qualifying condition. This is that the issue to which the evidence or question relates is not an issue of consent. The justification for enabling leave to be given in such cases was powerfully argued by McLachlin J (at 613–615) in *R v Seaboyer*. The distinction which she c drew was between impermissible generalisations about consent and specific inferences pointing to guilt or innocence. Examples of issues which will fall within this paragraph because the evidence of sexual behaviour is proffered for specific reasons are: (a) the defence of honest belief, which McLachlin J defined for the purposes of her examination of the Canadian legislation as resting on the concept—which I consider to be consistent with that described in *DPP v Morgan* d [1975] 2 All ER 347, [1976] AC 182—that the accused may honestly but mistakenly (but not necessarily reasonably) have believed that the complainant was consenting to the sexual act; (b) that the complainant was biased against the accused or had a motive to fabricate the evidence; (c) that there is an alternative explanation for the physical conditions on which the Crown relies to establish e that intercourse took place; and (d) especially in the case of young complainants, as in the Scottish case of *Love v HM Advocate* 2000 JC 1, that the detail of their account must have come from some other sexual activity before or after the event which provides an explanation for their knowledge of that activity. The fact that leave may be given for evidence and questions directed to these and similar specific f issues under this paragraph is an important protection of the accused's right to a fair trial.

[80] Paragraph (b) of s 41(3) sets out the second qualifying condition. This is the first of the two qualifying conditions that relate to issues which are issues of consent. To qualify under this condition the evidence or questions must relate to sexual behaviour which is alleged to have taken place 'at or about the same time' g as the event which is the subject matter of the charge against the accused. The inclusion of the words 'or about' give some, but not very much, latitude to the condition imposed by the paragraph. The overall effect is similar to that of the phrase 'at or near his own place of work' in s 15(1) of the Trade Union and Labour Relations Act 1974, as substituted by s 16(1) of the Employment Act 1980, h which was considered in *Rayware Ltd v Transport and General Workers' Union* [1989] 3 All ER 583, [1989] 1 WLR 675. Nourse LJ ([1989] 3 All ER 583 at 589, [1989] 1 WLR 675 at 683) said, that the word 'near' is an expanding word, to be extended so far as to give effect to the intention of the legislature. As May LJ ([1989] 3 All ER 583 at 588, [1989] 1 WLR 675 at 682) said in the same case, the question is in the end one of fact and degree.

j [81] As for the intention of the legislature in the case of s 41 of the 1999 Act, extensive reference was made to statements made by the Home Office ministers as reported in Hansard when the legislation was undergoing examination in Parliament. For the reasons which I explained in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 at 227,

[2001] 2 WLR 15 at 48, I consider that the effect of the exception to the rule that resort to Hansard is inadmissible for the purpose of construing an Act which was recognised in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 is that, strictly speaking, this exercise is available for the purpose only of preventing the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in Parliament. In expressing that view I wish to acknowledge the debt which I owe to my noble and learned friend Lord Steyn's valuable discussion of this point in 'Pepper v Hart; A Re-examination' (2001) 21 OJLS 59. But that situation does not arise in this case. In answer to a question which was put to him by my noble and learned friend in the course of the hearing counsel for the Secretary of State said in terms that he was not relying on this material as an aid to construction. So the proper course is to construe the words used according to their ordinary meaning without reference to what the ministers said about them in the course of the debates in Parliament.

[82] But I think that it is legitimate to refer for the purposes of clarification to the notes to this section in the explanatory notes to the Act prepared by the Home Office. I would use it in the same way as I would use the explanatory note attached to a statutory instrument (see *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97 at 107–108, [1999] 1 WLR 2093 at 2103). The relevant note states that it is expected that the phrase 'at or about the same time' will generally be interpreted no more widely than 24 hours before or after the offence. The use of the words 'or about' avoids the trap of placing a straitjacket around a matter that has to be determined according to the facts and circumstances of each case. It is sufficient for the purposes of this case to say that the previous sexual behaviour of the complainant, including acts of sexual intercourse, about which the respondent wishes to ask questions and lead evidence falls outwith the scope of the phrase 'at or about the same time' according to the ordinary meaning of those words. The last act of consensual sexual intercourse which he alleges took place about one week before the alleged rape.

[83] Paragraph (c) of s 41(3) sets out the third qualifying condition. It is the second of the two qualifying conditions that relate to issues which are issues of consent. The broad concept to which it is addressed is that of similar fact evidence. As the cases of *Boardman v DPP* [1974] 3 All ER 887, [1975] AC 421 and *R v P* [1991] 3 All ER 337, sub nom *DPP v P* [1991] 2 AC 447 demonstrate, the principle on which the admissibility of similar fact evidence is based is that evidence which falls into this category may so strongly support the truth of the offence charged that it is fair to admit it notwithstanding its prejudicial effect (*R v P* [1991] 3 All ER 337 at 348, [1991] 2 AC 447 at 462–463 per Lord Mackay of Clashfern LC). This qualifying condition recognises that the accused may wish to rely on the same principle in order to support his defence of consent. The similarities which it permits are expressed in two alternatives, which are best examined separately. But very precise limits are set on the extent to which the principle may be used in this context. These are indicated by the concluding words of the subsection, which provides that the condition will not be satisfied unless the similarity 'cannot reasonably be explained as a coincidence'.

[84] The first alternative is that on which the respondent seeks to rely in this case. It relates to the complainant's sexual behaviour on some other occasion which is alleged to have been so similar to any sexual behaviour of the complainant

a which took place as part of the event charged that it cannot reasonably be explained as a coincidence. In two respects the scope which is given by this provision for the giving of leave to put questions or adduce evidence is quite wide. The alternative is widely enough expressed to cover sexual behaviour with third parties as well as with the accused. And it is widely enough expressed to cover sexual behaviour after as well as before the event charged. To this extent
b the condition avoids the risk of unfairness to the accused. But the requirement that the similarity cannot reasonably be explained as a coincidence imposes a precisely expressed restriction which is significantly tighter than that which the Crown must satisfy under the rule established in *R v P*.

[85] On the limited version of the facts of this case which has so far been made available, no similarity is alleged as to the complainant's sexual behaviour with
c the respondent on previous occasions to any behaviour on her part which took place as part of the event charged except for the bare fact that it included occasions when she is alleged to have had consensual sexual intercourse with him. Mr Rook did not seek to suggest to the Court of Appeal that there was such a similarity as would enable evidence to be adduced or questions asked under
d s 41(3)(c) (see Court of Appeal's judgment[2001] EWCA Crim 4 at [19]). No attempt appears to have been made to investigate the facts to the level of detail that s 41(3)(c) demands.

[86] For this reason the respondent's allegations seem to me to invite the criticism that they are based on one of the two evils which lie at the heart of the mischief which the section seeks to address: the myth that simply because the complainant
e consented to sexual intercourse on previous occasions she was more likely to have consented to sexual intercourse on this occasion. The scope of the requirement that the similarity cannot reasonably be explained as a coincidence is therefore not, as matters stand, the critical issue in this case. In my opinion the application fails on the ground that no similarity other than the bare fact of alleged previous
f consensual intercourse with the respondent has been demonstrated.

[87] On the other hand the question whether the requirement that any similarity that may be alleged cannot reasonably be explained as a coincidence may yet arise in this case, if the respondent is given an opportunity to explain the basis for his application in greater detail. So I would add these comments. The test which this phrase lays down appears to have been taken from *Boardman v*
g *DPP* and in particular from Lord Salmon's observations where he said:

'It has, however, never been doubted that if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused, the manner in which the other crimes were committed may be
h evidence on which a jury could reasonably conclude that the accused was guilty of the crime charged. The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence.'
(See [1974] 3 All ER 887 at 913, [1975] AC 421 at 462.)

[88] It is not easy to see how that dictum, which is taken from the context of
j criminal sexual conduct, can be applied to conduct on which the accused wishes to rely as a defence to the charge which has been laid against him. I do not think that it is helpful to speculate as to what kinds of sexual conduct will satisfy this test. Each case will have to be approached on its own facts. But on any view it has been deliberately framed in such a way as to indicate, according to the ordinary meaning of the words used, that it will not be easy to satisfy. It has been

modified slightly from the strict test which Lord Salmon described because the phrase 'cannot be explained as a coincidence' is qualified by the word 'reasonably'. Nevertheless it leans strongly in favour of the protection of the complainant. I shall deal in the next section of this judgment (see [90] et seq, below) with the question whether it leans too far.

[89] The second alternative in para (c) of s 41(3) of the 1999 Act relates to the complainant's sexual behaviour on some other occasion which is alleged to be so similar to any other sexual behaviour of the complaint which took place 'at or about the same time' as the event charged that it cannot reasonably be explained as a coincidence. The scope to be given to this phrase, according to the ordinary meaning of the words used, is the same as that to be given to the same phrase in para (b) of s 41(3). As in the case of the first alternative, the sexual behaviour is not limited to sexual behaviour with the accused before the event charged. It can include within its scope sexual behaviour with third parties as well as sexual behaviour with the accused or with third parties which took place after the event. But, as in the case of the first alternative, the scope to be given to this alternative is qualified by the requirement that the similarity cannot reasonably be explained as a coincidence.

The convention right to a fair trial

[90] The right of an accused under art 6(1) of the convention is to a fair trial. As I observed in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 129, [2001] 2 WLR 817 at 851, this is a fundamental and absolute right, to which the rights listed in arts 6(2) and 6(3) are supplementary. The rights listed in art 6(3) include the accused's right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (see para (d) of art 6(3)). There is no doubt that Parliament, by placing restrictions on the questions that may be asked and the evidence that may be adduced by or on behalf of the accused, was entering upon a very sensitive area.

[91] But art 6 does not give the accused an absolute and unqualified right to put whatever questions he chooses to the witnesses. As this is not one of the rights which are set out in absolute terms in the article it is open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial in art 6(1). The test of compatibility which is to be applied where it is contended that those rights which are not absolute should be restricted or modified will not be satisfied if the modification or limitation 'does not pursue a legitimate aim and if there is not reasonable proportionality between the means employed and the aim sought to be achieved' (*Ashingdane v UK* (1985) 7 EHRR 528 at 547, [1985] ECHR 8225/78 (para 57)). A fair balance must be struck 'between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' (*Sporrong v Sweden* (1982) 5 EHRR 35 at 52–53, [1982] ECHR 7151/75 (para 69)). The general principles described in *Ashingdane v UK* were restated in *Lithgow v UK* (1986) 8 EHRR 329 at 393–394, [1986] ECHR 9006/80 (para 194) and again in *Fayed v UK* (1994) 18 EHRR 393 at 429–430, [1994] ECHR 17101/90 (para 65); see also *Brown's* case [2001] 2 All ER 97 at 129, [2001] 2 WLR 817 at 851. The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether

a a fair balance has been struck between the general interest of the community and the protection of the individual.

[92] In my opinion the placing of restrictions on evidence or questions about the sexual behaviour of complainants in proceedings for sexual offences serves a legitimate aim. The prevalence of sexual offences, especially those involving rape, which are not reported to the prosecuting authorities indicates a marked
b reluctance on the part of complainants to submit to the process of giving evidence at any trial. The rule of law requires that those who commit criminal acts should be brought to justice. Its enforcement is impaired if the system which the law provides for bringing such cases to trial does not protect the essential witnesses from unnecessary humiliation or distress.

[93] It seems to me that the critical question, so far as the accused's right to a
c fair trial is concerned, is that of proportionality. The points of particular concern which I have identified in my analysis of s 41 of the 1999 Act are (a) the exclusion by s 41(4) of evidence and questions for the purpose of impugning the credibility of the complainant as a witness (see [76], above) and (b) the requirement in
d s 41(3) that any similarity cannot reasonably be explained as a coincidence (see [83], above). The impact of these provisions on the right to a fair trial is highlighted by the fact that they are binding on the trial judge. They are mandatory. He has no discretion to admit the evidence or to allow the questioning if he thinks that it is in the interests of justice to do so.

[94] The question is whether these provisions have achieved a fair balance.
e This will be achieved if they do not go beyond what is necessary to accomplish their objective. That is the essence, in this context, of the principle of proportionality. Furthermore, to ask oneself whether they are fair to the defendant is to address one side of the balance only. On the other side there is the public interest in the rule of law. The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary
f distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case. The high rate of acquittals in rape cases before s 41 of the 1999 Act was introduced suggests that juries are not
g immune from temptation, and that they are quite likely to draw inferences from evidence about a complainant's sexual behaviour on occasions other than that of the alleged rape which the law now recognises they should not draw.

[95] A prohibition of evidence and questions about the complainant's sexual
behaviour on other occasions whose purpose, or main purpose, is to elicit material to impugn the credibility of the complainant as a witness seems to me to
h strike the correct balance. If the sole purpose is to impugn credibility, the defendant has no rights in the matter at all. The complainant's sexual behaviour on other occasions is irrelevant. No inferences can properly be drawn about her credibility from the mere fact that she has engaged in sexual behaviour on other occasions. I would hold that the words 'or main purpose' which qualify the words
j 'the purpose' in s 41(4) do not widen the prohibition to an extent which, when regard is had to the public interest, is unfair.

[96] The effect of the requirement in s 41(3)(c) that any similarity cannot reasonably be explained as a coincidence is more difficult to assess. It seems to me that the assessment might best be approached in stages by asking these questions.
(1) Does a proportionate response to the legitimate aim entitle the legislature, in

principle, to restrict the extent to which evidence may be adduced and questions asked about the complainant's other sexual behaviour where the issue is one of consent? (2) If so, are the restrictions in s 41(3)(c) so unfair that it can be said that no defendant who wishes to adduce such evidence or ask such questions can ever have a fair trial because its effect is to exclude relevant evidence whose probative value is not clearly outweighed by the prejudice which it may cause? (3) If not, has it been shown that it will cause such unfairness in this case?

[97] It is not necessary to dwell on the first or on the last of these three questions. Some limit must be placed on the extent to which evidence may be adduced and questions asked if the legitimate aim is to be achieved. That point is not in dispute. As far as this case is concerned, I have already mentioned the fact that no attempt appears yet to have been made to investigate the facts to the level of detail that s 41(3)(c) demands. It is not yet possible to say that there is any relevant evidence about similar sexual behaviour by the complainant which would be excluded by the restrictions. So I do not think that it can yet be said that, if the restrictions are not caught by the second question, they are so unfair in this case as not to be proportionate.

[98] There remains the second question. I agree with Mr Pannick for the Home Secretary that if the restrictions are likely to cause unfairness in isolated cases only, of which this is not one, the better course is to deal with them later and one by one as they arise. The point of the second question is that if it is answered in the affirmative the incompatibility which will result will be capable of being invoked by every defendant whose defence is directed to the issue of consent. That, in effect, is the position which the respondent adopts. He says that there is no point in attempting the exercise required by s 41(3)(c) because the restrictions are so tightly drawn that there is no reasonable prospect of overcoming them.

[99] It is plain that the question is in the end one of balance. Has the balance between the protection of the complainant and the accused's right to a fair trial been struck in the right place? As I indicated earlier in this judgment (see [58], above), I think that, if any doubt remains on this matter, it raises the further question whether Parliament acted within its discretionary area of judgment when it was choosing the point of balance indicated by s 41. The area is one where Parliament was better equipped than the judges are to decide where the balance lay. The judges are well able to assess the extent to which the restrictions will inhibit questioning or the leading of evidence. But it seems to me that in this highly sensitive and carefully researched field an assessment of the prejudice to the wider interests of the community if the restrictions were not to take that form was more appropriate for Parliament. An important factor for Parliament to consider was the extent to which restrictions were needed in order to restore and maintain public confidence.

[100] Some assistance in finding an answer to this question may be gained by looking at the solutions that have commended themselves to other jurisdictions. Rape-shield legislation in the United States has been classified into four different models: Professor Harriet Galvin 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade' (1986) 70 Minn L Rev 763; see also the helpful summary in Neil Kibble's paper (at pp 25-26). The Michigan model is the one followed most widely in the United States. It has been adopted in New South Wales (s 409B(3) of the Crimes Act 1900) and was adopted by Canada until it was held in *R v Seaboyer*, *R v Gayme* [1991] 2 SCR 577 to be unconstitutional.

a It imposes a general prohibition on the introduction of evidence of prior sexual behaviour, subject to certain specific exceptions, but permits evidence of prior sexual behaviour between the complainant and the defendant. The New Jersey model leaves the matter almost entirely to the discretion of the trial judge, but it provides for the question whether to admit the evidence to be determined at a pre-trial hearing. The Federal model follows the Michigan model to the extent b that it imposes a general prohibition on the introduction of prior sexual behaviour with specific exceptions, one of which relates to the complainant's behaviour with the accused, but it gives the trial judge a general residual discretion to admit the evidence if it would be contrary to the interests of justice to exclude it or to do so would violate the defendant's constitutional rights. A similar model is in force in Western Australia (ss 36B, 36BA and 36BC of the Evidence c Act 1906). The California model prohibits evidence of prior sexual behaviour to prove consent unless the evidence is of prior sexual conduct between the complainant and the defendant, while evidence with respect to credibility is admissible at the discretion of the court.

d [101] To these four models there now fall to be added two more. The first of these is the revised Canadian model. Section 276 of the code was redrafted following the decision in *R v Seaboyer* to give statutory effect to the guidelines which the Supreme Court of Canada laid down in that case for the reception and use of sexual conduct evidence. It starts by providing that evidence of other sexual activity, whether with the accused or with any other person, is not e admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented or is less worthy of belief. In *R v Darrach* (2000) 191 DLR (4th) 539 at 560 the Supreme Court of Canada held that this is an evidentiary rule that excludes such evidence because it is irrelevant. There are then three exceptions to that rule which allow the evidence f to be admitted if the judge determines that the evidence is of specific instances of sexual activity, that it is relevant to an issue at the trial and that it has significant probative value that is not significantly outweighed by the danger of prejudice to the proper administration of justice. Guidelines are included to assist the judge in determining whether the evidence is admissible. In *R v Darrach* the court held that the procedure created by the revised s 276 of the code, taken as a whole, was g consistent with the principles of fundamental justice and protected the defendant's constitutional rights.

[102] Lastly there is the Scottish model. It was first enacted by s 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and is now to be found in ss 274 and 275 of the Criminal Procedure (Scotland) Act 1995. Questioning h designed to show that the complainer is not of good character in sexual matters, that she is a prostitute or that she has at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge is excluded by s 274. But s 275 provides that such questioning or evidence may be allowed where the court is satisfied that it is designed to explain or rebut other evidence, is questioning or evidence as to sexual behaviour which took place on the same j occasion as the sexual behaviour forming the subject matter of the charge or is relevant to the defence of incrimination (that is, that the crime was committed by some other named individual) or that it would be contrary to the interests of justice to exclude it. A study by Dr B Brown 'Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials' (University of Edinburgh, 1992) concluded that, while there were a number of positive features in this legislation,

it fell short of achieving its aim in practice. It was suggested that, while there were other possibilities, a more certain remedy would be to modify the discretionary character of the exceptions and to identify instead specific types of circumstances in which sexual history or character evidence would be relevant to key issues in the trial. a

[103] It is reasonably clear from this brief review that there is no one single answer to the problem as to how best to serve the legitimate aim. There are choices to be made. There are indications from the wording and structure of s 41 of the 1999 Act that close attention was paid to the more recent Canadian and Scottish models. But in significant ways it has departed from both of them. The element of judicial discretion has been reduced to the minimum. There are risks involved in that choice. It has deprived the judge of the opportunity, in the last resort, of preventing unfairness to the defendant in circumstances where to do this would not significantly prejudice the proper administration of justice. b
c

[104] But two important factors seem to me to indicate that *prima facie* the solution that was chosen was a proportionate one. The first is the need to restore and maintain public confidence in the system for the protection of vulnerable witnesses. Systems which relied on the exercise of a discretion by the trial judge have been called into question. Doubts have been raised as to whether they have achieved their object. I think that it was within the discretionary area of judgment for Parliament to decide not to follow these systems. The second is to be found in a detailed reading of the section as a whole. As I have tried to show in my analysis of the various subsections, it contains important provisions which preserve the defendant's right to ask questions about and adduce evidence of other sexual behaviour by the complainant where this is clearly relevant. While s 41(3) of the 1999 Act imposes very considerable restrictions, it needs to be seen in its context. I would hold that the required level of unfairness to show that in *every case* where previous sexual behaviour between the complainant and the accused is alleged the solution adopted is not proportionate has not been demonstrated. d
e
f

Conclusions

[105] I emphasise the words 'every case' because I believe that it would only be if there was a material risk of incompatibility with the art 6 convention right in *all* such cases that it would be appropriate to lay down a rule of *general* application as to how, applying s 3 of the 1998 Act, s 41(3) of the 1999 Act ought to be read in a way that is compatible with the convention right or, if that were not possible, to make a declaration of general incompatibility. I do not accept that there is such a risk. This is because I do not regard the *mere* fact that the complainant had consensual sexual intercourse with the accused on previous occasions as relevant to the issue whether she consented to intercourse on the occasion of the alleged rape. g
h

[106] For these reasons I consider that it has not been shown that, if the ordinary principles of statutory construction are applied to them, the provisions of s 41 of the 1999 Act which are relevant to the respondent's case are incompatible with his convention right to a fair trial. I would hold that the question whether they are incompatible cannot be finally determined at this stage, as no attempt has been made to investigate the facts to the required level of detail to show that s 41 has made excessive inroads into the convention right. It seems to me that it is neither necessary nor appropriate at this stage to resort j

- a to the interpretative obligation which is described in s 3 of the 1998 Act in order to modify, alter or supplement the words used by Parliament. I think that it would only be appropriate to resort to surgery of that kind in this case if the words used by Parliament were unable, when they were given their ordinary meaning, to stand up to the test of compatibility. But that cannot, in my view, be said of the allegations which the respondent makes as to the complainant's sexual behaviour with him prior to the incident of the alleged rape. All he appears to be relying upon at present is the mere fact that on various occasions during the previous three weeks she had had consensual sexual intercourse with him in his flat. As I have said, I consider that this fact alone—and nothing else is alleged about it—is irrelevant to his defence of consent. So I would hold that the exclusion of evidence and questions which relate to it in regard to that defence
- b (but not that of honest belief) is not incompatible with his right to a fair trial.

[107] This does not mean that the question whether or not the respondent will have a fair trial is at an end. I agree with Mr Perry for the Crown that it will only be in rare and isolated cases, that the question of fairness will be capable of being determined before the trial. It was clearly right that this case should have

d been brought before your Lordships on appeal in view of the important issues of principle that were raised and the risk of exposing vulnerable witnesses to the risk of having to give evidence at a new trial. But now that these issues have been resolved the case must go back to the Crown Court for trial. The question whether the respondent did in the event have a fair trial will be open for consideration after the trial is over if he is convicted.

- e [108] I should like to add, however, that I would find it very difficult to accept that it was permissible under s 3 of the 1998 Act to read into s 41(3)(c) of the 1999 Act a provision to the effect that evidence or questioning which was required to ensure a fair trial under art 6 of the convention should not be treated as inadmissible. The rule of construction which s 3 lays down is quite unlike any
- f previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators. As Lord Woolf CJ said in *Poplar Housing and Regeneration Community Association Ltd v Donaghue* [2001] EWCA Civ 595, [2001] 19 EGCS 141, s 3 of the 1998 Act does not
- g entitle the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a
- h means of identifying the plain intention of Parliament (see Lord Hoffmann's observations in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131).

- [109] In the present case it seems to me that the entire structure of s 41 of the 1999 Act contradicts the idea that it is possible to read into it a new provision
- j which would entitle the court to give leave whenever it was of the opinion that this was required to ensure a fair trial. The whole point of the section, as was made clear during the debates in Parliament, was to address the mischief which was thought to have arisen due to the width of the discretion which had previously been given to the trial judge. A deliberate decision was taken not to follow the examples which were to be found elsewhere, such as in s 275 of the 1995 Act,

of provisions which give an overriding discretion to the trial judge to allow the evidence or questioning where it would be contrary to the interests of justice to exclude it. Section 41(2) of the 1999 Act *forbids* the exercise of such a discretion *unless* the court is satisfied as to the matters which that subsection identifies. It seems to me that it would not be possible, without contradicting the plain intention of Parliament, to read in a provision which would enable the court to exercise a wider discretion than that permitted by s 41(2). a

[110] I would not have the same difficulty with a solution which read down the provisions of sub-ss (3) or (5) of s 41, as the case may be, in order to render them compatible with the convention right. But if that were to be done it would be necessary to identify precisely (a) the words used by the legislature which would otherwise be incompatible with the convention right, and (b) how these words were to be construed, according to the rule which s 3 of the 1998 Act lays down, to make them compatible. That, it seems to me, is what the rule of construction requires. The court's task is to read and give effect to the legislation which it is asked to construe. The allegations about the complainant's previous sexual behaviour with the respondent are so exiguous that I do not think that it would be possible for your Lordships in this case with any degree of confidence to embark upon that exercise. I would leave that exercise to be undertaken by the trial judge in the light of such further information about the nature and circumstances of his relationship with the complainant that the respondent can make available if and when he renews his application. If he finds it necessary to apply the interpretative obligation under s 3 of the 1998 Act to the words used in s 41(3)(c) of the 1999 Act, he should do so by construing those words, so far as it is possible to do so, by applying the test indicated at [46] of the speech of my noble and learned friend Lord Steyn. b
c
d

[111] The Court of Appeal ([2001] EWCA Crim 4, sub nom *R v Y* (2001) Times, 13 February) reversed the decision of the trial judge on the question whether evidence and questions about the complainant's sexual behaviour with third parties would be admissible. I agree with that part of their decision. They also reversed the trial judge on the question whether evidence and questions about the complainant's sexual behaviour with the defendant would be admissible in relation to the defence of honest belief. With that part of their decision I also agree. But I am not satisfied that the respondent and his legal advisers have yet applied their minds sufficiently to the detailed requirements which must be met if his application for leave is to fall within the first alternative of the qualifying condition laid down in s 41(3)(c) in relation to the defence of consent. e
f
g

[112] By its order of 15 January 2001 the Court of Appeal allowed the appeal and reversed the ruling of the trial judge. In the formal petition to the House the appellant asks that that order should be reversed, but in the event at the hearing of the appeal your Lordships were not invited to set aside the order by either party. For those reasons I would dismiss the appeal. But I would hold that the respondent should be given an opportunity, in the light of the decision of this House, to renew his application to the trial judge for leave to be given under s 41(3)(c). h
j

LORD CLYDE.

[113] My Lords, this appeal raises important and difficult questions about the meaning and effect of s 41 of the Youth Justice and Criminal Evidence Act 1999. That section is one of three sections comprising Ch III of Pt II of that Act under

a the title 'Protection of Complainants in Proceedings for Sexual Offences'. Section 41 deals with certain limitations on the leading of evidence and the asking of questions in cross-examination at the trial of a person charged with a 'sexual offence', a phrase which is defined in s 62 and includes a charge of rape.

b [114] The protection of complainants, particularly in rape cases, has for a considerable time been a matter of very real concern. In 1976 some attempt was made to relieve the situation by the passing of the Sexual Offences (Amendment) Act 1976. Section 2 of that Act provided that where any person charged with rape pled not guilty:

c '(1) ... then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.'

d In terms of s 2(2) the judge was only to grant leave if he was satisfied 'that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked'. It is to be noted that this provision dealt only with cases of rape and did not relate to sexual experience of a complainant with the defendant. It left the leading of the evidence and the questioning as matter for the discretion of the trial judge. That might on the face of it appear to provide a flexible and reasonable solution to a problem which can in so many cases turn upon the particular circumstances of the case. But the very flexibility came to be seen as too uncertain a safeguard for the protection of the complainant.

e [115] So another attempt has been made to resolve this difficult and delicate problem. Section 2 of the 1976 Act has been repealed and s 41 of the 1999 Act has taken its place. The present appeal is concerned with construction of this new provision. I do not take up space in repeating the full terms of the section here but the form which has been adopted deserves comment. Subsection (1) of s 41 of the 1999 Act to an extent echoes the approach adopted in s 2(1) of the 1976 Act. But apart from other less important differences, the new subsection is not confined to cases of rape but extends to a 'sexual offence', a term which is explained in s 42(1)(d) of that Act, and instead of being limited as s 2(1) was to 'any sexual experience of a complainant with a person other than that defendant', the new section refers generally to 'any sexual behaviour of the complainant'.
g When one comes to the cases where leave to lead evidence or ask questions about the complainant's sexual behaviour, instead of simply relying on the discretion of the trial judge, as was the approach taken in the 1976 Act, the new section seeks to specify with some particularity the matters in relation to which the judge may or may not grant leave.

h [116] Both in legislation and in academic writings various forms of provision have been conceived to provide the desired restraint on the giving of evidence or the asking of questions about the complainant's sexual history. The forms vary from discretionary provisions to inflexible rules. Diverse opinions have been expressed about the merits of one form as against others. For example Temkin
j 'Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives' (1984) 47 MLR 625 at 635 expressed the view that experience in jurisdictions outside Scotland 'mostly suggests that the discretionary method is ineffective in controlling the use of sexual history evidence'. McColgan 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 OJLS 275 at 307 expressed the view that a discretionary approach was wholly inadequate and considered that it was

necessary to regulate the admission of sexual history evidence by means of tightly drawn legislation. On the other hand attempts to legislate with a blanket exclusion and strictly defined exceptions have been criticised. The constraints of what has been described as a 'pigeon-hole approach' may not prove satisfactory. Sopinka J observed in *R v Morin* [1988] 2 SCR 345 at 370–371 that:

'Attempts in the past to define the criteria for the admission of similar facts have not met with much success ... The test must be sufficiently flexible to accommodate the varying circumstances in which it must be applied.'

In the Home Office report *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office, June 1998) para 9.72 under recommendation 63 the working group favoured the Scottish approach subject to consultation on the precise formulation. Various formulations have been described and discussed by Kibble in a valuable paper 'The Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (February 2001, unpublished). But while it is interesting to explore these alternatives, the problem raised in the present case is not how the legislation should be drafted, but how s 41 of the 1999 Act is to be construed. It is desirable next to set out the facts.

[117] The respondent, A, has been charged with rape. The offence is said to have been committed in the early hours of 14 June 2000. His defence is that sexual intercourse took place with the consent of the complainant. It appears that the complainant had formed an intimate relationship with a friend of the respondent, Y, who was sharing a flat with him, and that at about 9.00 p m on 13 June 2000 the complainant and Y had had sexual intercourse at the flat in the absence of the respondent. At a preparatory hearing counsel for the respondent explained to the court that the defence contention was that there had been a sexual history between the respondent and the complainant for some three weeks prior to the date of the alleged rape and that he had had consensual sexual intercourse with her on occasions during that period. Counsel applied to cross-examine the complainant and to lead evidence about the alleged history. The judge ruled that the act of consensual intercourse with Y could be put to the complainant in cross-examination, but that the complainant could not be cross-examined nor could evidence be led about her alleged sexual relationship with the respondent, nor could a prepared statement by the respondent which outlined his alleged relationship with her be put in evidence. The judge also held that his ruling was *prima facie* in breach of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998) (the convention).

[118] The respondent sought to challenge the judge's ruling by way of appeal to the Court of Appeal ([2001] EWCA Crim 4, sub nom *R v Y* (2001) Times, 13 February). There the focus of the attack was on s 41(3)(b) of the 1999 Act. The Court of Appeal took the view that it was impossible to construe that provision as applying to events even days before the alleged rape. They considered that a fair trial might not be possible if there could not be adduced in support of the defence of consent evidence about previous sexual activity on the part of the complainant with the defendant. But they allowed the appeal on the ground that the judge should not have excluded questioning and evidence about such activity altogether since, as was conceded before the court, that was permissible in

a relation to the issues of an honest belief of consent. So also the statement by the defendant should have been admissible for that same purpose. They also held the judge to have been wrong in admitting questions about the alleged sexual intercourse with Y on the night before the alleged rape. That point was conceded by the respondent.

[119] The question which has been certified by the Court of Appeal is:

b 'May a sexual relationship between a defendant and a complainant be relevant to the issue of consent so as to render its exclusion under s 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?'

c Some preliminary observations fall to be made in relation to the question. First, the admissibility of evidence is in itself a matter to be determined by the national law and not by art 6. Article 6 guarantees the right to a fair trial and does not lay down rules as to the admissibility of evidence (*Schenk v Switzerland* (1988) 13 EHRR 242 at 265–266, [1988] ECHR 10862/84 (para 46)). The question under the article is whether the proceedings as a whole were fair (*Khan v UK* (2000) 8 BHRC 310 at 319 (para 34)). On the other hand the exclusion of evidence which is relevant

d to the defence may well render the trial unfair.

[120] Secondly, the House is being asked to determine a matter of compliance with the convention in advance of the trial. Of course there are strong practical reasons for the taking of such a course and it has been adopted on other occasions. *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2001] 2 WLR 817 is but one example. But the course has this consequence that the issue

e can only be answered on a very preliminary basis at this stage. The alleged previous sexual history of the complainant is claimed to be relevant to the matter of consent. The critical question which arises as matters presently stand is whether that evidence is excluded by s 41 of the 1999 Act. If it is relevant to the defence

f and necessarily made inadmissible by the statute, then it would be difficult to resist the conclusion that the statute was incompatible with art 6 of the convention.

[121] Thirdly, while in construing the section one may well first adopt the ordinary approach of looking to the meaning of the words and the purpose of the provision, where one is faced with a challenge to the compatibility of the provision with the convention resort may well require to be had to the rule of interpretation embodied in s 3(1) of the 1998 Act, namely that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. If that cannot be done a declaration of incompatibility may require to be made in terms

g of s 4 of that Act. It is for Parliament to devise a provision which strikes a proper balance between the interests of the complainant and the interests of the defendant. The question is whether a proper balance has been struck by s 41 of the 1999 Act.

[122] The recent development of the law in Canada in regard to the present

j problem is instructive. Section 276 of the Canadian Criminal Code had been so drafted as to provide a blanket exclusion of any evidence on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless it was led to rebut evidence led by the prosecution, or it was evidence seeking to incriminate another person as guilty of the offence, or it related to the occasion of the alleged offence and related to the consent which the

accused alleged he believed was given by the complainant. The provision came before the Canadian Supreme Court in *R v Seaboyer, R v Gayme* [1991] 2 SCR 577 and by a majority was held to be unconstitutional. In the course of the leading judgment McLachlin J identified several examples of evidence which the provision would exclude but which could be critical to the defence of the accused. These comprised evidence to support a defence of honest belief, evidence to show a bias or motive to fabricate the evidence on the part of the complainant, evidence to explain physical evidence on which the prosecution might rely to show intercourse or the use of force, and evidence of a pattern of conduct. However legitimate the aims of the legislation might be, it was cast so widely as to deprive the accused of the ability to mount lines of defence which were relevant and legitimate. The section was thereafter revised. The form of the revised version was to exclude evidence of sexual activity of the complainant with the accused or any other person to support an inference that by reason of that activity the complainant was more likely to have consented or was less worthy of belief. That provision sought to lay to rest the so-called twin myths relating to the effect of general sexual behaviour on matters of consent and credibility. Further such evidence was to be excluded unless the judge determined that it was of specific instances of sexual behaviour, was relevant to an issue at trial and that it had significant probative value which was not substantially outweighed by the danger of prejudice to the proper administration of justice. The revised version of the provision came before the court in *R v Darrach* (2000) 191 DLR (4th) 539 and was held to be compatible with the accused's right to make a full answer and defence and was in conformity with the constitution. The approach taken by the revised provision and the philosophy behind it deserve careful attention. The Canadian experience shows how important it is to secure a proper balance between the necessity to provide sufficient protection for the victim of a sexual offence at the trial of the person accused of the offence and the corresponding necessity to secure that the accused has the opportunity to present any relevant defence which he has to the charge. It is right that the victim be protected. But it is also right that an accused should be allowed a fair trial.

[123] The question whether a complainant has consented to intercourse with the defendant is often a critical issue in a trial for rape. So the question what evidence is or is not relevant to the matter of the giving or withholding of consent becomes of particular importance. From at least the nineteenth century the belief seems to have been held that if the complainant had had sexual intercourse with some other man or men than the defendant she would be more likely to have consented to intercourse with the defendant. It seems also to have been believed that such a complainant would be less worthy of belief than a woman of unblemished chastity. These ideas have been labelled as myths in Canadian jurisprudence. In *R v Seaboyer* McLachlin J ([1991] 2 SCR 577 at 630) considered that they had no place in a rational and just system of law.

[124] Ideas which may have seemed sound in the nineteenth century should be discarded in the face of the very different society in which we now live. The respect which is due to women in society requires that a proper recognition should be given to their independence of mind and the autonomy which they undoubtedly should enjoy. General beliefs about the propensity of unchaste women to consent to intercourse or to be unworthy of credit which may have held sway in an age when the position of women in society bears little comparison with what it is today should now be seen as heresies and discarded as

a outmoded. Any general idea that because a woman has consented once she is likely to have consented on the occasion in dispute should be relegated to history. Evidence of a general reputation in relation to sexual matters is properly excluded under s 41(6) of the 1999 Act. The only matters to which evidence or questioning may be permitted are specific instances of alleged sexual behaviour.

b [125] But there is one vital distinction which must be recognised among the generalities which are sometimes adopted in this context, and that is the distinction between a history of intercourse with the defendant and a history of intercourse with other men. To an extent that distinction has been recognised in the past. While questions could be asked in cross-examination of the complainant about someone other than the defendant evidence could not be called to contradict her answer since that would open the way to an inquiry into a multitude of collateral issues (*R v Holmes* (1871) LR 1 CCR 334). On the other hand evidence could be led to counter an answer where the question had been asked in relation to intercourse with the defendant (*R v Riley* (1887) 18 QBD 481). But the distinction should be recognised as going further. It may readily be accepted that some evidence at least relating to sexual behaviour with the defendant outside the particular event which is the subject of the trial may be relevant as casting light on the question of the complainant's consent. But I do not consider that evidence of her behaviour with other men should now be accepted as relevant for that purpose. As Lord Justice Clerk Macdonald said long ago in the Scottish case, *Dickie v HM Advocate* (1897) 24 R (J) 82 at 84:

e 'I am not aware that such evidence has ever been allowed, and indeed it could only be allowed upon the footing that a female who yields her person to one man will presumably do so to any man—a proposition which is quite untenable.'

f [126] The distinction was noted and stressed in the *Report of the Advisory Group on the Law of Rape* (the Heilbron committee) (Cmnd 6352 (1975)) p 17 (paras 100–101) where it was noticed that cross-examination of the complainant's relationship with other men has always stood on a different footing from cross-examination about her relationship with the accused, and that it was the former which causes the real problem. The view is expressed in para 134 (p 23) that questions and evidence as to the association with the accused will in general be relevant, but that the previous sexual history of the complainant with other men ought in general not to be introduced. Their recommendations (p 36) extended to the allowance of some such evidence but subject to leave and in circumstances which they specified. But, as Kibble has pointed out (p 23), little attention has been paid in the literature in the United Kingdom to the relevance and admissibility of prior sexual history with the accused. The context for discussion has sometimes been the admissibility of sexual history with third parties, and general references to 'sexual history' can mask the fact that it is behaviour with third parties which is principally being considered. The failure to draw the distinction can give rise to misunderstanding. It is a distinction which has to be kept in mind when assessing the substance of the 'twin myths'.

j [127] It is then somewhat surprising to find that s 41 of the 1999 Act does not recognise this distinction. It deals throughout with 'sexual behaviour', an expression which is defined in s 42(1)(c) as meaning:

‘... any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused ...’

Of course the admission of any evidence of sexual behaviour with anyone is subject to the obtaining of the leave of the court in terms of s 41(1) of the 1999 Act as more fully detailed in sub-s (2). But it should not be thought that evidence of sexual behaviour with other persons than the defendant is necessarily of equal standing in respect of relevance or of weight as sexual behaviour with the defendant himself. It may be noted in passing that since ‘sexual behaviour’ in s 41(1) includes anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused (see s 42(1)(c)), no restraint seems to be imposed under s 41(1) on evidence or questions about such behaviour, no leave being required. But that appears to conflict with the intention of s 41(5) which envisages some limitation being imposed on such evidence or questions.

[128] It is, however, to be noticed that the phrases ‘sexual behaviour’ and ‘other sexual experience’ seem to be referring to matters of conduct or activity, to acts or events, of a sexual character and not to general considerations of the existence of a relationship or to the objective facts of acquaintanceship or familiarity or the lack of such factors. The background to the critical incident forming the subject of the trial is not excluded from the evidence by the section, at least to the extent that it does not trespass into the particular field of any sexual behaviour or experience on the part of the complainant. The converse of this point is made in s 41(6) where the evidence of behaviour which may be permitted under sub-ss (3) and (5) of s 41 must relate to specific instances of behaviour and not to anything other than specific instances.

[129] The present appeal is concerned strictly with the admission of evidence in relation to an issue of consent. We are thus not immediately concerned to explore s 41(3)(a) of the 1999 Act. But it has to be noticed that on the face of that provision evidence of sexual behaviour of the complainant is not excluded by the statute under any limitations beyond that of the exercise of a judicial discretion under s 41(2). Evidence of sexual behaviour is thus potentially treated as admissible by the statute on any issue other than that of consent. To take one example which was raised during the hearing under reference to the recent Scottish case, *Love v HM Advocate* 2000 JC 1, evidence might be admitted about a sexual experience of the complainant, in that case a boy of 15, which had occurred two years after the abuse which was the subject of the charge but which could provide an alternative explanation for his evidence.

[130] One example of such evidence which caught the attention of the Court of Appeal is that of evidence directed to showing that the defendant had an honest belief that the complainant was consenting. It was not disputed before us that such evidence falls under s 41(3)(a). That evidence of sexual behaviour with other persons than the defendant should be so allowed seems questionable, but the only safeguard is the discretion of the judge and that would have to be relied upon as excluding irrelevant material. On the other hand evidence of sexual behaviour with the defendant might well be relevant to a defence that he honestly believed that the complainant was consenting on the occasion in question. That might seem to let in by a back door evidence which, apart from the express statutory

a limitations, might be excluded if presented as evidence relating to an issue of consent. Where evidence of sexual behaviour is admitted under s 41(3)(a) the jury then require to be directed by the judge that they may look to such evidence for the purpose of determining the issue of honest belief but must ignore the evidence for the purpose of determining consent. Such a summing-up was thought in the Court of Appeal to be worthy of Wonderland. But such mental
b ability as the distinction requires may not constitute an impossible feat for a jury. Nor may they be required to engage in it in so many cases. The recognition of the element of honest belief as a factor to be excluded if the necessary mens rea in a charge of rape is to be proved was established in *DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182. But even there, as Lord Hailsham of St Marylebone pointed out the question was wholly unreal:

c 'The choice before the jury was thus between two stories each wholly incompatible with the other, and in my opinion it would have been quite sufficient for the judge, after suitable warnings about the burden of proof, corroboration, separate verdicts and the admissibility of the statements only
d against the makers, to tell the jury that they must really choose between the two versions, the one of a violent and unmistakable rape of a singularly unpleasant kind, and the other of active co-operation in a sexual orgy, always remembering that if in reasonable doubt as to which was true they must give the appellants the benefit of it. In spite of the valiant attempts of counsel to suggest some way in which the stories could be taken apart in sections and
e give rise in some way to a situation which might conceivably have been acceptable to a reasonable jury in which, while the victim was found not to have consented, the appellants, or any of them could conceivably either reasonably or unreasonably have thought she did consent, I am utterly unable to see any conceivable half-way house.' (See [1975] 2 All ER 347 at 355, [1976] AC 182 at 207.)

f In practice the incidence of cases where a real issue of honest belief arises and calls for a delicate analysis may be fewer than may be feared.

[131] But in the present case we are concerned only with evidence sought to be presented as relating to an issue of consent. Further the issues as presented in the appeal relate only to evidence of sexual behaviour with the accused. As I have
g already stated the section recognises the possibility that sexual behaviour with others than the defendant are not necessarily to be excluded. But that is not the question in the present appeal. It is necessary to consider the two categories of case where evidence may be admitted in relation to an issue of consent as set out in s 41(3)(b) and (c) of the 1999 Act. That provision is made for the admission of
h evidence of specific instances of sexual behaviour in these two paragraphs reflects a recognition that such instances may be relevant to the resolution of a dispute on the issue of consent, that is to say, that the sexual history of the complainant may be relevant to the issue of consent and admissible in evidence.

[132] The former provision, s 41(3)(b), relates to the possible admission of
j evidence of behaviour 'alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused'. There is a degree of elasticity in this provision, but it cannot be strained so far as to allow evidence of incidents remote in time. The problem is to assess the permissible degree of remoteness, and that is a question which will have to be determined finally in light of the circumstances of each particular case. Certainly it appears

that incidents must be outwith anything which has taken place as part of the event which is the subject matter of the charge. Section 42(1)(c) excludes such things from the definition of 'sexual behaviour' so far as s 41(3)(b) is concerned. But how far backwards or indeed forwards one may go beyond the borders of the event remains for the judge to determine. In *State of Missouri v Murray* (1992) 842 SW 2d 122 it was held that incidents bearing on consent which had occurred three and a half and six and a half months before the alleged rape should have been admitted, but the statutory test there was that the incidents be 'reasonably contemporaneous' which is a different and broader test than that in s 41(3)(b). It would be undesirable to prescribe any test in terms of days or hours, but where the point of reference is to the time of the event it may be difficult to extend that to a period of several days. Certainly the period which the defendant in the present case seeks to explore could not be treated as within the scope of s 41(3)(b).

[133] I turn next to s 41(3)(c) of the 1999 Act. Some use was made in the hearing of the phrase 'striking similarity' in relation to this particular provision. That phrase was no doubt used because of the comparison which can be made between the drafting of s 41(3)(c) and the language used in particular by Lord Salmon in *Boardman v DPP* [1974] 3 All ER 887 at 913, [1975] AC 421 at 462. But Parliament has chosen not to use that phrase and the standard which it has selected is to my mind something short of a striking similarity. *Boardman v DPP* was concerned with the problem of similar fact evidence used for the purpose of establishing that the accused had committed the offence with which he was charged. An example can be seen in *R v Butler* (1986) 84 Cr App R 12. In the present context the defence is seeking to fortify its proposition that the complainant was consenting to intercourse. The context and the purpose of the evidence is not so much to show from past events that history has been repeated, as to indicate a state of mind on the part of the complainant towards the defendant which is potentially highly relevant to her state of mind on the occasion in question. The language used is thus not quite the language of *Boardman v DPP*.

[134] The provision seeks to make a comparison between the sexual behaviour of the complainant on some other occasion or occasions and the sexual behaviour of the complainant on the occasion of the alleged rape. That latter occasion is more particularly detailed as being either (i) of sexual behaviour which took place as part of the event which is the subject matter of the charge (the definition of 'sexual behaviour' in s 42(1)(c) of the 1999 Act being expressly qualified for this purpose), or (ii) of any other sexual behaviour of the complainant which took place at or about the same time as that event but not as part of the event which is the subject matter of the charge. It may be that the scope of the latter may coincide with the scope of s 41(3)(b), but that is not a point for decision here. The former occasion or occasions, that is to say the other occasion or occasions of similar behaviour, are not limited by reference to time or to place. In particular it may be noticed that behaviour subsequent to the critical event might be admissible where it bears upon the issue of an alleged earlier consent.

[135] The essentials for the application of the provision are that there should be a similarity in any respect between the two incidents of sexual behaviour which cannot reasonably be explained as a coincidence. It is only a similarity that is required, not an identity. Moreover the words 'in any respect' deserve to be stressed. On one view any single factor of similarity might suffice to attract the application of the provision, provided that it is not matter of coincidence. That the behaviour was with the same person, the defendant, must be at least a relevant

a consideration. But if the identity of the defendant was alone sufficient as the non-coincidental factor, that would seem to open the way in almost every case for a complete inquiry into the whole of the complainant's sexual behaviour with the defendant at least in the recent past, and that can hardly have been the intention of the provision. What must be found is a similarity in some other or additional respect. Further the similarity must be such as cannot reasonably be explained as a coincidence. To my mind that does not necessitate that the similarity has to be in some rare or bizarre conduct. So long as the particular factor is of a significance which goes beyond the realm of what could reasonably be explained as a coincidence, it should suffice. Something about the sexual behaviour of the complainant on each of the occasions, such as something said or done by him or her which is not so unremarkable as to be reasonably explained as a coincidence, c has to be found. I would not attempt any kind of definition and in any event it is the words of the statute which matter, but the language seems to me to be looking for some characteristic or incident of the complainant's sexual behaviour which can reasonably be seen to have a significance beyond the fact that it is contemporaneous with the behaviour and which bears some kind of connection or relationship with the behaviour which on a reasonable view is not a mere matter of chance. The task for the judge is to examine the evidence proposed to be led and see if such a similarity in some respect can be found. The matter comes eventually to be one of the circumstances of the particular case. d

[136] It may well be that the problem can be resolved in practice without any straining of the language of s 41(3)(c) of the 1999 Act. But if the situation is such e that the case cannot readily be fitted within the ordinary meaning of the words, then it would be necessary to resort to the special rule of construction embodied in s 3 of the 1998 Act. If a case occurred where the evidence of the complainant's sexual behaviour was relevant and important for the defence to make good a case of consent, then it seems to me that the language would have to be strained in f order to avoid the injustice to the accused of excluding from a full and proper presentation of his defence. Evidence of other occasions in which the accused had engaged with the complainant in sexual behaviour may not always be relevant. It may, for example, be so remote in time as to make the drawing of any inference from it impossible. But in many cases it may be highly relevant, and a fair trial would be endangered if in such a case it was excluded. I do not consider g that the terms of the section are so rigid as to make it impossible for such evidence to be admissible and so to create an incompatibility with the convention.

[137] The question then is whether or not the evidence which is sought to be led in the present case can fall within the scope of s 41(3)(c) of the 1999 Act. This will depend upon a careful assessment of the presence or absence of a similarity h beyond coincidence between the previous and the critical occasions. That is properly a matter for the trial judge to determine. In interpreting the section he must bear in mind that he may require to adopt the special standard laid down in s 3 of the 1998 Act. From the sparse facts which are before us, if not on the ordinary approach to construction, at least if one was to follow the instruction j contained in s 3, I am not able to affirm that the evidence in question may not fall within the scope of s 41(3)(c). I consider that the judge should be afforded a fresh opportunity of considering the matter in light of the present appeal.

[138] I do not propose to consider the provisions of sub-ss (4) and (5) of s 41 in any depth. It seems to me that the former will require a very fine analysis in its practical application. Issues of consent and issues of credibility may well run so

close to each other as almost to coincide. A very sharp knife may be required to separate what may be admitted from what may not. The purpose of sub-s (4) may be taken to be the abolition of the false idea that a history of sexual behaviour in some way was relevant to credit. The recognition of that myth as heresy is to be welcomed. But the subsection may have to be carefully handled in order to secure that that myth remains buried in the past and at the same time secure the availability of evidence of sexual behaviour which is properly admissible as bearing on the issue of consent. a
b

[139] Subsection (5) of s 41 of the 1999 Act opens the way for the admissibility of questioning and evidence by or on behalf of the defendant for the sole purposes of rebutting or explaining evidence adduced by the prosecution about any sexual behaviour of the complainant. This includes behaviour forming part of the event which is the subject of the charge and is obviously necessary to give the defendant even a minimal right to present his defence. There may well be room for debate about the precise scope of the subsection. Indeed the respondent sought to argue that a denial of consent by the complainant would enable him to call evidence of the previous sexual relationship which he claims he had with the complainant during the few weeks before the alleged rape. I am not persuaded that the subsection can properly by any standard be construed as to lead to that result. But it is unnecessary to explore its scope for the purposes of the present appeal. c
d

[140] Critically this appeal has been concerned with s 41(3)(c) of the 1999 Act and it is important that there should be some general guidance on the application of that section. I have had the opportunity of seeing in draft the formulation which my noble and learned friend Lord Steyn has proposed at [46] of his speech. I agree that the effect of the decision in this case can be expressed in the statement which he has made. e

[141] I recognise the peculiarity of the way in which this problem has come before us, as has been described in the speech of my noble and learned friend Lord Hutton. The circumstances do not make it altogether easy to determine the formal outcome. In light of the view which I have taken and of the consequence of the decision reached by the Court of Appeal I do not consider that their reasoning can be allowed to stand without qualification. On the other hand the appellant has substantially failed in the submissions presented on its behalf. I consider that the proper course is to dismiss the appeal and enable the trial judge to have the opportunity of making a fresh ruling in light of the decision of this House after such further procedure as he may consider appropriate. f
g

LORD HUTTON.

[142] My Lords, in a criminal trial there are two principal objectives of the law. One is that a defendant should not be convicted of the crime with which he is charged when he has not committed it. The other is that a defendant who is guilty of the crime with which he is charged should be convicted. But where the crime charged is that of rape, the law must have a third objective which is also of great importance: it is to ensure that the woman who complains that she has been raped is treated with dignity in court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant. The need to protect a witness against unfair questioning applies, of course, to all trials but it is of special importance in a trial for rape. Linked to the third objective is the further consideration that allegations h
j

a relating to the sexual history of the complainant may distort the course of the trial and divert the jury from the issue which they have to determine.

[143] It is the need to achieve both the objective of protecting an innocent defendant and the objective of protecting a woman complainant which gives rise to the difficult and important issue before the House on this appeal. The issue is difficult because in some cases where an innocent defendant wishes to give evidence that prior to the sexual intercourse which gives rise to the charge against him he had had consensual sexual intercourse with the complainant on previous occasions, it may be necessary to permit him to give such evidence and the complainant to be cross-examined on the matter in order to enable the jury to come to a just verdict. On the other hand there will be other cases where the adducing of evidence of the complainant's past sexual conduct and cross-examination about it will be unnecessary to ensure that justice is done and may prevent the conviction of a guilty defendant.

d [144] Parliament enacted s 41 of the Youth Justice and Criminal Evidence Act 1999 to give effect to the third objective. In the course of their submissions counsel referred to the statements of ministers in Parliamentary debates in order to show the mischief at which the section was aimed. In the debate on the Bill in the House of Commons on 24 June 1999, a minister of state at the Home Office, Mr Paul Boateng, said:

e 'Women—it normally is women although it might be a man—who are considering making an allegation of rape are all too often deterred from so doing, or from going through with the process of prosecution, because they are terrified of having their sexual history trawled through in a gratuitous way ... The intention of the Bill is to keep as much evidence of complainants' sexual behaviour out of trials as possible. That is vital if complainants are to pursue their complaints through to trial and not to feel that their privacy is being invaded to discredit and humiliate them. We must ensure that victims have faith in the criminal justice system and believe that their attacker will be on trial, not them and their history. Sexual history should be admitted only in very limited circumstances where it is really relevant to an issue at trial.' (See HC Official Report, SC E (Youth Justice and Criminal Evidence Bill), 24 June 1999, col 203.)

g [145] The thinking of the government was explained as follows by Lord Williams of Mostyn QC, a minister of state at the Home Office, during the third reading debate on the Bill in the House of Lords on 23 March 1999:

h 'I have to make it plain that as a matter of government policy we have concluded that evidence of a complainant's past attitude to or experience of sexual relations is not material upon which a jury should reasonably rely to conclude that the complainant might indeed have consented on the occasion that is the subject of the complaint. Consensual sex does not mean consent to sex in general—it does not even mean consent to sex with a particular person—it means consent to sex with a particular individual on a particular occasion ... The fact that a complainant has consented previously does not mean that she will consent again. A woman exercises—and is entitled to exercise—her consent independently on each occasion. The defendant's accumulated knowledge and experience of the complainant may affect his

belief in consent at the time of the alleged offence, even though, if he reflects on it later, he may recognise and concede that that belief was mistaken.’ (See 598 HL Official Report (5th series) cols 1216–1217, 1218.)

[146] Section 41 provides:

‘(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—(a) no evidence may be adduced, and (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—(a) that subsection (3) or (5) applies, and (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—(a) that issue is not an issue of consent; or (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).’

[147] The intent of s 41 is to counter what have been described as the two myths. One is that because a woman has had sexual intercourse in the past she is more likely to have consented to intercourse on the occasion in question. The other is that by reason of her sexual behaviour in the past she is less worthy of belief as a witness.

a [148] As regards the first myth it is important to recognise that the present case is one where the defendant wishes to make the case that the complainant had previously had consensual sexual intercourse with him—he does not wish to make the case that the complainant had previously had consensual sexual intercourse with other men and that therefore it was likely that she had consented to have sexual intercourse with him. This is an important distinction, and I propose
b to confine my observations to a case such as the present one where a defendant seeks to give evidence of the complainant having had previous consensual sexual intercourse with him.

[149] The Supreme Court of Canada in *R v Seaboyer*, *R v Gayme* [1991] 2 SCR 577 and *R v Darrach* (2000) 191 DLR (4th) 539 has given powerful and learned judgments demonstrating that the two myths have no place in modern law, but
c the judgments were given in cases where the defences which the defendants wished to advance related to the alleged sexual conduct of the complainants with other men and the judgments are primarily directed to this situation. In *R v Seaboyer*, McLachlin J (at 633) accepted by implication that in some cases evidence of previous sexual conduct of the complainant with the accused might be
d admissible. The learned justice (at 631–632) considered the proposal of Professor Harriet Galvin in an article entitled ‘Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade’ (1986) 70 Minn L Rev 763 at 903:

‘... Sexual conduct of victim of rape. In a prosecution for rape, evidence that the victim has engaged in consensual sexual conduct with persons other
e than the accused is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason more likely to consent to the sexual conduct with respect to which rape is alleged. Evidence of consensual sexual conduct on the part of the victim may, however, be admissible for other purposes.’

f McLachlin J (at 633) then stated:

‘While accepting the premise and the general thrust of Galvin’s proposal, I suggest certain modifications ... I question whether evidence of other sexual conduct with the accused should automatically be admissible in all cases; sometimes the value of such evidence might be little or none.’

g [150] The first question which arises on this appeal is whether evidence that there had been previous consensual sexual intercourse between the complainant and a defendant is a relevant matter for the jury to consider. On this issue I would make two observations. The first is that in enacting s 41(3)(c) of the 1999 Act Parliament has accepted that there may be circumstances in which previous
h sexual behaviour on the part of the complainant is relevant to the issue of consent, because para (c) permits evidence of previous sexual behaviour of the complainant where it is alleged to have been, in any respect, so similar to any alleged sexual behaviour of the complainant at the time of the alleged offence that the similarity cannot reasonably be explained as a coincidence.

j [151] The second observation is that whilst there can be no dispute that the minister of state was correct to say, in the passage from the debate in the House of Lords which I have set out above, that ‘The fact that a complainant has consented previously does not mean that she will consent again’, it does not follow, in my opinion, where there has been a recent affectionate relationship between a woman and a man, that one cannot say that the fact that she has

consented previously is relevant in deciding whether she consented when there was intercourse with the same man a relatively short time later. I consider that there is much force in the statement of Professor Galvin (at 807 of her article), that:

‘Even the most ardent reformers acknowledged the high probative value of past sexual conduct in at least two instances. The first is when the defendant claims consent and establishes prior consensual sexual relations between himself and the complainant ... although the evidence is offered to prove consent, its probative value rests on the nature of the complainant’s specific mindset towards the accused rather than on her general unchaste character.’

[152] In my opinion there will be some cases where evidence of previous consensual sexual intercourse between the complainant and the defendant would be clearly relevant, but there will also be cases where such evidence would not be relevant. Where there has been a recent close and affectionate relationship between the complainant and the defendant it is probable that the evidence will be relevant, not to advance the bare assertion that because she consented in the past she consented on the occasion in question, but for the reason given by Professor Galvin, which is that evidence of such a relationship will show the complainant’s specific mindset towards the defendant, namely her affection for him. In relation to this point Professor Galvin (at 786) cites the opinion of Dean Wigmore (*Wigmore on Evidence* (3rd edn, 1940) at 688) that such evidence shows ‘an emotion towards the particular defendant tending to allow him to repeat the liberty’. But where there had only been some isolated acts of intercourse, even if fairly recently, without the background of an affectionate relationship, it is probable that the evidence will not be relevant. But beyond stating that the test is that of relevance, I think that it is not possible to state with precision where the dividing line is to be drawn—it will depend on the facts of the individual case as assessed by the trial judge.

[153] An additional difficulty in the present case is that the information before the House as to the evidence which the defendant wishes to give is very limited. The agreed statement of facts records:

‘1.15 On 15th June 2000 the Respondent attended Fulham police station and, following a consultation with his solicitor, was interviewed. He declined to answer questions but read out a prepared statement which included the following: “... I, myself and my friend have only known her for about a month. And we both had sexual relationship with her. The evening or the night when they took my friend to the hospital I had sex with [the complainant] and we had sex in front of the river in Ham. While I had sex with her I was not wearing a condom. This sexual relationship which took place [the complainant] started it. [She] was never against this sexual relationship that we were having. This sex took place on Wednesday 14 June very early in the morning.” 1.16 It remains the Respondent’s case that, on the occasion in question, the complainant initiated consensual sexual intercourse and that this was part of a continuing sexual relationship. The consensual sexual relationship covered a period of approximately three weeks prior to 14th June 2000; and in particular he had consensual sexual relations with her,

a including sexual intercourse, at his flat on occasions between 26th May 2000 and 14th June 2000. The last instance was approximately one week before 14th June 2000.'

b [154] If the evidence were confined to those bare facts I would be of opinion that it would not be relevant to the issue of consent. But it may be that the defendant will be able to give more detailed evidence of his relationship with the complainant which would make his evidence of previous consensual intercourse relevant.

Is relevant evidence admissible under s 41 of the 1999 Act?

c [155] Therefore on the basis that further evidence which the defendant may wish to give may be relevant I turn to consider whether such evidence is admissible under s 41 of the 1999 Act. This gives rise to the following questions. The first is whether the evidence would be admissible under s 41 on ordinary principles of construction. If the answer to this question is in the negative the second question is whether the exclusion of the evidence infringes the defendant's right to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998) (the convention). If the answer to this question is in the affirmative the third question is whether s 41 can be construed pursuant to s 3 of the 1998 Act in such a way that it is compatible with art 6. If the answer to this question is in the negative it would be the duty of the House under s 4(2) of the 1998 Act to consider making a declaration that s 41 of the 1999 Act is incompatible with the convention right given by art 6.

f [156] I consider it to be clear that if, as in this case, the defendant says that the most recent act of previous intercourse took place approximately one week before the date of the alleged offence, that sexual behaviour of the complainant cannot come within the scope of the words 'at or about the same time as the event which is the subject matter of the charge against the accused' in s 41(3)(b) of the 1999 Act. This is so whether ordinary rules of construction are applied or the more expansive approach to construction is taken under s 3 of the 1998 Act.

g [157] A more difficult question arises under s 41(3)(c) because that paragraph is, in itself, a difficult one to construe in the context of the section. In *Boardman v DPP* [1974] 3 All ER 887, [1975] AC 421 this House laid stress on the need for 'striking similarity' between the criminal acts with which the accused was charged and other criminal acts which the prosecution sought to put in evidence against him. But in *R v P* [1991] 3 All ER 337, sub nom *DPP v P* [1991] 2 AC 447 the House stated that 'striking similarity' is not an essential element in permitting evidence to be given of other conduct and Lord Mackay of Clashfern LC (with whose speech all the other members of the House concurred) stated:

j 'As this matter has been left in *Boardman v DPP* ([1974] 3 All ER 887, [1975] AC 421) I am of opinion that it is not appropriate to single out "striking similarity" as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. Obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required and the discussion which follows in Lord Salmon's speech in the passage which I have quoted indicates that he had that type of

case in mind. From all that was said by the House in *Boardman v DPP* I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed ... But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle.' (See [1991] 3 All ER 337 at 346, [1991] 2 AC 447 at 460.)

[158] It is to be noted that s 41(3)(c) of the 1999 Act does not contain the term 'strikingly similar'—it contains the less stringent words 'so similar ... that the similarity cannot reasonably be explained as a coincidence'. It also provides that it is sufficient if the sexual behaviour of the complainant is alleged to have been so similar 'in any respect'. Moreover s 42(1)(c) defines 'sexual behaviour' as being 'any sexual behaviour'.

[159] I turn to consider the following hypothetical case. A defendant wishes to give evidence that for a number of months prior to the date of the alleged offence he had had a close and affectionate relationship with the complainant and that he had had frequent consensual intercourse with her during that period. Before intercourse he would kiss her and she would return his kisses. At the time of the alleged offence, before having intercourse, affectionate behaviour took place between them as it had done on the early occasions. Is this evidence admissible under s 41(3)(c)? It can be argued that the similarity between the sexual behaviour of the woman on the earlier occasions and on the occasion in question cannot reasonably be explained as a coincidence: there is a causal connection which is that the woman was fond of the defendant and attracted to him and that is why intercourse has taken place on all occasions. But can it be said that the behaviour is 'so similar that the similarity cannot reasonably be explained as a coincidence'? Such behaviour is normal between a man and a woman and so it cannot be said to be 'strikingly similar', but that is not what the paragraph requires. Therefore I think there is an argument that such evidence would be admissible under s 41(3)(c). However, I consider that some weight must be given to the word 'so', which I think was intended to emphasise that mere similarity was not sufficient. Moreover having regard to the way in which the mischief at which the section was directed was described by the minister of state in the debate in the House of Lords, I do not think that Parliament intended that evidence such as that which I have described in the hypothetical case can be admitted under s 41(3)(c). Therefore I would hold that such evidence is not admissible under the paragraph.

Is s 41 of the 1999 Act, on ordinary principles of construction, incompatible with the right to a fair trial given by art 6 of the convention?

[160] In *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2001] 2 WLR 817 the Judicial Committee of the Privy Council considered the circumstances in which a particular right given by art 6 of the convention may be qualified by

a considerations of the public interest which Parliament has taken into account in enacting the statutory provision under consideration; in that case the public interest being the need to address in an effective way the high incidence of death and injury on the roads caused by the misuse of motor vehicles. But it is clear that in relation to a fair trial certain rights are absolute and cannot be qualified. Lord Bingham of Cornhill stated:

b '... there is nothing to suggest that the fairness of the trial itself may be qualified, compromised or restricted in any way, whatever the circumstances and whatever the public interest in convicting the offender. If the trial as a whole is judged to be unfair, a conviction cannot stand. What a fair trial requires cannot, however, be the subject of a single, unvarying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases, as the European Court has consistently done.' (See [2001] 2 All ER 97 at 104–105, [2001] 2 WLR 817 at 825.)

c

And:

d 'The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within art 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.' (See [2001] 2 All ER 97 at 115, [2001] 2 WLR 817 at 836.)

e

Lord Hope of Craighead stated:

f 'A similar approach to the function of the rule of law can be seen in the fact that the court has consistently recognised that, while the right to a fair trial is absolute in its terms and the public interest can never be invoked to deny that right to anybody under any circumstances, the rights which it has read into art 6 are neither absolute nor inflexible.' (See [2001] 2 All ER 97 at 129, [2001] 2 WLR 817 at 851.)

g [161] In the type of case which I have instanced where a man, who may be innocent, wishes to give evidence of previous acts of sexual intercourse with the complainant in the course of a recent close and affectionate relationship, such evidence would be a central and essential part of his defence, and I consider that to deny him the opportunity to cross-examine the complainant and to give such evidence would compromise the overall fairness of the hearing and would deny him the essence of a fair trial. In my opinion the right of a defendant to call relevant evidence, where the absence of such evidence may give rise to an unjust conviction, is an absolute right which cannot be qualified by considerations of public interest, no matter how well founded that public interest may be. This right

h

j is well described in the argument of counsel for the appellants as set out by McLachlin J in *R v Seaboyer*, *R v Gayme* [1991] 2 SCR 577 at 607–608:

'The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s. 11(d) of the *Charter*. It has long been recognized that an essential facet

of a fair, hearing is the "opportunity adequately to state [one's] case." ... The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it: "If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him." (Doherty "Sparing the Complainant 'Spoils' the Trial" (1984) 40 CR (3d) 55 at 67.) In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.

Therefore I would hold on ordinary principles of construction that s 41 is incompatible with the right to a fair trial given by art 6.

Under s 3 of the 1998 Act can s 41 of the 1999 Act be read and given effect in a way which is compatible with the right to a fair trial given by art 6 of the convention?

[162] Section 3(1) provides: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' (My emphasis.) As my noble and learned friend Lord Steyn stated in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 831, [2000] 2 AC 326 at 366, this subsection enacts a strong interpretative obligation, and Lord Cooke of Thorndon ([1999] 4 All ER 801 at 837, [2000] 2 AC 326 at 373), described the subsection as an adjuration. It is clearly desirable that a court should seek to avoid having to make a declaration of incompatibility under s 4 of the 1998 Act unless the clear and express wording of the provision makes this impossible.

[163] I have observed (at [159]) that on ordinary principles of construction and having regard to the change in emphasis in *R v P* [1991] 3 All ER 337, sub nom *DPP v P* [1991] 2 AC 447 away from 'striking similarity' to 'probative force' there is a possible argument that relevant evidence of a previous close and affectionate relationship in which sexual intercourse took place is admissible under s 41(3) of the 1999 Act. Therefore pursuant to the obligation imposed by s 3(1) of the 1998 Act that s 41 must be read and given effect in a way which is compatible with art 6 of the convention, I consider that s 41(3)(c) should be read as including evidence of such previous behaviour by the complainant because the defendant claims that her sexual behaviour on previous occasions was similar, and the similarity was not a coincidence because there was a causal connection which was her affection for, and feelings of attraction towards, the defendant. It follows that I am in full agreement with the test of admissibility stated by my noble and learned friend Lord Steyn at [46] of his speech.

[164] Therefore I consider that the matter should be remitted to the trial judge to consider if the evidence which the defendant wishes to give (as amplified by him if he wishes to do so) is admissible under that test. Having regard to the terms of this speech I think it is unnecessary to answer the certified question.

[165] In conclusion I wish to make some observations on the nature of the present 'appeal'. In this case there was an appeal by the defendant under s 35 of

a the Criminal Procedure and Investigations Act 1996 from the ruling of the trial judge on a preparatory hearing. The appeal was brought by the defendant to challenge the ruling of the trial judge that s 41 of the 1999 Act prohibited him from giving evidence of, or addressing questions to the complainant, about previous consensual sexual intercourse between himself and the complainant. The Court of Appeal gave two principal rulings. One ruling was that the trial judge was in error in excluding such evidence and questioning entirely, because b judge was in error in excluding such evidence and questioning entirely, because they were permissible under s 41(3)(a) in relation to the defence of belief as to consent. The other ruling was, however, that the trial judge was correct to rule that such evidence and questioning were not admissible on the issue of consent. Because of the first ruling the Court of Appeal held that the appeal was allowed. Therefore, in discussion with the Court of Appeal after the judgment had been c given, counsel for the defendant accepted that he could not seek to appeal to this House as the Court of Appeal had allowed the defendant's appeal.

[166] Moreover the Crown did not wish to appeal against the ruling of the Court of Appeal upholding the decision of the trial judge that the evidence and questioning were inadmissible under s 41 of the 1999 Act on the issue of consent, d because this was the result for which the Crown contended.

[167] In the course of delivering the judgment of the Court of Appeal Rose LJ stated:

e '... it will not, in due course, form any part of this judgment as to whether or not, as a matter of final determination, the provisions of s 41(3)(b) of the 1999 Act, if they preclude evidence as to previous consensual sexual activity between the complainant and the defendant, is compatible with the fair trial provisions of art 6.' (See [2001] EWCA Crim 4 at [15].)

However, later in the judgment, Rose LJ stated in an obiter dictum:

f 'Whether if, following a trial ... the appellant were to be convicted, it would be possible to argue, by way of appeal, that his trial had not been fair, in the light of art 6, remains for consideration on some future occasion.' (See [2001] EWCA Crim 4 at [37].)

g [168] This dictum caused the Crown concern because it was its view that the exclusion of evidence of previous sexual behaviour by the complainant with the defendant would not render the trial unfair under art 6. Accordingly the Crown sought leave from the Court of Appeal to appeal to this House, and the Court of Appeal granted leave and certified the following question as being a point of law of general public importance which was involved in the decision to allow the h interlocutory appeal:

j 'May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under s 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?'

[169] Section 33 of the Criminal Appeal Act 1968 (as amended, *inter alia*, by s 36 of the 1996 Act) provides:

'(1) An appeal lies to the House of Lords, at the instance of the defendant or the prosecutor, from any decision of the Court of Appeal on an appeal to

that court under Part I of this Act or section 9 (preparatory hearings) of the Criminal Justice Act 1987 or section 35 of the Criminal Procedure and Investigations Act 1996. a

(2) The appeal lies only with the leave of the Court of Appeal or the House of Lords; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to be considered by that House.’ b

In the written statement of facts and issues before the House the final paragraph states: c

‘The appellant wishes to make clear that it is not suggested that the decision of the Court of Appeal was wrong on the question of whether the evidence was admissible as relevant to the issue of belief in consent.’

And in its written case the Crown states: d

‘17.1 The Appellant’s principal submissions in relation to the judgment of the Court of Appeal are as follows: (i) the Court of Appeal was correct to decide that the disputed evidence was relevant to the defence of genuine belief in consent; (ii) the Court of Appeal was also correct to conclude that if the disputed evidence was admissible solely on the question of belief in consent, the jury will, in due course, have to be directed that the evidence is not relevant to the issue of actual consent; (iii) the Court of Appeal erred in suggesting that such a direction to the jury might lead to an unfair trial.’ e

[170] Therefore it would appear to be clear that this was not ‘an appeal ... at the instance of the ... prosecutor from [a] decision of the Court of Appeal’— f rather the prosecutor accepted that the decision of the Court of Appeal was correct but wished to appeal against an obiter dictum of the Court of Appeal.

[171] However, the Court of Appeal granted leave to appeal and certified that a point of law of general public importance was involved in the decision, and therefore I think, on balance, that the House had jurisdiction to hear the matter. Moreover in this case it was of obvious importance that the issue whether s 41 of the 1999 Act is compatible with art 6 of the convention or whether the section can be read in a way which is compatible with the article should be resolved because of the number of cases pending in which the point arose and of the need to protect vulnerable complainants from the risk of having to give evidence at a second trial and, very understandably, the Court of Appeal was clearly influenced g by this consideration. h

[172] Section 33 of the 1968 Act, however, makes it clear that leave should only be given to appeal from a *decision* of the Court of Appeal. If it is considered desirable that a party who does not wish to challenge the decision of the Court of Appeal but to obtain a ruling of the House on the correctness of an important obiter dictum in the course of the judgment on a point which affects other cases should be allowed to do so, I consider that the wording of s 33 would have to be amended by Parliament. j

[173] In the unusual circumstances of the present case where the Crown, as the appellant, is not challenging the decision of the Court of Appeal, the question

a whether to allow or dismiss the Crown's appeal gives rise to a point of some difficulty, but as I consider that the argument advanced by the Crown gave too narrow a construction to s 41 I would dismiss this appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Governor and Company of the Bank of Scotland v A Ltd and others

[2001] EWCA Civ 52

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF CJ, JUDGE AND ROBERT WALKER LJJ

4, 5 DECEMBER 2000, 18 JANUARY 2001

Bank – Account – Suspect transactions – Police informing bank of investigation into possible money laundering by client – Bank fearing liability to third parties if account not frozen but concerned that client would bring action if account frozen – Bank fearing that it would be unable to defend client’s proceedings without exposing itself to risk of prosecution for breaching statutory provision against ‘tipping-off’ – Guidance on steps to be taken by bank to protect its position in such circumstances – Criminal Justice Act 1988, s 93D – CPR 25.1(1)(b).

The first defendant, A Ltd, opened sterling and dollar accounts at the appellant bank. The second and third defendants were clients or associates of A Ltd. Substantial sums of money were transferred to those accounts, and the bank became increasingly alarmed, suspecting that the money might have been obtained through fraud. The bank communicated with the police, and became aware that investigations were being conducted into activities closely associated with A Ltd. As a result, the bank believed that it faced a dilemma. If it paid out the moneys held in the accounts, it considered that it could be liable to third parties as a constructive trustee. If it did not pay out the moneys, the bank faced the prospect of an action by A Ltd—an action that it would be unable to defend because the police objected to the bank revealing the information disclosed, and it therefore risked prosecution under s 93D^a of the Criminal Justice Act 1988, a provision intended to prevent ‘tipping off’ when the police were investigating money laundering. The bank therefore applied without notice in private to a Chancery judge, seeking directions but not asking for any form of substantive relief. The judge suggested that he should grant an interim injunction restraining the bank from making any payment from the accounts—a suggestion accepted by the bank. After a series of costly applications, the injunction was eventually discharged by another Chancery judge. By that time, the bank had released the money in A Ltd’s account, but the issue of costs remained outstanding. The judge awarded those against the bank, holding that the injunction should never have been granted. The bank appealed, submitting that it had had a reasonable apprehension that it might be held liable as a constructive trustee, and that it had acted reasonably in invoking the court’s jurisdiction to give guidance and directions to trustees. On the appeal, the Court of Appeal considered, *inter alia*, whether it had been wrong in principle to grant the injunction and, if so, what steps the bank should have taken to protect its position.

Held – Where a bank suspected that moneys held in a client’s account had been obtained by fraud, but was concerned that freezing the account would expose it to an action which it would be unable to defend without breaching s 93D of the

^a Section 93D is set out at [6], below

a 1988 Act, it should, in the absence of agreement with the Serious Fraud Office (SFO) as to what could be disclosed, make an application to the court, naming the SFO as respondent to the application. The hearing could be held in private and there would be no question of the customer having to be served since it would not be a party. If it was necessary for any order to be made, the appropriate order would be an interim declaration under CPR 25.1(1)(b)^b. Such a declaration could set out what information it would be proper for the bank to rely on. In determining its terms, the court would pay most careful attention to the SFO's views as to what would or would not prejudice its investigations. The life of the declaration would probably be short since in the majority of cases it would only be necessary to conceal the existence of the investigations for a limited period. Unless the SFO had acted unreasonably, it was likely that the parties to the application would have to pay their own costs. The issue of disclosure having been resolved, the bank could then decide what course it wished to adopt. The 'tipping-off' legislation gave extensive powers to the police, and it was of the greatest importance that the use of those powers was confined to situations where it was appropriate. Institutions such as banks needed to be able to ensure that they were not adversely affected because of the existence of the powers of the police. The ability of the court to grant interim advisory declarations achieved that purpose, and it was not necessary for a bank to establish the status of trustee to obtain relief. The powers of the court were, however, discretionary, and were only to be used where there was a real dilemma which required its intervention. In the instant case, the second judge had been entitled to discharge the injunction as a matter of principle and to award costs against the bank. Although its motives could not be criticised, the bank, lacking the benefit of a helpful precedent, had sought assistance in the wrong manner and had been unwise to accept the judge's proposal at the initial hearing. It could never be appropriate to grant an injunction against the only party seeking relief, and a litigant who accepted a proposal from a judge was in exactly the same position as if he was the author of that proposal. Having obtained an injunction to which it was not entitled, the bank had sought to benefit from it. In those circumstances, it was more appropriate that the bank should pay the defendants' costs than vice versa. Accordingly, the appeal would be dismissed (see [14], [23], [38], [40]–[43], [46], [47], below).

g Notes

For the offence of tipping off, see 12(2) *Halsbury's Laws* (4th edn reissue) para 1174.

For the Criminal Justice Act 1988, s 93D, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1064.

h

Cases referred to in judgment

Agip (Africa) Ltd v Jackson [1992] 4 All ER 385, [1990] Ch 265, [1989] 3 WLR 1367; *aff'd* [1992] 4 All ER 451, [1991] Ch 547, [1991] 3 WLR 116, CA.

C v S [1999] 2 All ER 343, [1999] 1 WLR 1551, CA.

j *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700.

Dallaway (decd), *Re* [1982] 3 All ER 118, [1982] 1 WLR 756.

El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685, CA; *rs'vg* [1993] 3 All ER 717.

Finers (a firm) v Miro [1991] 1 All ER 182, [1991] 1 WLR 35, CA.

b Rule 25.1, so far as material, provides: '(1) The court may grant the following remedies— ... (c) an interim declaration ...'

- Foley v Hill* (1848) 2 HL Cas 28, [1843–60] All ER Rep 16, 9 ER 1002. a
- Foskett v McKeown* [2000] 3 All ER 97, [2000] 2 WLR 1299, HL.
- Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, [1914–15] All ER Rep 24, CA.
- Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511, CA.
- Ideal Bedding Co Ltd v Holland* [1907] 2 Ch 157.
- Manchester Trust v Furness* [1895] 2 QB 539, CA. b
- Merry v Pownall* [1898] 1 Ch 306.
- Paragon Finance plc v DB Thakerar & Co (a firm), Paragon Finance plc v Thimblely & Co (a firm)* [1999] 1 All ER 400, CA.
- Rowell v Pratt* [1937] 3 All ER 660, [1938] AC 101, HL.
- Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378, [1995] 3 WLR 64, PC. c
- Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555.
- Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75, [1986] 1 WLR 1072, PC. d

Appeal

By notice dated 28 July 2000 the Governor and Company of the Bank of Scotland appealed from the decision of Laddie J on 23 June 2000 whereby he (i) discharged an order made by Lightman J on 16 November 1999 restraining the bank from making any payment out of accounts held by the first defendant, A Ltd, without permission of the court, and (ii) ordered the bank to pay the costs of A Ltd and the other defendants, Mr B and C Ltd. The facts are set out in the judgment of the court. e

Geraldine Andrews (instructed by *Underwood & Co*) for the bank.

Paul Downes (instructed by *Bower Cotton Partnership*) for the defendants. f

Jonathan Crow (instructed by the Solicitor for the Serious Fraud Office) for the Serious Fraud Office.

Cur adv vult

18 January 2001. The following judgment was delivered. g

LORD WOOLF CJ (giving the judgment of the court).

[1] This is an appeal by the Bank of Scotland against a decision of Laddie J dated 23 June 2000. Laddie J discharged an interim order made by Lightman J on 16 November 1999, as subsequently varied. He ordered the bank to pay the costs of all the defendants. Laddie J also determined that the order made by Lightman J was subject to an implied cross-undertaking as to damages but deferred his decision as to whether, in the particular circumstances of the case, an inquiry into the damages was appropriate. h

[2] The issues on this appeal arise out of and are the consequence of the provisions of ss 93A, 93B and 93C which are concerned with the money laundering offence and s 93D of the Criminal Justice Act 1988, which is intended to prevent 'tipping off' when the police are investigating money laundering. j

[3] Miss Geraldine Andrews, who represents the appellant bank on this appeal, contends that the appeal raises issues of considerable public importance as to the steps which are open to a bank to protect itself when, as a result of

a information which it has received from the criminal intelligence services, it has grounds for fearing that if it pays out money from a customer's account it will be exposed to claims for knowingly assisting a breach of trust. She submits the bank needs to be able to protect itself: (a) against the risk of being sued by its customer if it does not pay or by third parties if it does; and (b) against the potentially unjust operation of the provisions of s 93A and s 93D of the 1998 Act.

b [4] Before Laddie J the bank was merely described as a bank. The defendants to the proceedings were described as A Ltd, Mr B and C Ltd. The investigations by the authorities which contributed to these proceedings are no longer being pursued. However, the fact of those investigations having occurred could reflect adversely on the defendants and it is therefore reasonable that their identity should not be disclosed. For that reason we will describe them in the same way
c as Laddie J did. However, the actions of the bank did not reflect any discredit upon the bank and in those circumstances we do not consider there is any justification for the bank's identity not being disclosed. Miss Andrews submitted that equal treatment between the parties requires the bank's identity to not be
d administration of justice must be kept to a minimum and only allowed where it is fully justified.

[5] The Serious Fraud Office (SFO) is not a party to the proceedings. However, the SFO was represented by Mr Jonathan Crow and we are most grateful for his assistance.

e *Statutory provisions*

[6] The statutory provisions with which we are mainly concerned are s 93A and s 93D of the 1988 Act.

f '93A. *Assisting another to retain the benefit of criminal conduct*—(1) Subject to subsection (3) below, if a person enters into or is otherwise concerned in an arrangement whereby—(a) the retention or control by or on behalf of another ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or (b) A's proceeds of criminal conduct—(i) are used to secure that funds are placed at A's disposal; or (ii) are used for A's benefit to acquire
g property by way of investment knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.

(2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or
h indirectly represented in his hands his proceeds of criminal conduct.

(3) Where a person discloses to a constable a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a constable any matter on which such a suspicion or belief is based—(a) the disclosure shall not be treated as a breach of any
j restriction upon the disclosure of information imposed by statute or otherwise; and (b) if he does any act in contravention of subsection (1) above and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if—(i) the disclosure is made before he does the act concerned and the act is done with the consent of the constable; or (ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

(4) In proceedings against a person for an offence under this section, it is a defence to prove—(a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct; or (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that the arrangement any property was used, as mentioned in subsection (1) above; or (c) that—(i) he intended to disclose to a constable such a suspicion, belief or matter as is mentioned in subsection (3) above in relation to the arrangement; but (ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(b) above ...

93D. Tipping-off—(1) A person is guilty of an offence if—(a) he knows or suspects that a constable is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted into money laundering; and (b) he discloses to any other person information or any other matter which is likely to prejudice that investigation, or proposed investigation.

(2) A person is guilty of an offence if—(a) he knows or suspects that a disclosure ("the disclosure") has been made to a constable under section 93A or 93B above; and (b) he discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.

(3) A person is guilty of an offence if—(a) he knows or suspects that a disclosure of a kind mentioned in section 93A(5) or 93B(8) above ("the disclosure") has been made; and (b) he discloses to any person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.

(4) Nothing in subsections (1) to (3) above makes it an offence for a professional legal adviser to disclose any information or other matter—(a) to, or to a representative of, a client of his in connection with the giving by the adviser of legal advice to the client; or (b) to any person—(i) in contemplation of, or in connection with, legal proceedings; and (ii) for the purpose of those proceedings.

(5) Subsection (4) above does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose.

(6) In proceedings against a person for an offence under subsection (1), (2) or (3) above, it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial in the way mentioned in that subsection.

(7) In this section "money laundering" means doing any act which constitutes an offence under section 93A, 93B or 93C above or, in the case of an act done otherwise than in England and Wales or Scotland, would constitute such an offence if done in England and Wales or (as the case may be) Scotland.'

[7] During argument there was discussion as to the extent of the defence provided by s 93D(4). Mr Crow helpfully drew our attention to the similarity between the language of s 93D(4) and the scope of legal professional privilege. Based on this assistance, we conclude that the subsection broadly protects a legal adviser when that adviser is engaged in activities which attract legal professional privilege.

a The facts

b [8] It is neither necessary nor desirable to set out the factual background to this appeal in any detail. It is sufficient to state that A Ltd was incorporated in March 1997. Having been introduced to the bank by an undoubtedly respectable third party, in September 1999 A Ltd opened sterling and dollar accounts at the bank. Substantial sums of money were transferred to these accounts. The bank became increasingly alarmed as to the position. The bank received due diligence material which was designed to set the bank's concerns at rest, but in fact the material had the opposite effect. The bank considered that it might be regarded as a constructive trustee of the funds which it held in the accounts. It considered that the money could have been obtained through 'Prime Bank Instrument Fraud or something similar'. The bank communicated with the police. The bank also communicated with the ICC Commercial Crime Bureau and the British Bankers Association. As a result of this consultation process, the bank became aware that investigations were being conducted into activities closely associated with A Ltd and in particular into the activities of one T. T appeared to be closely involved with A Ltd.

d [9] As a result the bank believed that it faced a dilemma. If it paid out the moneys held in the account, it considered it could be liable to third parties as a constructive trustee. If it did not pay out the moneys it held, an action could be brought and the bank would not be able to defend itself because the police objected to the bank revealing what they had told the bank and invoked s 93D.

e [10] Because of the position in which it found itself, on 16 November 1999 the bank applied without notice in private to Lightman J. The bank sought directions as to what it should do. It did not ask for any form of substantive relief.

f [11] In an attempt to assist the bank, Lightman J suggested that he should grant an injunction against the bank, restraining the bank from making any payment from the accounts. The record of the order which he made was in these terms:

g '... until further order of the court ... the applicant (whose identity shall remain confidential and be denoted by a symbol) shall be restrained from making any payment out of the trust funds the subject of this order, whose identity is stated in counsel's aforementioned skeleton argument, without the permission of the court ...'

[12] The effect of the order was to freeze A Ltd's accounts. As Laddie J pointed out:

h 'A Ltd was not to see anything which the bank had put before the court in support of the application nor the order itself, nor be informed of its existence, nor the claim form which the bank was to issue. Indeed the identity of the accounts to be frozen was itself to be kept secret. No application notice was to be issued.'

j [13] Laddie J also points out that since there was no return date requiring the bank to return to court after a short period, 'the bank could retain the benefit of the order indefinitely'. In addition, the order was not expressed to be subject to any cross-undertaking in damages. According to the bank this was not an accident. The bank was not and is not prepared to compensate A Ltd for any harm it has suffered. The bank's position at that time and when the matter came before Laddie J was that it is the defendants who should be responsible for, not only their own costs, but the bank's costs as well. Mr B and C Ltd were joined to the

proceedings because they had been responsible for remitting the moneys into A Ltd's accounts and they might have claims against the bank in relation to those moneys. a

[14] The bank was unwise to accept Lightman J's order. No doubt, at the time, the bank felt it should not look a gift horse in the mouth. However, if a litigant accepts a proposal made by a judge it is in exactly the same position as if it was the author of what the judge has proposed. In fact, the judge's order did not solve the bank's problems. It made them more acute. The bank became subject to a court order preventing it from making payments from the account and it could not tell its client why this had happened. On 18 November 1999 the bank's solicitors therefore wrote to A Ltd: b

'We have been instructed by (the bank) in connection with your accounts numbered ... Our client is unhappy about certain aspects of the transactions which have taken place on the accounts. The Bank has therefore instructed us to investigate the matter and seek the advice of counsel before reporting. In the meantime, our client can allow no further transactions of any sort on the accounts. We apologise for any inconvenience or embarrassment that this may cause.' c
d

[15] If this was the course which the bank wished to take, it did not need to be subject to an injunction. While it may not be politic to freeze an account, a bank always has the power to do so. However, if a bank acts in this way without justification, it will almost inevitably be subject to proceedings and when this happens it will be in an acutely difficult position if it is subject to an order such as that made by Lightman J. e

[16] Initially A Ltd held its hand. It was no doubt advised by its solicitors that the situation was sufficiently unusual for the bank to wish to make enquiries. However, by 21 December 1999 A Ltd's patience ran out and on that date it issued an application to the Commercial Court. A Ltd sought an order that the sums held by the bank should be paid to A Ltd's solicitors. Two days later the application was heard by Gray J. The evidence of A Ltd was to the effect that the company deserved an impeccable reputation. Money laundering checks had been carried out and there was not a shred of evidence to suggest that the moneys were tainted in any way. It followed, according to A Ltd, they were entitled to the order they were seeking. A Ltd and its lawyers at that time were still in total ignorance of the order made by Lightman J. However, Gray J could not be left in ignorance of the position and counsel, Mr Crookenden QC, who was then appearing on behalf of the bank, made submissions to the judge in private after A Ltd and its lawyers had withdrawn. Mr Crookenden informed the judge of the freezing order and showed the judge the skeleton argument which had been relied upon before Lightman J. There had been no formal evidence prepared for the hearing. Initially Gray J was minded to adjourn A Ltd's application for a short period though he could not tell Mr Downes, A Ltd's counsel, the reason for this. However, having heard further submissions of Mr Downes and against the bank's objections, the hearing was not adjourned but the judge made an order that unless an application was made by the bank to the court before 17 January 2000, the bank would have to pay over to A Ltd's solicitors the sum held by it in A Ltd's account. f
g
h
j

[17] The consequences of the hearing before Gray J, not surprisingly, achieved the objective which the bank and the SFO wanted to avoid. It made A Ltd aware that the reason for the hearings in private was a fear of tipping off by the bank

a contrary to s 93D. This meant that A Ltd and its advisors became aware that a serious criminal investigation was underway although they did not have any details as to the nature of the investigations.

[18] The bank then made another application in private in the Chancery Division. The application was heard on 13 January by Neuberger J. A statement had been prepared for that hearing by Mr Redfern, the solicitor acting for the bank. In that statement he accepted that the bank's suspicions might be completely without justification. But he indicated that the bank had serious grounds for suspicion. The bank asked for the issues to be resolved in a single court and for its costs to be debited to A Ltd's account if, as was contended, the money in that account was subject to a constructive trust. Mr Redfern indicated the bank was unwilling to go to the expense of defending what could be very difficult and expensive proceedings without some reassurance that it would not have to carry the costs of so doing.

[19] Before Neuberger J, the SFO was represented by Mr Crow. Neuberger J varied the order of Lightman J so that the existence of the Chancery proceedings could be disclosed. The Commercial Court proceedings were stayed by consent. The action in the Chancery Division continued. Mr B and C Ltd were joined as defendants.

[20] Between the hearing before Neuberger J and the hearing before Laddie J, a number of applications were made to the court, as a result of which the contents of the bank's skeleton arguments were disclosed, as were the transcripts of the private hearings in the Chancery Division and in the Queen's Bench Division. Furthermore, the bank released the money which it held to the credit of A Ltd's account, apart from a comparatively small sum which was to remain frozen with the consent of the defendants because the bank wished to safeguard its ability to recover the costs which it had incurred. This meant that on 17 May 2000, when the hearing before Laddie J took place, there was no longer any issue as to the payment of the sums credited to A Ltd's account. The issues were as to costs and as to what guidance the courts could give banks as to the proper practice to adopt in the future in these circumstances.

The judgment of Laddie J

[21] In his judgment, which was handed down on 23 June 2000, Laddie J took a strong line. The bank stated that in making the application to the court for directions, it was following the guidance given by this court in *C v S* [1999] 2 All ER 343, [1999] 1 WLR 1551. That case involved the tipping-off legislation but the facts were different from this case. In *C v S* an order for disclosure had been made in civil proceedings. If disclosure had been given, this could have resulted in disclosure which could prejudice investigations being carried on by the National Criminal Intelligence Service (NCIS). In *C v S*, as in this case, a court (the Court of Appeal) had held a hearing in private without a party concerned being aware that this was happening. In its general guidance, this court emphasised that—

'the degree to which the applicant can be involved and the extent that it is possible for the issues to be resolved in open court, again, will depend on the circumstances, but the general approach must be to comply with the ordinary principles to the extent that this is possible. If necessary, the stratagems, which were deployed in this case, will have to be used. Where these sort of arrangements are necessary, there should always be a transcript prepared and the institution should be required to provide a copy to the applicant

when it is informed by the NCIS that there is no longer any requirement for secrecy ...

(7) It will be for the NCIS (or other investigating authority) to persuade the court that, were disclosure to be made, there would be a real likelihood of the investigation being prejudiced. If the NCIS did not co-operate with the institution (and with any requirements of the court) in advancing such a case, the court could properly draw the inference that no such prejudice would be likely to occur and could, accordingly, make the disclosure order sought without offending the principle in *Rowell v Pratt* ([1937] 3 All ER 660, [1938] AC 101) and without putting the institution at risk of prosecution.

(8) Especially when the applicant cannot be heard, it is important that the court recognises its responsibility to protect the applicant's interests. The court must have material on which to act if it is to deprive an applicant of his normal rights. The one criticism, which can be made in this case, of what occurred in the courts below, is that they did not have that material. The court should bear in mind that a partial order may be better than no order. It should also consider the desirability of adjourning the issue in whole or in part, since the expiry of a relatively short period of time may remove any risk of the investigation being prejudiced. The NCIS will, no doubt, wish to co-operate with the courts in achieving speedy progress, as this will be the most productive way of avoiding prejudicing an investigation and protecting the interests of litigants.' (See [1999] 2 All ER 343 at 349–350, [1999] 1 WLR 1551 at 1556.)

The principle applied in *Rowell v Pratt* [1937] 3 All ER 660, [1938] AC 101, to which reference was made, is that the courts will not make an order if it would result in a person being required to commit a criminal offence.

[22] Laddie J correctly states that *C v S* provides no justification for the order which was made by Lightman J. The SFO in this case accept that there had never been any investigation as to what material could or could not be disclosed without prejudicing the investigation. The bank was not at fault for this because the skeleton argument relied on by the bank stated that the police did not wish information resulting from the bank's enquiries to be revealed even to the court. This was an approach on the part of the police which cannot be justified. However, it did make the bank's position very difficult. Laddie J was unhappy about the absence of any formal statements or affidavits but it is important in this situation that so far as possible the incurring of any costs greater than necessary should be avoided.

[23] We do, however, agree with Laddie J that Lightman J was wrong to grant the injunction. It served no useful purpose and although we are in favour of a flexible approach in relation to the deployment of the orders which a court can make, we cannot envisage any circumstances when it is appropriate to grant an injunction against the only party who is seeking relief. Although we do not agree with all the reasoning of Laddie J, we do accept that he was entitled to discharge the injunction which had been granted by Lightman J as a matter of principle, as well as because the injunction could no longer serve any useful purpose.

[24] In opening the appeal Miss Andrews described her client, the bank, as having been in a uniquely difficult situation. She submitted that one of the main causes of the problem was to be found in the law of trusts (the other being s 93D of the 1988 Act). She also submitted that the solution to the problem was to be

a found in the law of trusts, and in particular in the court's inherent and statutory jurisdiction to guide and direct trustees as to the administration of their trusts.

[25] These submissions call for some explanation since on the face of it the relationship between a bank and its customer is not a fiduciary relationship. It is a commercial relationship founded in contract into which the intrusion of equitable doctrines such as constructive notice may result, in the well-known words of Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539 at 545, in 'doing infinite mischief and paralysing the trade of the country'. The need for certainty in commercial transactions underpinned many of the submissions which Mr Downes made on behalf of the respondents.

[26] Nevertheless, it is clear that a bank may become subject in equity to an accessory liability if it dishonestly assists in a breach of trust committed either by its customer or by others. When a bank account is in credit the bank's relationship to the customer is that of debtor, not trustee (*Foley v Hill* (1848) 2 HL Cas 28, [1843-60] All ER Rep 16). But if the debt owed to the customer is affected by any equitable interest or claim of a third party the bank may become accountable in equity if it dishonestly assists in any course of action which disregards the third party's interest or claim.

[27] This potential accountability in equity is sometimes referred to as a liability as a constructive trustee, but that expression is ambiguous and may be misleading (see generally the explanation by Millett LJ in *Paragon Finance plc v D B Thakerar & Co (a firm)*, *Paragon Finance plc v Thimbleby & Co (a firm)* [1999] 1 All ER 400 at 408-410). The essentials of this type of liability were very clearly expressed by Ungood-Thomas J in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582:

'It seems to me imperative to grasp and keep constantly in mind that the second category of constructive trusteeship (which is the only category with which we are concerned) is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee.'

[28] The *Selangor* case was not cited to the court, but it is well known. It is an instructive case because the defendants included two banks which had been involved in different episodes of dishonest corporate manipulation. One bank was held liable as an accessory to breach of trust. The other escaped liability. The test which Ungood-Thomas J applied was as follows:

'The knowledge required to hold a stranger liable as constructive trustee in a dishonest and fraudulent design, is knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on enquiry, which the stranger failed to make, whether it was being committed.' (See [1968] 2 All ER 1073 at 1104, [1968] 1 WLR 1555 at 1590.)

[29] Since the *Selangor* case the ever rising volume of commercial fraud has led the court to revisit the test of guilty knowledge on many occasions. It is not necessary for the purposes of this appeal to review all the authorities. The most recent and clearest guidance is in the decisions of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378 and of this court

in *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511. The whole of the opinion of the Privy Council (delivered by Lord Nicholls of Birkenhead) merits careful study. For present purposes it is sufficient to note one short passage (the reference to a solicitor can equally aptly apply to a banker):

'The analysis of the position of the accessory, such as the solicitor who carries through the transaction for him, does not lead to such a simple, clear cut answer in every case. He is required to act honestly, but what is required of an honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do? The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Knox J captured the flavour of this, in a case with a commercial setting, when he referred to a person who is "guilty of commercially unacceptable conduct in the particular context involved": see *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 761. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty.' (See [1995] 3 All ER 97 at 107, [1995] 2 AC 378 at 390.)

[30] Mr Downes accepted that a bank may become subject to fiduciary obligations in this way, but only if there is a pre-existing fiduciary relationship. He referred to *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 734, where Millett J described this as a 'precondition for equity's intervention'. In doing so Millett J was showing obedience to the doctrine of precedent, since in *Agip (Africa) Ltd v Jackson* [1992] 4 All ER 451 at 466, [1991] Ch 547 at 566 this court had restated the principle which Millett J (at first instance [1992] 4 All ER 385 at 403, [1990] Ch 265 at 291) had doubted, describing it as based on authority rather than principle. The House of Lords has recently indicated that Millett J's doubts were well founded, so far as the process of tracing is concerned: see *Foskett v McKeown* [2000] 3 All ER 97, [2000] 2 WLR 1299. But these points were not fully argued in this court and they are not necessary to the disposal of this appeal.

[31] In brief, Miss Andrews' position was that the bank had a reasonable apprehension that it might be held liable as a constructive trustee, and that it had acted reasonably in invoking the court's jurisdiction to give guidance and directions to trustees. Miss Andrews relied on the decision of this court in *Finers (a firm) v Miro* [1991] 1 All ER 182, [1991] 1 WLR 35. That was a case in which Mr Stein, a partner in a London firm of solicitors, had acted for Mr Miro in setting up an elaborate structure of offshore companies and trusts, which Dillon LJ described as follows:

'Some moneys are indeed held in the firm's client account but the bulk are held through complex chains, with all the trimmings often found in the more sophisticated tax avoidance schemes; the powers expressed to be conferred by the documents on one nominal party can only be exercised on the direction of another who in turn holds his power to give directions as bare trustee for a third and so on. The end result is that all assets are held to the order of Mr Stein on behalf of the defendant. The object of the exercise was unquestionably secrecy. The defendant did not want any one to know who owned these various moneys and other assets, and he relied on the duty of confidentiality owed him by Mr Stein and the firm (and predecessor firms). There is no reason to doubt that when Mr Stein set up all these elaborate

- a arrangements for the defendant he honestly believed that all the moneys and
assets belonged to the defendant as a result of inheritance and success in
business and that the defendant wanted to conceal his wealth for fear of
political expropriation. There are however now grounds for suspecting that
very much of this wealth may have been achieved by the defendant by fraud
on Insurance [an American company].’ (See [1991] 1 All ER 182 at 185, [1991]
b 1 WLR 35 at 38–39.)

- [32] In the *Finers* case this court upheld the order of Mummery J refusing to
direct the release to Mr Miro of the assets controlled by Mr Stein, and directing
the dispatch of a letter to the liquidator of the American insurance company.
They rejected the argument that there was no jurisdiction to make such an order,
c since no trust for the liquidator had yet been established. As to that Dillon LJ said:

- ‘... if there has been fraud, the corollary must be that the schemes set up
by Mr Stein were, although he did not know it, set up to conceal the traces
of fraud, and in such circumstances there is no difficulty in piercing the
corporate veil. The plaintiffs have fiduciary powers in respect of the
d underlying assets either directly or through their control of the scheme
companies and trusts they claim no interest for themselves in those assets or
the scheme companies or trusts, save for the proper professional costs of the
firm as solicitors acting for the defendants. In my judgment the court has
jurisdiction under RSC Ord 85, and should be prepared to give directions in
the dilemma in which the plaintiffs now find themselves, if there is indeed
e any basis on which such directions could serve a useful purpose.’ (See [1991]
1 All ER 182 at 186, [1991] 1 WLR 35 at 39–40.)

[33] Similarly Balcombe LJ said:

- f ‘What gives the court jurisdiction is the fact that the plaintiffs undoubtedly
hold assets on trust for the defendant and are also potentially liable as
constructive trustees at the suit of Insurance. English law has always imposed
strict liabilities upon trustees but in return has been ready to allow trustees
to come and seek the directions of the court if they need to do so. A procedure
for seeking such relief is provided by RSC Ord 85 but that rule of itself merely
g provides a summary way of proceeding.’ (See [1991] 1 All ER 182 at 191,
[1991] 1 WLR 35 at 45.)

- [34] Mr Downes submitted that the *Finers* case was clearly distinguishable,
since it was a case where the solicitor was (on any possible view of the facts)
formally constituted as a fiduciary, and subject to fiduciary obligations. In the
h present case, by contrast, the bank was not formally constituted as a fiduciary, nor
was there any identifiable trust property as to which the court could give
directions. He drew attention to the process by which references to ‘trust funds’
had worked their way into the proceedings before Lightman J and Neuberger J,
and described that as a fundamental error. The true view, he said, was that the
j bank was not a trustee and it held no trust property.

[35] There is a sharp theoretical distinction between property rights and
merely personal rights (see generally Sir Roy Goode ‘Ownership and Obligation in
Commercial Transactions’ (1987) 103 LQR 433). The distinction between ownership
and obligation tends to become blurred in the case of a credit balance on a current
account with a bank of undoubted financial standing. The natural tendency to
speak of ‘money at the bank’ is hard to resist, even for counsel who is concerned

to expose that as a heresy. The bank has a personal, unsecured obligation to pay its customer, but the benefit of that obligation is rightly regarded as an asset into which trust property may be traced. (It is unnecessary to consider the difficult case of *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75, [1986] 1 WLR 1072, in which a bank which also acted as a trustee deposited trust money with itself, and then became insolvent.)

[36] The facts of the *Finers* case are distinguishable from those of the present case. Mr Stein was on any view a trustee holding or controlling identifiable assets in trust for someone. Miss Andrews did not submit that A Ltd was on any view not the beneficial owner of the credit balance on its account, although the evidence of Mr G (whose witness statements referred without much further explanation to a 'joint venture' and to 'investment funds') might possibly have provided a basis for such a submission.

[37] Nevertheless we are inclined to the view that it was open to the bank to seek directions on the footing that it was at least a putative fiduciary. If A Ltd had been the recipient of funds which were the proceeds of fraud (something which is not now contended for) and if the bank had such strong grounds for doubting its customer's honesty that it would itself have been dishonest to turn a blind eye to its doubts, then there was a clear risk of the bank incurring liability in equity as an accessory to breach of trust. A bank placed in that dilemma ought to be able to invoke equity's assistance. The fact that the bank was not formally constituted as a trustee and that a tracing process would attach, not to any assets of the bank, but to the chose in action representing the bank's obligation to its customer, ought not to be an insuperable obstacle. (The terms of Neuberger J's order, requiring the credit balance to be treated as if it had been paid into court, may provide a technique for surmounting the obstacle, although we would not wish to encourage that sort of technical expedient.)

[38] However, we do not find it necessary to express a final view on these points, which were not fully explored in argument, since with the development of the court's powers to grant declaratory relief in appropriate cases it is no longer necessary for the bank to establish the status of a trustee in order to obtain relief.

[39] On this part of the case we would add one footnote. There is a line of authority showing equity's attitude to one type of putative trustee, that is, those who believe that they have been constituted as trustees, but whose belief is proved wrong because the trust is set aside on the ground of undue influence or on some similar ground. The trustees may have unsuccessfully defended the claim but can still hope to get their costs out of the fund, if they have acted reasonably. Sir Robert Megarry V-C described this principle in *Re Dallaway (decd)* [1982] 3 All ER 118 at 121, [1982] 1 WLR 756 at 759-760:

'Executors who have an estate which is held to consist of nothing can have nothing out of which they could take their costs. However, in the parallel case of trustees the courts have tempered this icy logic. It has been held that where a settlement is set aside and so there is no property out of which the trustees can take their costs as of right, the court nevertheless has a discretion to allow the trustees to take their costs out of the fund before handing it over to the successful litigants. It has also been held that in exercising this discretion, trustees who have acted properly ought to be allowed their costs: see *Merry v Pownall* [1898] 1 Ch 306 at 310-311. Furthermore, although the trustees may not be strictly trustees for the successful litigants (a point on which the views of Kekewich J in *Merry v Pownall* [1898] 1 Ch 306 at 312 and

a in *Ideal Bedding Co Ltd v Holland* [1907] 2 Ch 157 at 174 do not appear to be entirely in accord), they are sufficiently trustees of the fund for them not to be confined to party and party costs.'

[40] The bank was, however, in a genuinely difficult situation. There was a dilemma as to what it should do. The mistake it made was not to recognise that there was no point in obtaining relief against A Ltd. It was reasonable to try to anticipate the proceedings which could be expected if it refused to honour instructions of A Ltd as to the moneys which stood to its credit in its accounts. However, the appropriate defendant to any application for directions was not A Ltd but the SFO. The question of the information which could properly be disclosed should have been capable of being resolved between the SFO and the bank, but if they could not reach agreement, then the court would have to resolve the dispute. The hearing could have been held in private and there would have been no question of A Ltd having to be served since it would not have been a party. If it was necessary for any order to be made in proceedings against the SFO, then the appropriate order would have been an interim declaration under CPR Pt 25.1(1)(b). The declaration could set out what information it would be proper for the bank to rely on. In determining the terms of any declaration which could be granted, the court would pay most careful attention to the views of the SFO as to what would or would not prejudice the SFO's investigation. With the assistance of the court, in the great majority of cases there is unlikely to be any difficulty in determining the terms of an interim declaration. The life of the interim declaration would probably be short since in the majority of cases it will only be necessary to conceal the existence of the investigations for a fairly limited period.

[41] The issue as to what information could be disclosed having been resolved, the bank could then decide what course it wished to adopt. In this case its primary concern appears to have been the danger of it being held a constructive trustee. If the bank chose not to honour A Ltd's instructions because of this concern, then the only course open to A Ltd was to commence proceedings as it did. The commencement of proceedings would no doubt be closely followed by an application for summary judgment under Pt 24.2. Under Pt 24.2, the court will only give judgment to a claimant if the bank has no real prospect of successfully defending the claim or issue and there is no other reason why the case or issue should be disposed of at a trial. Where the circumstances are as suspicious as they were in this case they could well provide very good reason for the court not being prepared to grant summary judgement. To oppose an application for summary judgment, the bank would have to draft its evidence with particular care. Here any advisory interim declaration would assist the bank. Miss Andrews contends she was seeking to follow the course outlined above. It is not clear that this was the position.

[42] Laddie J was firmly of the view that if a judge heard in private an application of the class we envisage, then it would rarely be right for that judge to deal with inter partes issues between the bank and its customer. It is obviously undesirable that a judge should be aware of information which is not known to a party appearing before the judge. Despite this concern there can be circumstances where in the public interest this course is necessary. Section 93D is an exceptional statutory provision to deal with an exceptional public interest. Money laundering is an increasingly common problem of large-scale crime. It is of the greatest importance, in the public interest, that the police should be

supported by financial institutions in their attempts to prevent money laundering and to detect it when it happens. When a financial institution co-operates with the authorities, then the courts should be sympathetic to an application for their assistance, if assistance is really necessary. In this case, there being no helpful precedent, the bank went about obtaining assistance in the wrong way. Then, having obtained an injunction to which they were not entitled, the bank sought to benefit from that injunction. The unfortunate consequence is that in this case a great deal of costs have been incurred. It is hard on the bank that under the order of Laddie J they have not only had to bear their own costs, but they have also had to bear the costs of the parties against whom they brought their proceedings as well. But Laddie J was perfectly entitled to make the order which he did. As was not known at the time but is now known, there is no ground on which the bank could properly refuse to make payments of the sums due to A Ltd on their accounts. Mr Downes submitted this was a situation where the bank could not possibly be a constructive trustee. Its position could not be other than that of a mere debtor. He based himself upon the speech of Lord Cottenham in *Foley v Hill*. As we have explained, he put his case too high. But although A Ltd may have contributed to these proceedings becoming so complex and expensive, the fact remains that as between the bank and A Ltd, because of the nature of the bank's business, it is more appropriate that the bank should pay the costs of A Ltd and the other defendants than vice versa.

[43] Having given judgment in the defendants' favour, Laddie J provided in his judgment standard directions with the admirable objective of avoiding problems of the sort with which the bank was faced occurring in the future. He divided his directions under two heads: directions which would apply if the institution wants to make payment, and directions which would apply if the institution does not want to make payment. The guidelines may be of assistance to parties in the future but we prefer not to endorse them. Laddie J's two heads may not be a helpful starting point since usually the bank will have no preference of its own and it will simply want to do what is right and proper so as to extricate itself from embarrassment. Moreover the situations which can arise are so varied that it is extremely difficult to anticipate what will be the best course to adopt in a particular case. We would prefer to confine our guidance to what is self-evident from our judgment in this case. First of all, there should be no question of an injunction being granted in the circumstances in which it was granted in this case. If there is a dispute as to whether a payment can be made or disclosure made by the bank, the SFO on behalf of the police and the bank should try to resolve it between themselves. If they can not do so, that can be the subject of an application for interim declaratory relief in the way we have suggested. Unless the SFO acts unreasonably, it is likely that the parties to the application will have to pay their own costs. If proceedings are brought by a customer of the bank, the bank will have to take a commercial decision as to whether to contest the proceedings or not. If the proceedings are to be contested, then they should be conducted as openly as possible. Consideration should be given as to whether it is desirable for the judge who hears any proceedings against the bank to be different from the judge from whom guidance is sought. The answer will depend upon the circumstances of the particular case. It is possible, however, to envisage circumstances where the best method of achieving justice will be for the same judge to hear both sets of proceedings. If there are proceedings of which a bank's customer is unaware, then at least if the bank acts in accordance with guidance given by the court, there will be no question of it being subject to criminal proceedings.

[44] The emphasis both in the courts below and before this court by the bank as to whether the bank could be liable as a constructive trustee is understandable and, although we consider that it gave rise to unnecessary complications, we do not criticise the bank for its attempts to rely upon this possible liability. The bank initially had grounds for being genuinely concerned that it might be liable as a constructive trustee. The law in this area has been developing and is continuing to develop. Secondly, as this litigation is primarily concerned with the issue of costs from the bank's point of view, establishing the existence of a constructive trust became increasingly attractive. This was because if there was a trust fund, that fund could be used for recouping the bank's ever increasing expenditure on costs. But the prospect of achieving this wholly desirable end, from the bank's point of view, was a mirage. It disappeared into the horizon as it became increasingly clear that the funds remitted to the bank for the credit of A Ltd's account could not be shown to be tainted in any way. The third reason for the bank's enthusiasm for trying to establish a constructive trust was that it brought with it the court's administrative responsibilities in relation to trusts under Ord 86. Invoking the court's powers in relation to trusts provided what was hoped would be a solid foundation for the court exercising its administrative or advisory jurisdiction in relation to the dilemma with which the bank was faced.

[45] The wide power of the courts to give guidance to trustees is undoubted. However, the court's ability to resolve disputes which could give rise to undesirable legal consequences is no longer restricted, if it ever was, to situations involving trusts. In his first Hamlyn lecture given in 1949, 'Freedom Under the Law', Sir Alfred Denning, as he then was, identified the challenge facing the court as being to develop 'new and up-to-date machinery' (p 116). The first element of the machinery identified in the lecture was the remedy of declaratory relief. The court's power to make a declaration (or 'declaration of right') was derived from the Court of Chancery and was originally supposed to be restricted to declaratory judgments as to existing private rights (see *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, [1914-15] All ER Rep 24, which sets out the early history). Sir Alfred Denning saw the need to develop its scope in order to control the abuse of executive power, and over the half-century which has elapsed since his lecture it has performed a crucial function in the emergence of the modern law of judicial review. The development of declaratory relief has not, however, been confined to judicial review. Doctors and hospitals have increasingly been assisted by the ability of the courts to grant advisory declarations. It was at one time thought that an interim declaration could have no practical purpose. The developments in other jurisdictions showed this was not the situation. Now the CPR acknowledges that just as interim injunctions can be granted so can interim declarations. Order 15, r 16 still remains part of the CPR. Its transitional life is about to come to an end. The rules committee has approved a new rule, CPR Pt 40.20, which omits any mention of 'rights'. It merely states 'the court may make binding declarations whether or not any other remedy is claimed'.

[46] The courts have responded to the need identified by Sir Alfred so many years ago. The facts of this appeal confirm the need to do so. The 'tipping-off' legislation which was the source of the problem with which this appeal deals, gave extensive powers to the police. Properly used they were beneficial. Misused they could create unintended consequences. It is of the greatest importance that use of those powers is confined to situations where it is appropriate. Institutions such as banks need to be able to ensure that they are not affected adversely unnecessarily because of the existence of the police's powers. The ability of the

courts to grant interim advisory declarations achieves this purpose. The fact that the courts now have these powers, must not, however, be regarded as a substitute for financial institutions taking the decisions which should be their commercial responsibility. The courts' powers are discretionary and only to be used where there is a real dilemma which requires their intervention. a

[47] The use of the court's power to grant interim declarations in proceedings involving the SFO will protect a bank from criminal proceedings but it will not automatically provide protection for the bank against actions by customers or third parties. However, it seems almost inconceivable that a bank which takes the initiative in seeking the court's guidance should subsequently be held to have acted dishonestly so as to incur accessory liability. The involvement of the court should, however, enable, in the great majority of cases, a practical solution to be determined which protects the interests of the public but allows the interests of a bank to be safeguarded. In this case, although the bank's motives are not open to criticism, we consider Laddie J was entitled to make the orders which he did and we cannot interfere with his decision. The appeal is dismissed. b
c

Appeal dismissed.

Kate O'Hanlon Barrister.

Dodson v Peter H Dodson Insurance Services (a firm)

COURT OF APPEAL, CIVIL DIVISION

SCHIEMANN, MANCE LJ AND SMITH J

12 OCTOBER, 12 DECEMBER 2000

Motor insurance – Compulsory insurance against third party risks – Extent of cover – Insured being covered to drive another's car with permission – Insured having sold car in respect of which policy issued – Whether insured covered to drive another's car with permission having sold own car without replacement.

The claimant completed an insurance proposal form in respect of his motor car and instructed the defendant insurance broking firm, of which his father was principal, to put into effect a valid policy of insurance which would enable him to drive, subject to the owner's permission, any motor car not belonging to him and not held under a hire purchase agreement by him. In particular, he wished to be sure that he would be insured to drive any of his parents' cars. A policy and certificate of motor insurance for the period from 11 September 1992 to 11 September 1993 were issued. Clause 1(1) of the policy provided: 'the company will indemnify the insured in respect of legal liability for death of or bodily injury to any person and damage to property caused by or in connection with ... (b) the driving by the insured (with the owner's permission) of (c) any motor car or motor cycle neither owned nor held under a hire purchase agreement by the insured ...' Paragraph 1 of the certificate of motor insurance provided: 'Description of vehicle. Any private motor car owned by or hired under a hire purchase agreement to the policy holder' and the explanatory notes to the certificate provided: 'Replacement and additional vehicles. The certificate covers the vehicle last notified to and accepted by the company ... If you wish to insure another vehicle you must notify the company giving full particulars.' On 17 April 1993 the claimant sold his car. He was advised by his parents that, despite the fact that he no longer owned a car, the policy remained in force and was valid in respect of third party risks in the event of his driving a car belonging to someone else with that person's consent. On 16 May 1993 the claimant was driving his mother's car with her consent and was involved in a collision, as a result of which one person was killed and two others were injured. The claimant's insurers declined to indemnify the claimant in respect of claims for damages arising out of the accident, asserting that the policy had become void and was not in force once he had sold his own car and had failed to obtain an immediate replacement. The claimant's mother's insurers accepted liability under the Road Traffic Act 1988 in respect of third party claims, and in due course took proceedings to recover their outlay from the claimant personally. The claimant initially claimed indemnity from his insurer, but discontinued those proceedings on legal advice and sought from the defendant an indemnity on the basis that his liabilities had been caused by the defendant's allegedly wrong and negligent advice that, if he sold his own car, he would nevertheless be insured under the policy whilst driving cars belonging to others with their consent. The defendant applied for summary judgment under CPR 24 on the basis that the claimant's insurer was, after all, liable. The judge made an order declaring that, on the true construction of the

insurance policy issued by the claimant's insurer, the claimant remained covered by the policy, despite the sale of his own car, in the event of his driving, with the owner's permission, any motor car not belonging to or held under a hire purchase agreement by him. The claimant appealed. a

Held – On the true construction of cl 1(1)(b) of the policy, following the claimant's sale of his car without replacing it, the claimant was covered during the remainder of the policy period in the event of his driving, with the owner's permission, any motor car not belonging to and not held under a hire purchase agreement by him. Under cl 1(1)(b), the insurers had to be taken to have accepted that cover while driving other cars could continue after disposal of the insured car, and there appeared to be no satisfactory stopping point short of a conclusion that such cover was independent of the retention or replacement of any insured car. Moreover, if cover under an apparently independently worded indemnity clause was intended to depend upon retention or replacement of the insured car, to which the cover did not relate, or upon continuation of cover under a separately expressed indemnity clause, one would have expected that to be clearly stated. Furthermore, in the case of any real ambiguity, an insurance policy such as that in the instant case fell to be construed against the insurers whose standard wording it was, and who had put it forward contractually in apparently general terms and had then sought to read into it an unexpressed restriction of their liability. Accordingly, the judge's declaration would be upheld and the appeal would be dismissed (see p 92 *f* to *h*, below). b
c
d

Rogerson v Scottish Automobile and General Insurance Co Ltd [1931] All ER Rep 606, *Tattersall v Drysdale* [1935] All ER Rep 112 and *Wilkinson v General Accident Fire and Life Assurance Corp Ltd* [1967] 2 Lloyd's Rep 182 considered. e

Boss v Kingston [1963] 1 All ER 177 disapproved and distinguished.

Notes f

For cover for an assured driving other cars, see 25 *Halsbury's Laws* (4th edn reissue) para 723.

Cases referred to in the judgments

Boss v Kingston [1963] 1 All ER 177, [1963] 1 WLR 99, DC.

Conn v Westminster Motor Insurance Association Ltd [1966] 1 Lloyd's Rep 123; *affd* [1966] 1 Lloyd's Rep 407, CA. g

McInnes v National Motor and Accident Insurance Union Ltd [1963] 2 Lloyd's Rep 123.

Peters v General Accident Fire and Life Assurance Corp Ltd [1937] 4 All ER 628; *affd* [1938] 2 All ER 267, CA.

Rogerson v Scottish Automobile and General Insurance Co Ltd (1931) 146 LT 26, [1931] All ER Rep 606, HL; *affg* (1930) 38 Ll L Rep 142, CA. h

Tattersall v Drysdale [1935] 2 KB 174, [1935] All ER Rep 112.

Wilkinson v General Accident Fire and Life Assurance Corp Ltd [1967] 2 Lloyd's Rep 182.

Appeal j

The claimant, Mr Simon Dodson, appealed with the leave of Bell J from his order of 17 February 2000 whereby he declared that on a true construction of a motor insurance policy issued to the claimant by Eagle Star Insurance Co Ltd through the defendant insurance brokers, Peter H Dodson Insurance Services, the claimant had remained covered during the policy period in the event of his driving, subject to the owner's permission, any motor car not belonging to or

- a held under a hire purchase agreement by him. The claimant sought damages from the defendant for negligence in allegedly advising him that the insurance would remain in force in such a situation, following his involvement in a road accident, as a result of which he incurred substantial liabilities to his passengers and to third parties. The facts are set out in the judgment of the court.
- b *Benet Hytner QC* and *David Zucker* (instructed by *Mills Kemp & Brown*, Barnsley) for the claimant.
Brian Doctor QC (instructed by *Squire & Co*) for the defendant.

Cur adv vult

- c 12 December 2000. The following judgment of the court was delivered.

MANCE LJ.

- d 1. We have before us an appeal with leave of Bell J from his order made 17 February 2000 declaring that, upon the true construction of a policy of motor insurance issued by the Eagle Star Insurance Co Ltd (the Eagle Star) to the claimant for the period 11 September 1992 to noon on 11 September 1993 and despite the sale of the claimant's car on 17 April 1993, the claimant remained covered during the policy period in the event of his driving, subject to the owner's permission, any motor car not belonging to or held under a hire purchase agreement by him. The claimant's claim is for damages against the
- e defendants, insurance brokers through whom he placed the policy, for negligence in (allegedly, since it is in issue whether they ever did) advising him that the insurance would remain in force in this situation. He was involved in a serious accident on 16 May 1993, whilst driving his mother's car, as a result of which he incurred substantial liability to his passengers and third parties. The Eagle Star refused to indemnify him. Acting presumably with the advice of lawyers, he
- f discontinued the proceedings initially pursued against them. Instead he has pursued the defendants, his brokers, by the present proceedings. The brokers' response to the proceedings was to plead that the Eagle Star was after all liable, and to issue an application for summary judgment under CPR Pt 24. On that application, the judge assumed the accuracy of all the matters pleaded in the
- g statement of claim, and made the order now under appeal.
2. For further details of the insurance position and the background, it is convenient to quote the judge's judgment:

- h 'The claimant, Simon Dodson, is the son of Peter Dodson who is the principal of the defendant insurance brokers. The claimant's mother worked in the firm. On or about 10 September 1992 the claimant completed an Eagle Star "Motorstar" insurance proposal form in respect of his D-registered Peugeot 309 motor car, instructing the defendant to put into effect a valid policy of insurance which would enable him to drive, subject to the owner's permission, any motor car not belonging to and not held under a hire
- j purchase agreement by him. In particular he wanted to be sure that he would be insured to drive any of his parents' motor cars. The claimant paid the required annual premium and a policy and certificate of motor insurance were issued, valid until 10 September 1993. The policy was entitled "PRIVATE CAR POLICY", beneath which appeared the following statement for and on behalf of the Eagle Star: "The insured having 1 made to Eagle Star Insurance company Limited (the Company) a written proposal and declaration, and

2 paid or agreed to pay the premium as consideration, the Company will provide the insurance detailed in this Policy during the Period of Insurance stated in the Schedule and during any further period for which the Company may accept payment for renewal." The period of insurance stated in the schedule was "from the 11th day of September 1992 to 1200 hours on the 11th day of September 1993". Clause 1 of the policy was entitled "LIABILITY TO THIRD PARTIES". It bore the marginal note "Indemnity to the Insured". Paragraph 1 of the clause read as follows:

"1. The Company will indemnify the Insured in respect of legal liability for death of or bodily injury to any person and damage to property caused by or in connection with

(a) the Insured Vehicle

(b) the driving by the Insured (with the owner's permission) of any motor car or motor cycle neither owned nor held under a hire purchase agreement by the Insured

(c) a trailer or disabled mechanically propelled vehicle attached to any vehicle described in (a) or (b) above."

On 17 April 1993 the claimant sold his Peugeot 309. He asked his mother and father whether his policy of insurance would continue to provide valid cover in the event of his driving, subject to the owner's consent, any motor car not belonging to and held under a hire purchase agreement by him. He was advised by them that despite the fact that he no longer owned a motor car of his own, the policy of insurance remained in force and was valid in respect of third party risks in the event of him driving a car belonging to someone else, with that person's consent. Thereafter the claimant from time-to-time drove his mother's G-registered Renault (a Renault 5 GT Turbo according to information in the trial bundle) with her consent. On 16 May 1993 while driving that car with her consent he was involved in a collision as a result of which a man was killed and two other persons were injured. The Eagle Star declined to indemnify the claimant in respect of the claims for damages arising out of the accident, asserting that his policy had become void and was not in force once he had sold his own car and failed to obtain an immediate replacement. His mother's insurance did not cover the claimant driving her car but her insurers, AGF, accepted liability under the relevant provisions of the Road Traffic Act 1988 in respect of the third party claims. In due course AGF took proceedings to recover their outlay from the claimant personally. He initially claimed indemnity from the Eagle Star, in third party proceedings, but he discontinued those proceedings on legal advice. The claimant now, in these proceedings, seeks from the defendant an indemnity in respect of AGF's claim against him, and in respect of other liabilities, on the basis that his liabilities have been caused by the defendant's allegedly wrong and negligent advice that if he sold his own motor car he would still be insured under the Eagle Star policy whilst driving other people's cars with their consent. The defendant contends that its advice was right. So the important issue arises whether on a true construction of the Eagle Star policy and despite the sale of his car on 17 April 1993 the claimant was as at 16 May 1993 covered in the event of his driving, subject to the owner's permission, any motor car not belonging to and not held under a hire purchase agreement by him. It has been ordered, in effect, and agreed that that issue should be decided first. Being no longer a party to the action, the Eagle Star was not present or represented at the trial of the issue.'

a 3. The judge went on to set out certain material parts of the proposal and certificate of insurance:

b "The Eagle Star proposal form completed by the claimant bore the
c description "Private Car Proposal". It asked for details in the following
d order: first, the proposer's name and address, and whether "the vehicle" was
kept at that address, and the driver's occupation; next, the particulars of "the
vehicle", including the make and model, the type of body and seating
capacity, the cylinder capacity, the estimated value, year of manufacture,
date of purchase and registration mark, and whether it had been modified or
e altered from the manufacturer's specification; then, whether the proposer
was the sole owner and the registered keeper of the vehicle; then details of
the proposer and any other person who might drive "the vehicle", including
f date of birth, type of current United Kingdom driving licence held, and
driving experience, and stating the name of the main driver of the vehicle
and particulars of any motoring convictions, and of health; and then the type
of cover required. Thereafter came a declaration of the truth of the proposal.
I have already referred to the Eagle Star's statement of insurance, and to
cl 1(1) of the policy. The policy provided under "Interpretation" that: "The
Certificate of Motor Insurance, the Schedule, the Appendices and any
endorsements are incorporated in their policy ..." The certificate of motor
insurance was in "FORM B". Its first five paragraphs read as follows:
"1. DESCRIPTION OF VEHICLE. Any Private Motor Car owned by or hired
under a hire purchase agreement to the Policyholder. 2. NAME OF POLICY
e HOLDER SIMON PETER DODSON 3. EFFECTIVE DATE of the commencement of
Insurance for the purposes of the relevant law. 1200 hrs 10.9.1992. 4. DATE
OF EXPIRY of Insurance 1200 hrs 10.9.1993. 5. PERSONS OF CLASSES OF PERSONS
entitled to drive. Provided that the person holds a licence to drive the vehicle
or has held and is not disqualified from holding such a licence. A. The
f Policyholder B. The Policyholder is also entitled to drive, subject to the
owner's permission, any motor car (or motor cycle) not belonging to and not
held under a hire purchase agreement by the Policyholder." Explanatory
notes to the certificate read as follows:

g "REPLACEMENT AND ADDITIONAL VEHICLES

h The Certificate covers the vehicle last notified to and accepted by the
Company. It describes the vehicle by Registration Mark (Form A) or by
description (Form B). If you wish to insure another vehicle you must notify
the Company giving full particulars. If the vehicle is additional to that
already covered, another Certificate (and, in most cases, a new policy) will
be required. FORM A CERTIFICATES -YOU MUST OBTAIN A COVER NOTE (OR NEW
CERTIFICATE) BEFORE THE REPLACEMENT OR ADDITIONAL VEHICLE IS USED. FORM
B CERTIFICATES-You must notify the Company WITHIN SEVEN DAYS of
acquiring the new or replacement vehicle. The company reserves the right
to decline to insure any vehicle."

j This advice reflected para 1 of cl 11 ("CONDITIONS") of the policy which
bore the marginal note "Replacement Vehicles", and provided:

"If the reference in the top left-hand corner of the Certificate of Motor
Insurance is (a) Form A, no cover applies under this Policy for additional or
replacement vehicles until the Company has been notified of such addition
or replacement and a Certificate of motor Insurance has been received by the
Insured (b) Form B, the Company shall not be liable (except so far as is

necessary to comply with compulsory motor insurance legislation) to make any payment under this Policy in respect of any replacement or additional vehicle unless particulars of that vehicle are notified to the Company within seven days of the date of acquisition." a

Clause 11(5) of the policy which bore the marginal note "Vehicle Maintenance and Safekeeping", provided:

"The insured shall maintain the Insured Vehicle in an efficient and roadworthy condition and take all reasonable steps to safeguard it from damage or loss, including theft/attempted theft/taking without consent and malicious damage/malicious fire." b

"Appendix 1 Extent of Cover" provided, under "B THIRD PARTY, FIRE AND THEFT", that cl 2 of the policy, which provided that the Eagle Star would indemnify the insured against damage to or loss of "the Insured vehicle and its accessories" was inoperative save for damage or loss by fire or theft or attempted theft.' c

4. The judge then turned to authorities and textbooks to which counsel had referred him. The authorities were *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 146 LT 26, [1931] All ER Rep 606, *Tattersall v Drysdale* [1935] 2 KB 174, [1935] All ER Rep 112, *Boss v Kingston* [1963] 1 All ER 177, [1963] 1 WLR 99 and *Wilkinson v General Accident Fire and Life Assurance Corp Ltd* [1967] 2 Lloyd's Rep 182. The textbooks included *MacGillivray on Insurance Law* (9th edn, 1997) pp 487–488, 822–824 (paras 20.1–20.4, 29.15–29.18), and *Hardy Ivamy Fire and Motor Insurance* (4th edn, 1984) pp 243–246. d

5. As against his brokers, the claimant now makes common cause with his insurers. His case is that his cover under cl 1(1)(b) of the policy depended (as Eagle Star had contended) upon his retaining his interest in either the insured car, or (in view of the 'Replacement/Additional Vehicles' clause to which we will come) a substitute for it. Although the insurance covered third party, fire and theft, he submits that its essential 'subject-matter' was the insured car or a replacement. This, he submits, is the tenor of both the authorities and the texts. e

6. The defendants deny that one can deduce any general principle from the authorities. They submit that the issue is one of construction of a particular policy wording, differing from any covered by the cases. f

7. The judge accepted the defendants' case. He viewed cl 1(1)(b) as an independent head of insurance, capable of operating throughout the insurance period irrespective of whether or not the insured maintained his interest in the insured car or had replaced it under the insurance with another. g

8. We start with the authorities. In *Rogerson's* case, the policy was a one-year policy expiring 19 May 1929. The insured had exchanged the insured car shortly after effecting the insurance, and on 28 July 1928 was involved in an accident in his new car. In the policy, cl A covered, firstly: h

'All sums which the assured shall become legally liable to pay [for damage] by any motor vehicle described in the schedule hereto (hereinafter called "the insured car") ...' (See the report in the Court of Appeal (1930) 38 Ll L Rep 142 at 143.) j

There was added to cl A the following:

'This insurance shall cover the legal liability as aforesaid of the assured in respect of the use by the assured of any motor car (other than a hired car),

a provided that such car is at the time of the accident being used instead of “the insured car.”’

9. The House of Lords ((1931) 146 LT 26, [1931] All ER Rep 606) recognised the principle that in case of doubt such a policy will fall to be construed against insurers. The speeches treat the case as turning on the proviso. In the view of the House that assume[d] ‘that there is “the insured car”, the use of which, if an accident arises, would entitle the assured to the benefit of the policy’. Lord Buckmaster went on (at 608):

c ‘But if it be assumed that the original car be sold and another car taken in its place, the result would be, if the assured’s contention were correct, that it might be possible to shift the insurance from car to car during the whole period of twelve months for which the policy runs, and that although there is no express limitation on the nature of the car that may be regarded as a substitute.’

d 10. In *Tattersall v Drysdale* Goddard J, who had been counsel for the successful insurers in *Rogerson’s* case, preferred a broader view of that decision. The plaintiff’s insurance in *Tattersall v Drysdale* was initially in respect of his Morris Oxford but ultimately, after a number of changes of car and endorsements, in respect of a Standard car. It insured him in respect of the car and against third party risks. But it contained a clause extending the third party indemnity to the assured ‘whilst personally driving for private purposes any other private motor car ... not belonging to the assured in respect of which no indemnity is afforded by any insurance applying to such car’, provided that the car thereby insured should not be in use at the same time (see [1935] 2 KB 174 at 175, [1935] All ER Rep 112 at 113). This wording therefore avoided the risk, identified by Lord Buckmaster, that an insured might shift the insurance from car to car *purchased by the insured*, without insurers’ knowledge or control. In August 1934, the plaintiff being minded to get another car, but not desiring immediate delivery and indeed not having decided finally what car he would have, agreed with dealers to surrender the Standard in return for an allowance of £180 against the price of any new car he cared to select and the use in the meantime of a car belonging to the dealers free of charge. In that car he had an accident on 9 September 1934. Goddard J rejected the submission that the insurance applied, saying:

h ‘The words of the extension clause in this policy are different from those used in *Rogerson’s* case (*Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 146 LT 26, [1931] All ER Rep 606), and [counsel for the defendant] argues that the latter case really turned only on the construction placed on the phrase “instead of the insured car,” which do not appear in the clause under consideration. But in my judgment that view is too narrow. I think that both in the Court of Appeal and the House of Lords the decisive factor was that the subject-matter of the insurance was the specified car, and that as the assured had parted with it he no longer was interested in the policy. The true view, in my judgment, is that the policy insures the assured in respect of the ownership and user of a particular car, the premium being calculated, as was found in *Rogerson’s* case, partly on value and partly on horse-power. It gives the assured by the extension clause a privilege or further protection while using another car temporarily, but it is the scheduled car which is always the subject of the insurance. Though the words differ in the two policies, the effect and intention seem to me to be

the same, and express provision is made for what is to happen when the assured parts with the car. To construe this policy otherwise would be to hold in effect that two distinct insurances were granted, one in respect of the scheduled car, and another wholly irrespective of the ownership of any car. It may be that a person who does not own a car can get a policy which would insure him against third-party risks whenever he happens to be driving a car belonging to some one else; but the clause I am considering is expressly stated to be an extension clause, that is extending the benefits of this policy, and accordingly if the assured cease to be interested in the subject-matter of the insurance the extension falls with the rest of the policy.' (See [1935] 2 KB 174 at 179, [1935] All ER Rep 112 at 115.)

11. After issuing a first draft of this judgment, there came to our attention a further decision of Goddard J, not referred to below or before us. That is *Peters v General Accident Fire and Life Assurance Corp Ltd* [1937] 4 All ER 628, where Goddard J (at 632) applied his reasoning in *Tattersall v Drysdale* to an 'extension clause' reading:

'In terms of and subject to the limitations of and for the purposes of this section the corporation will treat as though he were the policyholder any person who is driving such vehicle on the policyholder's order or with his permission ...'

Before us Mr Doctor QC for the defendants emphasised both Goddard J's reference in *Tattersall v Drysdale* to the expressed nature of the clause there as an extension clause, and its proviso 'that the car thereby insured should not be in use at the same time', which, he points out, contemplated that the insured car continued available for use.

12. The third case, *Boss v Kingston* [1963] 1 All ER 177, [1963] 1 WLR 99, concerned a third party risks only motor cycle policy. Clause (1) indemnified the insured against third party risks in connection with any motor cycle described in the policy schedule. Motor cycle A was there specified. Clause (2) read:

'(2) In terms of and subject to the limitations of and for the purposes of the policy the company will also indemnify the insured while driving a motor cycle not belonging to him and not hired to him under a hire-purchase agreement as though such motor cycle was a motor cycle described in the schedule.' (See [1963] 1 All ER 177 at 179, [1963] 1 WLR 99 at 103.)

Boss sold motor cycle A, and two weeks later was found driving a motor cycle owned by one Hansford, who was riding pillion and whose insurance did not cover Boss. The Divisional Court held that Boss was driving uninsured. Lord Parker CJ, giving the judgment of Gorman J and himself, observed that the case was distinguishable from *Rogerson's* case and *Tattersall v Drysdale*, since it concerned a third party only insurance, and accordingly there was no necessity for the insured to have any insurable interest in any vehicle. He said that the question turned on the proper construction of the policy. But he concluded for three reasons that it was 'impossible to construe this policy as providing [by cll (1) and (2)] two wholly independent indemnities':

'In my judgment, it is impossible to construe this policy as providing two wholly independent indemnities, and for the following reasons:—(i) It seems to me, and, indeed, this was admitted, that the premium is fixed by reference to the named vehicle. (ii) The natural interpretation of the second

a indemnity is to effect temporary cover whilst the named vehicle is out of use. Thus, it only covers use of a vehicle not owned by or under hire-purchase to the assured. (iii) Condition (5), which is a condition precedent to liability, not only cannot be complied with if possession of the named vehicle is wholly parted with but is really only apt in regard to a named vehicle. That being so, the only remaining question is whether, in the circumstances of this case, the policy has lapsed in regard to the named vehicle. I conceive that it might be possible for the vehicle to be parted with in circumstances in which rights of user are retained, in which case it could be said that the indemnity in respect of it remains in operation. Where, however, as here, possession of the vehicle is parted with and no rights of user are retained, the indemnity must, I think, lapse in regard to that vehicle. That being so, for the reasons given above, the whole policy will lapse.' (See [1963] 1 All ER 177 at 180, [1963] 1 WLR 99 at 104.)

13. Salmon J reached the same decision with reluctance and viewed condition (5) as critical:

d 'I must confess that, but for condition (5) in the policy, I should have come to a different conclusion. If it were not for this condition, I should have been disposed to find that it would need express words in this third-party liability policy to make the sale of the vehicle named in the policy absolve the insurers from their liability to indemnify the assured whilst driving the other vehicles referred to in the policy. Condition (5), however, imposes an obligation on the assured to take all reasonable steps to maintain the named vehicle in an efficient condition, and states that the company shall have at all times free access to examine such vehicle. The assured's compliance with that obligation is a condition precedent to the insurer's liability. Once the assured sells or parts with possession of the named vehicle without retaining power to comply with his obligation under condition (5)—and there is no suggestion that he retained such power—he is in breach of condition (5), and it inescapably follows that the insurers are absolved from all legal liability.

f I reach this conclusion with some reluctance, for the following reasons: First, it seems to me that this assured bona fide believed that he was covered. I am inclined to think that almost any other person to whom this policy had been issued, except perhaps a trained lawyer, would have suffered under a similar delusion. Secondly, the insurers in this case testified that they would without question have paid if the assured had in these circumstances met with an accident and injured or killed a third party. Any other reputable insurers would have adopted a similar attitude. Thus, the assured certainly had no criminal intent, and the mischief at which the Road Traffic Act, 1960, s. 201 is aimed was not achieved.' (See [1963] 1 All ER 177 at 180, [1963] 1 WLR 99 at 104–105.)

14. The last paragraph finds no parallel in the majority judgment. The first consideration contrasts with Lord Parker CJ's second reason. We approach Salmon J's second consideration with caution. All we have before us are textbooks and subsequent authority (see below) which do not seem to lend it support. We have no other evidence to throw light on the general understanding of the motor insurance market, which includes insurers, agents and brokers. Neither the evidence of the insurers in *Boss v Kingston* nor Salmon J's confident expression of certainty constitute evidence in this case. Part of the difficulty of

the present case lies in the fact that the present insurers, Eagle Star, are not before the court, although we understand that they have been aware of these proceedings at all material times, and participated through their solicitors in discussions shortly before the appeal was heard. It would not be fair to conclude that they have adopted an attitude that no other reputable insurers would adopt. Indeed, the attitude that they adopted must, presumably, have been regarded by the claimant's own legal advisers as correct. a

15. In this connection it is also relevant to note the decision in *Wilkinson's case* [1967] 2 Lloyd's Rep 182. The insured there was insured in respect of both damage to the insured car and third party liability. He exchanged his car several times and on each occasion effected a substitution of the insured car by an endorsement in respect of which his insurers required to know a good deal of detail. He sold the last substituted and insured car, without acquiring any further substitute. An accident later occurred (after a renewal), and the insured sought third party indemnity. The issue litigated was whether the insurers through agents had renewed knowing that the insured no longer owned any car. It was assumed by all involved that 'in the normal situation' it was clear on the authorities (particularly *Rogerson's case*) that the policy would be void after the sale of the last insured car ([1967] 2 Lloyd's Rep 182 at 190). b

16. The relevant passages in *MacGillivray* include the following statements (pp 822–823): c

'29–16 *The assured—extension of cover when driving other vehicles.*

Motor vehicle policies frequently contain clauses extending to the assured when driving another vehicle ... which does not belong to him and is not hired to him under a hire-purchase agreement ... Sometimes a proviso is added to the effect that such vehicle must have been being used at the relevant time instead of the insured car (Footnote: As in *Rogerson v Scottish Automobile and General Insurance Co Ltd* ((1931) 146 LT 26, [1931] All ER Rep 606)). This restricts the facility to the temporary use of another car while the car named in the schedule to the policy cannot be driven, so that, once the scheduled vehicle is sold, cover lapses and the extension is inoperative (Footnote: *Rogerson v Scottish Automobile and General Insurance Co Ltd*, *supra*). Even in the absence of such a proviso the same result would follow if, upon a true interpretation of the insurance, the insurers were granting cover on the basis of the continuing user or ownership of the scheduled vehicle, and that vehicle were then sold (Footnote: *Tattersall v Drysdale* ([1935] 2 KB 174, [1935] All ER Rep 112); *Wilkinson v General Accident Fire and Life Assurance Corp Ltd* ([1967] 2 Lloyd's Rep 182); *Boss v Kingston* ([1963] 1 All ER 177, [1963] 1 WLR 99)). In the case of a motor policy under which the premium is assessed by reference to a named vehicle and which places obligations upon the assured as regards the user and maintenance of that vehicle, such an interpretation will naturally be placed on it, but this need not necessarily be so in the case of all policies covering only third-party risks.' d

17. *Ivamy* contains this passage (pp 243–244): e

'INSURED DRIVING CARS OTHER THAN THE INSURED VEHICLE

A typical clause in a policy states that: "[The Company] will pay ... The amount of: ... damages and claimant's costs and expenses ... any other costs and expenses agreed between [the Policyholder and the Company] in writing arising from bodily injury or damage to property for which the f

j

a Insured person may be liable at law resulting from an accident ... while an Insured Person is driving another car or motor cycle, but only when this is permitted in the Policyholder's Certificate."

... *Effect of Sale of Insured Car*

Where the insured car is sold, the indemnity extended to the insured whilst driving any other car comes to an end.'

b There follows discussion of *Rogerson's* case and *Tattersall v Drysdale*.

18. After considering the authorities, Bell J said in the present case:

c '... I do accept Mr Doctor's essential argument that those decisions concentrated, as they had to, on the particular wording of the material provisions in the different policies which they construed. I do not believe that one can deduce from the cases a general principle that in respect of all broadly similar policies of motor insurance the sole subject matter or insurable interest is the vehicle owned or held by hire purchase, and proposed by the insured, so that when it is disposed of without the substitution of another in accordance with the provisions of the policy, the

d policy lapses or becomes void.'

19. The judge's reference to 'subject matter' no doubt derives from Goddard J's judgment in *Tattersall v Drysdale* [1935] 2 KB 174, [1935] All ER Rep 112. But Goddard J cannot have been using the phrase as equating with or referring to insurable interest. It was, we think, no more than shorthand for a

e conclusion, as a matter of contractual construction, that cover under the particular clause insuring against third party liability while driving another car was conditional upon the retention of the insured car. The reasoning in *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 146 LT 26, [1931] All ER Rep 606 and in *Tattersall v Drysdale* did not, in our view, depend critically on the

f fact that property insurance had been being taken out on the insured car, although that may have featured in the argument. In *Boss v Kingston* [1963] 1 All ER 177, [1963] 1 WLR 99 there was no such property insurance at all, but only third party liability cover relating to: (a) driving the specified motor cycle, and (b) driving any other motor vehicle not belonging or hire-purchased to the policy holder.

g 20. The central issue of construction in the present case is thus whether the third party cover afforded while driving other cars depended or was conditional upon the insured's continuing ownership of his own car (in respect of which it happens that in this case he did also take out property insurance against fire and theft). While each case turns ultimately on the terms of the particular policy, previous decisions cannot simply be put on one side, once one sees that they

h concerned policy wording in somewhat differing terms. The question is whether the difference is material (see *MacGillivray*, pp 265–266 (paras 11.2–11.4)). If it is not, we have to consider whether and to what extent we must or should follow the previous authority, which in the case of *Tattersall v Drysdale* and *Boss v Kingston* is not binding on us.

j 21. We heard submissions as to the extent to which a reasonable insured might be expected to be aware of prior decisions on particular wordings or general statements about their effect like those to be found in *MacGillivray* and *Ivamy*. First, a prior decision must normally be taken as establishing the objective construction of a particular policy wording, unless there is some material change in the wording or context. Secondly, the present insurance was placed by the claimant through the defendants acting as his brokers, and insurance brokers may

be expected to be aware of the general significance of particular cover and indeed owe a duty to advise clients at inception or when asked about its scope. But the fact that, in this case, it is asserted by the claimant (though not accepted by the defendants) that the defendants (through the claimant's parents) advised that cover was continuing cannot indicate that that was or is a view that a reasonable broker would or should have held. That would be to prejudge the outcome of this action if it is allowed to proceed further. Indeed, in view of the apparent unanimity of direction in the textbooks and authority, there may be something to be said for a view that, even if the broker's advice (assuming any to have been given as alleged) proves under this judgment to have been correct, none the less it should not have been given in apparently unqualified terms, or without confirming the existence of cover with insurers, so as to avoid any argument.

22. The essence of the judge's reasoning was that nothing in cl (1) or any other insurance document in this case linked cl 1(1)(b) to cover continuing under cl 1(1)(a), and that it would have been easy to express such a link by adding words in cl 1(1)(b) such as 'whilst still the owner or hirer on hire purchase of the Insured Vehicle'.

23. The judge's reasoning thus distinguishes both *Tattersall v Drysdale* and *Boss v Kingston*. Mr Doctor submits that this can be done. However, as stated, neither decision is binding upon us. *Tattersall v Drysdale*, Mr Doctor submits, is distinguishable because the clause there was expressed to be an extension clause, as well as containing the proviso to which we have referred. *Boss v Kingston*, Mr Doctor submits, can be distinguished on a number of grounds. First, the motor car in *Boss v Kingston* was specifically identified in the schedule. That is however, in our judgment, no material distinction. Under the present certificate incorporated into the policy the insurance 'covers the vehicles last notified to and accepted by the Company' and 'it describes the vehicle by Registration Mark (Form A) or by description (Form B)'. The present policy used form B, and the last vehicle 'notified to and accepted by the Company' was specified in the proposal form, with details as to make and model, type of body and seating capacity, cylinder capacity, estimated value, year of make, date of purchase and registration mark. The proposal also required information about any alterations, whether it was in sole ownership, its registered keeper, the main and other persons likely to drive it and anticipated use.

24. The proposal for the present insurance thus confirms that this was based on the insured having and wishing to insure himself in respect of his own car—here against fire and theft as well as third party liability. That was on any view the origin and context of the policy. As indicated by Lord Parker CJ's first reason in *Boss v Kingston* (and the nature of the proposal in this case), so here also the basic premium which insurers required (leaving aside no claims bonus and age-related factors) will have depended first and foremost upon the details given regarding the car and its anticipated use and users. Mr Doctor, as we understand, accepts this. He adds that some premium may also be attributable to the third party cover afforded by cl 1(1)(b) in respect of the driving by the insured of other cars (although it is not unknown for insurers to grant ancillary cover for no extra premium). The present proposal confirms the obvious, namely that premiums for motor insurance covering third party liability vary fundamentally according to factors related to the insured car (its characteristics), the insured and any others who will be permitted to drive it (their age, experience and record), and their likely user. No attempt is made in the present proposal to elicit information about other vehicles (not belonging or on hire-purchase to the insured) that the insured

a might drive. So, in this sense, the driving of other vehicles must have been regarded as ancillary. This is so, whether or not any element of the premium was attributable to it. If any element of premium was attributable to it, it must have been a fixed element, not depending on particular circumstances. An insured may of course be bound under the general duty of disclosure to disclose any unusual matter relating to any anticipated driving of other vehicles. If such a matter were
b disclosed (for example if an insured intended as a matter of daily routine to drive someone else's high-powered sports car in preference to his own run-of-the-mill vehicle), that could no doubt affect insurers' willingness to accept the insurance at all or the premium. That would be a special and different situation, not applicable here. But, accepting all this, it is unclear how one derives from it support for a conclusion that the cover for driving other vehicles depended upon
c retention of the insured vehicle and so of cover while driving that vehicle. Insurers may not have been very concerned to try to rate the possibility that other cars might be driven, before or after disposal of the insured car, because this is, in the general frame of things, a less common and problematic aspect of risk. That does not lead to the conclusion that it is not a risk that insurers would
d tolerate in those cases where an insured disposed of (and did not replace) the insured car.

25. The second reason given by Lord Parker CJ in *Boss v Kingston* involves a statement about 'the natural meaning' of the indemnity relating to liability whilst driving any vehicle not belonging or hired to the insured. Lord Parker CJ viewed cl (2) in *Boss v Kingston* as offering 'temporary cover while the insured vehicle is
e out of use'. It may be, though he did not say so specifically, that his view was influenced by the opening words of cl (2)—'In terms of and subject to the limitations of and for the purposes of this policy ...' and that he equated them to the express words of extension in *Tattersall v Drysdale*. Goddard J's reasoning in *Peters*' case, where he described a clause with the same opening words as those
f in *Tattersall v Drysdale* as an 'extension clause', is certainly consistent with that view. In the absence of words like those opening words, Lord Parker CJ's view appears to us too narrowly expressed. Those who acquire and insure a car become accustomed to driving themselves, and there are many circumstances in which they may want cover while driving another's car. On the face of cl 1(1)(b),
g there is no requirement that the insured vehicle should be 'out of use', or even that the use of any other vehicle should be 'temporary'. Clause 1(1)(b) must cover situations where the insured vehicle is physically available for use, but the insured, in the ordinary course and for reasons entirely of his own convenience, prefers to drive another car—for example, a more comfortable car on a long journey or a friend's car at destination after he chooses to take a long-distance trip
h to say Edinburgh by train or air.

26. Having regard to Lord Parker CJ's reasoning in *Boss v Kingston* [1963] 1 All ER 177 at 178–179, [1963] 1 WLR 99 at 102 (second paragraph), it might also be argued that the granting under the present policy of fire and theft cover on a specified vehicle, owned and kept by the insured according to the proposal,
j makes this a more obvious case than *Boss v Kingston* for treating the whole cover as dependent upon a continuing assumption that the insured would have and retain possession of the specified car. That view is reflected in *MacGillivray*. But, it seems to us improbable that the scope of cl 1(1)(b) varies according to whether or not the insured elects for any property cover on the car. The basis of the proposal in *Boss v Kingston* does not appear from the report. But the present insurers were clearly concerned to have full details of the insured's car, and his relationship to

it. The present insured (in common, we would think, with most insureds) also had a clear insurable interest in the car with which the insurance originated, whether he chose to take out property insurance on the car or not.

27. As to Lord Parker CJ's third reason, which Salmon J found decisive, the present policy contains similar provision in the shape of cl 11(5) as regards maintenance of the insured vehicle in an efficient and roadworthy condition and the taking of all reasonable steps to safeguard it from damage or loss. Further, cl 11(8) of the present policy makes 'the observance and fulfilment of the terms of this Policy so far as they relate to anything to be done or complied with by the Insured' (in other words, compliance with cl 11(5)) a 'condition precedent to any liability of the Company to make any payment under this Policy', in precisely the same way that cl 11(6) of the policy in *Boss v Kingston* made compliance with, inter alia, cl 11(5) a condition precedent to any liability there. Further, cl 11(5) relates, clearly, to the liability cover, as well as the fire and theft cover afforded by this particular policy. In so far as it extends to the taking of all reasonable steps to safeguard the insured vehicle from damage or loss, it goes beyond the clause in *Boss v Kingston*. Mr Doctor points out that it does not contain the further provision, present in *Boss v Kingston*, whereby 'the company shall have at all times free access to examine' the vehicle described in the schedule. That provision cannot, however, have been crucial to the decision in *Boss v Kingston*, and its absence cannot constitute a material distinction between *Boss v Kingston* and this case. We need not consider whether a right to inspect would anyway be implicit in the light of cl 11(5).

28. We prefer to leave for consideration on another occasion the question whether the impact of cl 11(5) read with cl 11(8) may, as a matter of construction, be confined to cases where indemnity is claimed either for loss or damage to the insured car (cl 2) or against third party liability while driving the insured car (cl 1(1)(a)) rather than under cl 1(1)(b). The point evidentially did not occur to the Divisional Court in *Boss v Kingston*. Mr Doctor did not suggest it as the correct interpretation of cl 11(5) and (8). So we did not hear argument on it. The question may in fact amount to no more than a restatement, in another context, of the same question that we have to consider under cl 1. If cl 1(1)(b) provides merely ancillary cover, then it may be understandable that breach of cl 11(5) should undermine the whole policy. If cl 1(1)(b) is otherwise apt to provide independent cover, then it may be natural to try to read cl 11(5) as confined in its impact to cl 1(1)(a) and 2.

29. The obligation under cl 11(5) is not an absolute obligation to ensure that the car never becomes inefficient or unroadworthy. It is an obligation to take reasonable steps to have it maintained from time-to-time either in accordance with normal procedures to prevent it becoming inefficient or unroadworthy or in response to any inefficiency or unroadworthiness which becomes apparent (see e.g. *Conn v Westminster Motor Insurance Association Ltd* [1966] 1 Lloyd's Rep 123 and [1966] 1 Lloyd's Rep 407 and *McInnes v National Motor and Accident Insurance Union Ltd* [1963] 2 Lloyd's Rep 123). So we see no inconsistency with, and no reason to limit cl 11(5) in the light of the modified cover provided by cl 7 ('Service and Repair'), which reads: 'This Policy (excluding the terms of Section 2 of Clause 1) shall operate while the Insured Vehicle is in the custody of a member of the motor trade for service or repair.'

30. We do, however, see considerable force in the submission that the court in *Boss v Kingston* placed a greater significance on the similar provision to cl 11(5) there present than it can fairly bear. A requirement to maintain a car, as and

a when necessary, postulates continued possession of the car. Its subject matter is the insured car, and it can only operate *so long as* the insured retains the insured car. It is in Lord Parker CJ's words in *Boss v Kingston* 'really only apt in relation to a normal vehicle'. But it does not follow axiomatically that it *requires* the insured to retain the car, or that its inclusion indicates that any indemnity cover relating to other vehicles ceases after disposal of the insured car. On this it may simply be neutral.

b We have dealt with the clauses which appear common to the policy in *Boss v Kingston* and the present policy. But the present policy contains other relevant terms not present or considered in *Boss v Kingston*. First, without going through the policy to identify every occasion, the policy wording contains many references focusing on the insured vehicle, without corresponding provision in respect of the driving of other vehicles. For example, the cover in respect of 'Foreign Travel' specified in cl 6(3), (4), (5) and, probably, (6) is only afforded in respect of the insured vehicle. The general exception in cl 10(6) relating to accidents or liability while in or on the various dangerous parts of an aerodrome is also limited to the insured vehicle. We incline to attribute this limitation, as regards liability cover, c to oversight. Again, it suggests the policy's focus on the insured vehicle.

d 31. Clause 9, 'Rebate for Laying Up', is also of interest. It provides:

e 'Upon notice being given to the Company that the Insured Vehicle is to be laid up and out of use, otherwise than as a result of damage or loss covered by this Policy, the Policy (except for Clause 2) will be suspended as from the date of receipt by the Company of the current Certificate(s) of Motor Insurance. The Company will allow an appropriate return of premium at the end of the period of suspension.'

f 32. Clause 2 is the property damage cover in respect of loss or damage to the insured vehicle (here only against the perils of fire and theft). So, if an insured wishes to lay up the insured car, he can only do so by giving up the cover under cl 1(1)(b). There is no right to restrict the cover to cl 1(1)(b) cover. That contrasts with the defendants' submission that the insured can, under the same policy, always decide to sell his car and retain the benefit of cl 1(1)(b) cover until the date when it would otherwise have expired.

g 33. These two factors point in the same direction as Lord Parker CJ's reasoning in *Boss v Kingston*. But an important pointer in the opposite direction is, in Mr Doctor's submission, cl 11(1), the 'Replacement/Additional Vehicles' clause. This has to be read with the clause on the reverse of the certificate whereby the Eagle Star reserved the right to decline to insure any vehicle. Under form A, cover for an additional or replacement vehicle would depend upon notification and h agreement. Under form B, which actually applied, the only express condition of cover in respect of an additional or replacement vehicle is that its particulars should have been notified to the Eagle Star within seven days of its acquisition. That being done, cover would presumably apply from acquisition.

j 34. Clause 11(1) refers to cover 'for' or 'in respect of' an additional or replacement vehicle, and does not therefore, expressly, address the cover provided by cl 1(1)(b) in respect of the driving of any other vehicle not owned or hired by the insured. It may be argued that this indicates that the cover under cl 1(1)(b) was intended to be independent and to continue even though the insured did not acquire, or give notice of acquisition of, any additional or replacement vehicle. But that would be an obscure way of indicating such an intention, and it is difficult to think that it played any role in the use of such words

in relation to additional vehicles. The only possible effect of failure to notify an additional vehicle is to leave it uncovered, while the cover in respect of the original insured vehicle together with the cover for driving other vehicles would remain naturally untouched. An alternative and more likely possibility is that the draughtsman was not addressing his mind to cl 1(1)(b) at all. Failure to notify an additional vehicle can have no effect on the previous cover under cl 1(1)(a) and (b). Failure to notify a replacement vehicle means that there is no cover for or in respect of that vehicle. On this basis, if cover under cl 1(1)(b) is naturally dependent upon retention of the specified vehicle, then it too would fall on any failure to insure a replacement vehicle.

35. The significant feature of cl 11(1) in the present context is that it provides no period within which any replacement vehicle must be acquired. And there is under this motor policy no obligation to inform insurers of any disposal of the insured vehicle or any major change in circumstances during the policy period. All that cl 11(1) says is that notice must be given within seven days of any replacement. It is, no doubt, quite common for an insured to dispose of his insured car by trading it in against another car. But this is clearly not the only or even perhaps the most common situation. Garage trade-in values can usually be bettered elsewhere. Cars are bought and sold at auction and by advertisement. For this and many other reasons, there may well be delay between disposal of one car and its replacement. The basic submission of Mr Hytner QC for the claimant was that, if there was any gap, however short, between the times of these events, the policy lapsed and the latter could no longer be notified as a 'replacement' under cl 11(1). We cannot accept that. The Eagle Star must we think be taken to have accepted (at the least) the risk of replacement not being achieved at the moment of disposal of the old car—and to have agreed to provide cl 1(1)(b) cover on a continuous basis.

36. Mr Doctor argues for a wide latitude in this context. In his submission replacement under that clause contemplates disposal of the insured car followed by its 'replacement' by purchase of another car at *any* later time within the policy period. In the meantime, between the disposal and the acquisition of a new car, the insured would, he submits, be covered under cl 1(1)(b) in respect of the driving of any other car not owned by or hired to him. In a loose sense, no doubt, a person might speak of 'replacing' a car, if he sold one car and, after a gap of almost any length (even years), bought another. We doubt whether the draughtsman of cl 11(1) was actually thinking so generally. The difficulty remains that he has not introduced any express limits. The clause must, in our view, be read as allowing some gap between disposal and replacement, and we have come to the conclusion that this gap cannot sensibly be limited to whatever the law might regard as *de minimis*. That would itself introduce a considerable and unsatisfactory uncertainty, and, unless *de minimis* was given an unusually expanded meaning, would appear unlikely to cater for quite common situations. It would also be most unsatisfactory if cover under the second indemnity continued for some period after disposal, only to cease abruptly at some entirely unspecific point in time, by when it was subsequently adjudged that it was too late to 'replace'.

37. Although they were not reflected in any pleading and not considered in the judge's judgment, we may refer at this point to statements by the claimant's solicitors and by Mrs Dodson in their witness statements to the effect that, although the claimant took advantage of a favourable offer from a friend to sell his car on 17 April 1993, he was at all times thereafter, and still at the date of the accident on 16 May 1993, looking to get another car 'shortly'. He never in fact

- a acquired or gave notice in respect of any replacement. If these facts were established, and in the absence of any guidance in the policy, could the insured then still be said to be replacing his car within the meaning of cl 11(c)? And if not, then what if the gap had been only two weeks or one week? Mr Hytner's analysis cannot answer these questions satisfactorily or clearly, except by the unacceptable submission that all cover ceases automatically unless a replacement car is acquired before or at the time of the disposal of the insured car.
- b

38. It is also worth noting the position under a certificate describing the insured car in form A, although form B applied in this case. Again, there is no period provided within which the replacement vehicle must be obtained. But cover for such a replacement depends on obtaining a cover note before the replacement vehicle 'is used' (see the certificate). No cover applies for a replacement vehicle 'until the Company has been notified of such ... replacement and a [fresh] Certificate of motor insurance has been received by the insured'. Again, there is nothing to indicate that these steps must be completed before the original insured car is disposed of. Yet, on Mr Hytner's case, as soon as the original car is disposed of, the policy cover would come generally to an end. We think that, under a certificate in form A, any insured would be entitled to assume that there could be a gap between disposal of his old car and completion of the steps necessary to obtain insurance for a fresh car, without prejudicing his continuing right to rely on the policy, including his right to rely on the second indemnity in respect of liability while driving another car not owned or on hire-purchase to him.

c

d

39. It may also be of some interest to consider what happens regarding premium if cover lapses automatically upon or after disposal of the insured vehicle without replacement. There will have been no total failure of consideration. There is nothing to entitle an insured to a pro rata or other return of premium. Yet, if all cover ceases entirely on disposal without replacement of the insured car, the insured will be left: (i) without cover under cl 1(1)(b) at the very moment when he is likely to require it, and (ii) without any right to any return of premium. As to (i), it may be said that driving other people's cars on a regular basis in circumstances where one has no car at all of one's own involves different risks from driving such cars on an ancillary basis, when one retains one's own car. That is, however, itself speculative. Many car owners after sale of their own cars may have very little opportunity to borrow or drive other cars. To postulate extreme situations (such as the driver who, a month into the insurance, disposes of his own car and is lent his father's Ferrari on a regular basis) does not assist. Insurance involves a general pooling of diverse risks, some of which may well always be extreme. The general insurance assumption is that it is possible to cater for the rare extremes by predicting and rating the mean. As to (ii), a partial answer may be that insurers are in practice willing to concede a return of premium (though not necessarily strictly pro rata) if a motor insured wishes to cancel and return the certificate for any reason. The same objection would anyway arise under a policy excluding any cover along the lines of cl 1(1)(b) (if such policies are ever issued), and it is perhaps also unlikely that cl 1(1)(b) was included to meet this objection, since (as we have pointed out) there may well be insureds who, after disposal of their own car, have no possibility of or interest in driving anyone else's car and so would obtain no benefit from cl 1(1)(b) in any event.

e

f

g

h

j

40. The judge said that, if Eagle Star had intended cl 1(1)(b) to bear the meaning for which the claimant contends, it would have been easy to have inserted some words such as 'whilst still the owner or hirer on hire purchase of

the Insured Vehicle' at its beginning. The same argument could have been, and quite probably was, run in *Boss v Kingston* [1963] 1 All ER 177, [1963] 1 WLR 99. It is almost always possible on any point of construction to say after the event that the point could have been put beyond doubt, either way, by express words. So we are not particularly impressed by this argument. Bearing in mind the tenor and terms of the authorities and texts up to the present date, it might, if anything, be said that, so far as it has any force, its force lies in the opposite direction to that which the judge suggested: if cl 11(1) had been intended to confer or reflect the independence in scope of cover under cl 1(1)(b) for which Mr Doctor contends, in contrast to the more limited cover recognised in *Tattersall v Drysdale* [1935] 2 KB 174, [1935] All ER Rep 112 and *Boss v Kingston*, one might have expected that intention to have been made more explicit. The matter is also more complicated than the judge thought. Any addition to cl 1(1)(b) would have to take account of cl 11(1) relating to 'Additional/Replacement Vehicles'. The wording suggested by Mr Doctor to the judge would immediately achieve the unacceptable result that, if there was a minimal gap occurring, in the ordinary course of replacing the insured car, between its disposal and its replacement, then cl 1(1)(b) cover would cease during that gap. That does not, however, mean that we disagree with the judge that some formula could quite readily be devised by insurers to reflect the intention for which Mr Hytner contends, if that does represent insurers' intention. We are sure that it could be.

41. Looking at the arguments overall, we confess to having been concerned as to whether we can—at least without creating unacceptable uncertainty—satisfactorily distinguish *Boss v Kingston*, a case which has stood for nearly 40 years and received a general interpretation in the leading insurance texts. But at the end of the day, we have come to the conclusion, firstly, that the presence of the 'Replacement/Additional Vehicles' clause constitutes a very relevant distinction between this policy and that considered in *Boss v Kingston*. The absence from cl 1(1)(b) of any wording equivalent to the opening words of cl (2) in *Boss v Kingston* may also constitute a relevant distinction. Under cl 1(1)(b), insurers must be taken to have accepted that cover while driving other cars could continue after disposal of the insured car, and we see no satisfactory stopping point, short of a conclusion that such cover is independent of the retention or replacement of any insured car. Secondly, we regard the reasoning in *Boss v Kingston* as itself open to substantial doubt. Insurance wordings should be clear. If cover under an apparently independently worded indemnity clause is intended to depend upon retention or replacement of the insured car, to which the cover does not relate, or upon continuation of cover under a separately expressed indemnity clause, one would expect this to be clearly stated. In case of any real ambiguity (and this is in our view, at lowest, such a case), an insurance wording such as the present falls to be construed against the insurers whose standard wording it is and who put it forward contractually in apparently general terms and then seek to read into it an unexpressed restriction of their liability. On this basis, we consider that Lord Parker CJ's second reason in *Boss v Kingston* is open to legitimate criticism, at least so far as it was formulated as a general proposition, not based on any language particular to the policy in case. We have already given reasons for doubting the validity of his first and third reasons, when reviewing them earlier in this judgment.

42. The uncertainty involved in unsettling an apparent consensus of view about the scope of a second indemnity such as cl 1(1)(b) in this policy has caused us the greatest concern. But all the authorities recognise that the point is

a ultimately one of construction of the individual policy. There is here, on any view, one major material difference, constituted by the 'Replacement/Additional Vehicles' clause, as well as the difference in wording of the relevant indemnity. Further, our decision can only affect current and recent policies (and then still only policies which do not make the position clear one way or the other). At the end of the day, and after some hesitation, we have come to the conclusion that it
b is more important to reinforce the message that insureds are entitled to clear wordings and to the benefit of any ambiguity, than to force the present particular policy wording (and probably other policy wordings in future) into an artificial mould dictated by legal authority. If any insurer does not like our decision, it can for the future formulate its policies differently, provided that it makes its intention clear. Indeed, we would consider it desirable that motor insurers should
c in any event (and whatever such intentions may be) ensure that their intentions on the present point are made express in their wordings—to avoid yet further disputes and decisions in the series currently ending with this judgment.

d 43. We therefore dismiss this appeal and uphold the judge's declaration that, following the claimant's sale of his car on 17 April 1993 without replacing it, the claimant was covered under cl 1 of the policy during the remainder of the policy period in the event of his driving, with the owner's permission, any motor car not belonging to and not held under a hire purchase agreement by him.

Appeal dismissed. Permission to appeal to the House of Lords refused.

Kate O'Hanlon Barrister.

Practice Note

QUEEN'S BENCH DIVISION

LORD WOOLF CJ

23 MAY 2001

Contempt of court – Magistrates' court – Wilfully interrupting proceedings of court – Refusal to give evidence – Procedure and sentencing.

LORD WOOLF CJ gave the following direction at the sitting of the court.

General

1. Magistrates' courts have the power to detain someone, whether a defendant or another person present in court, who wilfully insults or interrupts proceedings under s 12 of the Contempt of Court Act 1981 until the court rises. In any such case, the court may order any officer of the court, or any constable, to take the offender into custody and detain him until the rising of the court; and the court may, if it thinks fit, commit the offender to custody for a specified period not exceeding one month or impose a fine not exceeding level 4 on the standard scale, or both. This power can be used to stop disruption of their proceedings. Detention is until the person can be conveniently dealt with without disruption of the proceedings. Prior to the court using the power the offender should be warned to desist or face the prospect of being detained.

2. Magistrates' courts also have the power to commit to custody any person attending or brought before a magistrates' court who refuses without just cause to be sworn or to give evidence under s 97(4) of the Magistrates' Court Act 1980 until the expiration of such period not exceeding one month as may be specified in the warrant or until he sooner gives evidence or produces the document or thing or impose on him a fine not exceeding level 4 on the standard scale or both.

3. In the exercise of any of these powers, as soon as is practical, and in any event prior to an offender being proceeded against, an offender should be told of the conduct which it is alleged to constitute his offending in clear terms. When making an order under s 12, the justices should state their findings of fact as to the contempt.

4. Exceptional situations require exceptional treatment. While the Practice Direction deals with the generality of situations, there will be a minority of situations where the application of the Practice Direction will not be consistent with achieving justice in the special circumstances of the particular case. Where this is the situation, the compliance with the Practice Direction should be modified so far as is necessary so as to accord with the interests of justice.

5. The power to bind persons over to be of good behaviour in respect of their conduct in court should cease to be exercised.

Contempt consisting of wilfully insulting or interrupting proceedings

6. In the case of someone who wilfully insults or interrupts proceedings, if an offender expresses a willingness to apologise for his misconduct, he or she should be brought back before the court at the earliest convenient moment in order to make the apology and to give undertakings to the court to refrain from further misbehaviour.

- a 7. In the majority of cases, an apology and a promise as to future conduct should be sufficient for justices to order an offender's release. However, there are likely to be certain cases where the nature and seriousness of the misconduct requires the justices to consider using their powers under s 12(2) of the 1981 Act to either fine or order the offender's committal to custody.
- b *Where an offender is detained for contempt of court*
8. Anyone detained under either of these provisions in paras 1 or 2, above, should be seen by the duty solicitor or another legal representative and be represented in proceedings if they so wish. Legal aid should generally be granted to cover representation. The offender must be afforded adequate time and facilities in order to prepare his case. The matter should be resolved the same day
- c if at all possible.
9. The offender should be brought back before the court before the justices conclude their daily business. The justices should ensure that he understands the nature of the proceedings, including his opportunity to apologise or give evidence and the alternative of them exercising their powers.
- d 10. Having heard from the offender's solicitor the justices should decide whether to take further action.

Sentencing of an offender who admits being in contempt

- e 11. If an offence of contempt is admitted, the justices should consider whether they are able to proceed on the day or whether to adjourn to allow further reflection. The matter should be dealt with on the same day if at all possible. If the justices are of the view to adjourn they should generally grant the offender bail unless one or more of the exceptions to the right to bail in the Bail Act 1976 are made out.
- f 12. When they come to sentence the offender where the offence has been admitted, the justices should first ask the offender if he has any objection to them dealing with the matter. If there is any objection to the justices dealing with the matter, a differently-constituted panel should hear the proceedings. If the offender's conduct was directed to the magistrates, it will not be appropriate for the same bench to deal with the matter.
- g 13. The justices should consider whether an order for the offender's discharge is appropriate, taking into account any time spent on remand, whether the offence was admitted and the seriousness of the contempt. Any period of committal should be for the shortest time commensurate with the interests of preserving good order in the administration of justice.

h *Trial of the issue where the contempt is not admitted*

14. Where the contempt is not admitted the justices' powers are not limited to making arrangements for a trial to take place. They should not at this stage make findings against the offender.
- j 15. In the case of a contested contempt, the trial should take place at the earliest opportunity and should be before a bench of magistrates other than those justices before whom the alleged contempt took place. If a trial of the issue can take place on the day such arrangements should be made taking into account the offender's rights under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). If the trial cannot take place that day, the justices should again

bail the offender unless there are grounds under the 1976 Act to remand him in custody.

16. The offender is entitled to call and examine witnesses where evidence is relevant. If the offender is found by the court to have committed contempt the court should again consider first whether an order for his discharge from custody is sufficient to bring proceedings to an end. The justices should also allow the offender a further opportunity to apologise for his contempt or to make representations. If the justices are of the view that they must exercise their powers to commit to custody under s 12(2) of the 1981 Act, they must take into account any time spent on remand and the nature and seriousness of the contempt. Any period of committal should be for the shortest period of time commensurate with the interests of preserving good order in the administration of justice.

Dilys Tausz Barrister.

a **Parkinson v St James and Seacroft
University Hospital NHS Trust**
[2001] EWCA Civ 530

b COURT OF APPEAL, CIVIL DIVISION

BROOKE, HALE LJ AND SIR MARTIN NOURSE

27, 28 FEBRUARY, 11 APRIL 2001

c *Damages – Unwanted pregnancy – Negligence – Hospital performing sterilisation operation on woman negligently – Woman becoming pregnant and giving birth to child with behavioural difficulties – Whether damages recoverable for cost of rearing disabled child conceived as a result of negligently-performed sterilisation – Whether damages limited to costs of special needs and care attributable to child’s disabilities.*

d A surgeon employed by the defendant health authority performed a sterilisation operation on the claimant, P, the mother of four children. The operation was performed negligently, and P subsequently conceived a fifth child. During the pregnancy a consultant advised her that the child might be born with a disability, but she chose not to have the pregnancy terminated and duly gave birth to a boy. He had behavioural problems, possibly caused by an Autistic Spectrum Disorder. Although P accepted that any disability from which the child suffered was not caused by a breach of duty on the authority’s part, she sought damages for the costs of his upbringing in proceedings brought by her in respect of the negligently-performed sterilisation. On the determination of a preliminary issue, the judge held that P could recover damages for the costs of providing the special needs and care attributable to the child’s disability, but not for the basic costs of his maintenance. The health authority appealed, while P cross-appealed.

e **Held** – Where a child’s significant disabilities flowed foreseeably from an unwanted conception resulting from a negligently-performed sterilisation, damages were recoverable for the costs of providing for the child’s special needs and care attributable to those disabilities, but not for the ordinary costs of his upbringing.

g Such a conclusion satisfied the various tests used to determine whether a duty of care was owed in respect of economic loss. The birth of a child with congenital abnormalities was a foreseeable consequence of a surgeon’s careless failure to carry out a sterilisation operation properly, and there was a very limited group of people who might be affected by that negligence. Accordingly, the foreseeability and proximity tests were satisfied. Nor was there any difficulty in principle in accepting the proposition that the surgeon should be deemed to have assumed responsibility for the foreseeable and disastrous economic consequences of performing his services negligently. The purpose of the operation was to prevent a woman from conceiving further children, including children with congenital abnormalities, and the surgeon’s duty of care was strictly related to the proper fulfilment of that purpose. Moreover, an award of compensation which was limited to the special upbringing costs associated with rearing a child with a serious disability would be fair, just and reasonable. If principles of distributive justice were called in aid, ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it was limited to the extra expenses associated with the child’s disability. In contrast, it would not be fair,

h

j

just and reasonable to award compensation which went further than the extra expenses associated with bringing up a child with a significant disability. What constituted a significant disability would have to be decided by judges, if necessary, on a case by case basis. Although it would not include minor defects or inconveniences, the expression would certainly stretch to include disabilities of the mind (including severe behavioural disabilities), as well as physical disabilities. The definition in s 17(11)^a of the Children Act 1989 should be used, namely that the child was disabled if he was blind, deaf or dumb or suffered from a mental disorder of any kind or was substantially and permanently handicapped by illness, injury or congenital deformity. The disability need not have been present at conception. Any disability arising from genetic causes or foreseeable events during pregnancy up until the child was born alive, and which were not novus actus interveniens, would suffice to found a claim. Accordingly, both the appeal and the cross-appeal would be dismissed (see [49]–[53], [55], [90]–[92] and [95]–[97], below).

McFarlane v Tayside Health Board [1999] 4 All ER 961 considered.

Notes

For damages recoverable for a negligently-performed sterilisation, see 12(1) *Halsbury's Laws* (4th edn reissue) para 896.

For the Children Act 1989, s 17, see 6 *Halsbury's Statutes* (4th edn) (1999 reissue) 394.

Cases referred to in judgments

Alcock v Chief Constable of the South Yorkshire Police [1991] 4 All ER 907, [1992] 1 AC 310, [1991] 3 WLR 1057, HL.

Ann v Merton London Borough [1977] 2 All ER 492, [1978] AC 728, [1977] 2 WLR 1024, HL.

Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse (No 2) [1998] PNLR 564, CA.

Caparo Industries plc v Dickman [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.

Collins v Wilcock [1984] 3 All ER 374, [1984] 1 WLR 1172, DC.

Dunlop v McGowans 1980 SLT 129, HL.

Emeh v Kensington and Chelsea and Westminster Area Health Authority [1984] 3 All ER 1044, [1985] 1 QB 1012, [1985] 2 WLR 233, CA.

Emerson v Magendantz (1997) 689 A 2d 409 (RI 1997), Rhode Island SC.

Fassoulas v Ramey (1984) 450 So 2d 822, Florida SC; *affg sub nom Ramey v Fassoulas* (1982) 414 So 2d 198, Florida District CA (3rd District).

Hardman v Amin [2000] Lloyd's Med Rep 498.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.

Heil v Rankin [2000] 3 All ER 138, [2001] QB 272, [2000] 2 WLR 1173, CA.

Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq) [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

Hunt v Severs [1994] 2 All ER 385, [1994] 2 AC 350, [1994] 2 WLR 602, HL.

Lee v Taunton and Somerset NHS Trust [2001] 1 FLR 419.

Lord v Pacific Steam Navigation Co Ltd, The Oropesa [1943] 1 All ER 211, [1943] P 32, CA.

^a Section 17, so far as material, is set out at [91], below

- a *McFarlane v Tayside Health Board* 1997 SLT 211; *rvsd* (1998) 44 BMLR 140, CS; *rvsd* in part [1999] 4 All ER 961, [2000] 2 AC 59, [1999] 3 WLR 1301, HL.
- Moore v Lucas* (1981) 405 So 2d 1022, Florida District CA (5th District).
- Perrett v Collins* [1998] 2 Lloyd's Rep 255, CA.
- Rand v East Dorset Health Authority* (2000) 56 BMLR 39.
- b *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831, [1989] 2 WLR 790, HL.
- South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.
- Surtees v Kingston-upon-Thames Royal BC, Surtees v Hughes* [1991] 2 FLR 559, CA.
- c *Thake v Maurice* [1986] 1 All ER 497, [1986] 1 QB 644, [1986] 2 WLR 337, CA.
- White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, [1999] 2 AC 455, [1998] 3 WLR 1509, HL; *rvsg* sub nom *Frost v Chief Constable of the South Yorkshire Police* [1997] 1 All ER 540, [1998] QB 254, [1997] 3 WLR 1194, CA.
- White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187, HL.
- d *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL.

Cases also cited or referred to in skeleton arguments

- Allen v Bloomsbury Health Authority* [1993] 1 All ER 651.
- Garrison v Foy* (1985) 486 NE 2d 5, Ind CA.
- e *Hay (or Bourhill) v Young* [1942] 2 All ER 396, [1943] AC 92, HL.
- Howe v David Brown Tractors (Retail) Ltd (Rustons Engineering Co Ltd, third party)* [1991] 4 All ER 30, CA.
- Kealey v Berezowski* (1996) 136 DLR (4th) 708, Ont Ct (Gen Div).
- McKay v Essex Area Health Authority* [1982] 2 All ER 771, [1982] 1 QB 1166, CA.
- f *McKernan v Aasheim* (1984) 687 P 2d 850, Wash SC.
- McLelland v Greater Glasgow Health Board* 1999 SLT 543, Ct of Sess.
- Page v Smith* [1995] 2 All ER 736, [1996] AC 155, HL.
- Simmerer v Dabbas* (2000) 89 Ohio St 3d 586, Ohio SC.
- Smith v Leech Brain & Co Ltd* [1961] 3 All ER 1159, [1962] 2 QB 405.
- g *Stribling v De Quevedo* (1980) 432 A 2d 239, Penn SC.
- Ultramares Corp v Touche* (1931) 74 ALR 1139, NY CA.
- Walkin v South Manchester Health Authority* [1995] 4 All ER 132, [1995] 1 WLR 1543, CA.
- Williams v Van Biber* (1994) 886 SW 2d 10, Miss CA.
- h *X & Y v Pal* (1991) 23 NSWLR 26, NSW CA.

Appeal and cross-appeal

- The defendant, St James and Seacroft University Hospital NHS Trust (the health authority), appealed from the decision of Longmore J on 11 December 2000 whereby, on the hearing of a preliminary issue, he held that the claimant, Angela Parkinson, could recover damages for the costs of providing the special needs and care attributable to the disability of her son who had been conceived following a sterilisation operation on his mother, which had been negligently performed.
- j Mrs Parkinson cross-appealed from the judge's decision that she was not entitled to recover damages for the basic costs of Scott's maintenance. The facts are set out in the judgment of Brooke LJ.

Jeremy Stuart-Smith QC and Christina Lambert (instructed by Hempsons) for the health authority.
Richard Hone QC and Margaret Bickford-Smith (instructed by Levi & Co, Leeds) for Mrs Parkinson.

Cur adv vult

11 April 2001. The following judgments were delivered.

BROOKE LJ.

[1] This is an appeal by the defendants and a cross-appeal by the claimant from a judgment of Longmore J on 11 December 2000 in which he held on a preliminary issue that the claimant could recover damages for the costs of providing for her son Scott's special needs and care relating to his disability, but that she could not recover damages for the basic costs of his maintenance. The defendants appeal against the first of the judge's directions and the claimant appeals against the second.

[2] The assumed facts on which the preliminary issue was tried are set out in the amended particulars of claim. The defendant health authority is responsible for the management and administration of St James's Hospital in Leeds. In November 1993 Mrs Parkinson, who was then 34, was seen by a doctor at the hospital after her own doctor had referred her to the hospital with a request for tubal ligation. A month later she was admitted to the hospital and underwent a laparoscopic sterilisation procedure.

[3] Unhappily, it later transpired that the doctor who performed this procedure had failed to apply a clip effectively to Mrs Parkinson's left fallopian tube. Furthermore, two clips, which are known as Filshie clips, appear to have dropped into her abdomen and were allowed to stay there in a part of her anatomy known as the Pouch of Douglas. It was admitted that the procedure had been performed negligently.

[4] Mrs Parkinson conceived a fifth child about ten months later. She went to see a consultant at the hospital, who warned her that the child might be born with a disability, but Mrs Parkinson chose not to have her pregnancy terminated. She gave birth to the child, who is called Scott, in May 1995.

[5] Her claim includes a complaint that the doctor's negligence resulted in damage to the left side of her pelvis, resulting in persistent abdominal pain and dyspareunia. She had to undergo a laparotomy and a salpingectomy, and she complains of continuing urinary problems. Liability for this part of her claim is in issue.

[6] The conception and birth of Scott were catastrophic events in her life. The judge describes how at the time of her sterilisation she was living with her husband in a cramped two-bedroomed house. Their family of four children was complete. She intended to return to work, and the couple had planned to move to larger accommodation. Because of Scott's arrival they were unable to do so. The need for extra money to support the new child was met by her husband working extra overtime at the foundry at which he was a supervisor, but the consequences of the pregnancy placed an intolerable strain on the marriage. This led to Mr Parkinson leaving the family home three months before Scott was born.

[7] Although the full nature and extent of Scott's disabilities would have to be explored at a trial of this action, it is necessary to summarise briefly what his mother says about him. When he was born, he had a heart murmur, and for the

a first six months he was very quiet. It could then be seen that he was not meeting his developmental milestones. He did not start walking until he was two-and-a-half years old and he did not speak properly until he was three years old. He was big for his age, and his mother had to carry him. In these early years he was very clingy and did very little for himself. Sometimes he would sit in the kitchen and bang his head on the fridge.

b [8] When he was three years old, his behaviour changed. He seemed to like making a lot of noise. He would throw tantrums if he did not get his own way. He did not mix well with children at any age, and had a tendency to lash out at his older siblings. If visitors came to the house, he became jealous if he did not have his mother's full attention. When he went to a nursery at the age of four, he behaved in the same way, and his mother was advised by a special needs
c co-ordinator that he had severe learning difficulties and special needs.

[9] His mother described in her first statement how she had to give him her full attention at home. Part of her later statement, made in October 2000, reads as follows:

d 'I find that usually Scott gets up before the other children—at about 6.50 am. Because he does not get enough sleep by mid-afternoon he gets
e tired and irritable. I have done everything possible to get him to sleep more, but it does not work. He is not a big eater but does eat what is put in front of him. He still cannot dress himself. Unfortunately Scott does not get on with the other two children. This is because of his attitude towards them.
f We have a small sitting room at the back of the house for the children to watch television and play games and Scott wants the room to himself. If, for example, one of the children wants to change the channel on the television and if Scott wants to watch another channel he will get violent and hit the child concerned with his hands or feet or even bite them. If he has something in his hand he will hit them with it. I have noticed a deterioration in his
behaviour over the last year. He now has a very short fuse so far as temper tantrums are concerned. He soon flares up. On one of these temper tantrums he kicked the side of the settee and has caused it to be torn so that it will require replacing.'

g [10] This evidence from Scott's mother is supported by a statement made in October 1999 by the special educational needs co-ordinator at his school and by a report written the following year by a consultant educational psychologist. The psychologist writes about Scott's social communication difficulties, his disruptive
h behaviour and his delayed acquisition of basic number concepts. She says that although he was thought to have symptoms of an Autistic Spectrum Disorder, this was not apparent at interview, but it would be consistent with information in the papers available to her. Although it should be possible for his behaviour to improve, she felt that his difficulties would be lifelong.

j [11] When it was suggested that it had been agreed for the purposes of the trial of the preliminary issue that Scott was a much loved member of Mrs Parkinson's family, Mr Hone QC for Mrs Parkinson told us that that this was not agreed. Although the extent of his disability was in issue, it was admitted by the defendants that he should not be treated as a 'healthy' child. Conversely, it was accepted by Mr Hone that any disability from which Scott might suffer was not caused by any breach of duty on the defendants' part.

[12] It may be helpful to start by putting this case into a historical perspective. Cases of this kind first came before the English courts less than 20 years ago, and until very recently the approach of the English judges was conditioned by two decisions of this court, *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044, [1985] 1 QB 1012 and *Thake v Maurice* [1986] 1 All ER 497, [1986] 1 QB 644. In the first of these cases, where a sterilisation had been performed negligently, the court held that a mother was entitled to recover damages, including damages for her future loss of earnings, following the birth of a child with congenital abnormalities who required constant medical and parental supervision. In the second, the court gave practical advice about the way in which different elements of the damages claim should be approached. The effect of these two judgments was that the mother was held to be entitled to claim the cost of a child's upbringing even when the 'unwanted' child was a healthy child.

[13] Scottish judges were not bound by this English line of authority, and there was a difference of opinion as to the recoverability of damages for the cost of bringing up a healthy child between the Lord Ordinary (Gill) (at first instance (1997 SLT 211)) and the Inner House of the Court of Session in *McFarlane v Tayside Health Board* (for the judgments on the appeal see (1998) 44 BMLR 140). The first time the House of Lords had to consider the issues that may arise in a case of this kind was on a further appeal in this Scottish case (see [1999] 4 All ER 961, [2000] 2 AC 59). It has been necessary for us to give very careful consideration to the speech of each member of the House of Lords in this case.

[14] When *Emeh's* case was decided in July 1984 the law of negligence was quite simple. In *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728 Lord Wilberforce had propounded a two-stage test. First, the court had to ask whether as between the alleged wrongdoer and the person who had suffered damage there was a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part might be likely to cause damage to the latter. If the answer was Yes, then the court had to consider whether there were any considerations which ought to negative, or to reduce or limit, the scope of the duty or the class of person to whom it was owed, or the damages to which a breach of any duty might give rise. When Waller LJ, who had great experience of personal injuries litigation, applied that test in *Emeh's* case, he experienced little difficulty in holding that Mrs *Emeh* should be entitled to recover.

[15] In particular, he said:

'In my view it is trite to say that if a woman becomes pregnant it is certainly foreseeable that she will have a baby, but in my judgment, having regard to the fact that in a proportion of all births (between one in two hundred and one in four hundred were the figures given at the trial) congenital abnormalities might arise, that makes the risk clearly one that is foreseeable, as the law of negligence understands it.' (See [1984] 3 All ER 1044 at 1049, [1985] 1 QB 1012 at 1019.)

[16] Since 1984 successive decisions of the House of Lords have made the law of negligence much more complicated. The simple approach in *Anns's* case was eventually abandoned. In different complex factual situations the House of Lords now invented different techniques for identifying situations outside the normal run of cases involving physical injury or physical damage (often coupled with

a consequential loss) in which the courts might uphold a claim for damages for negligence founded on economic loss. Because the English common law has recently taken such a significant change of direction in such cases, we can derive no assistance from the decisions of the highest courts in a number of US states which have denied recovery on the grounds that the birth of a child with congenital abnormalities was not reasonably foreseeable at the time when a doctor
b performed a sterilisation procedure negligently.

[17] In an analysis of this kind it is customary for the court to be taken through each of the leading House of Lords cases in the last decade as if there was one test to be applied in almost every case. We now have the benefit of a thoughtful passage in the latest edition of *Clerk & Lindsell on Torts* (18th edn, 2000) pp 346–347 (para 7-95) which draws a lot of the threads together in a helpful way:

c 'Different views have been expressed as to the relationship of the threefold test and assumption of responsibility. Lord Goff in *Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 at 521, [1995] 2 AC 145
d at 181 regarded "assumption of responsibility" as rendering any enquiry into the threefold criterion of fairness as being superfluous. An alternative view regards "assumption of responsibility" as a sub-set of proximity. Rather than regarding one approach as replacing or being subsumed within another, it is suggested that the most helpful approach may be that taken by Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 2)* [1998]
e PNLR 564 at 583–587. After explaining that "the search for a principle or test has followed three separate but parallel paths" (the "threefold" test stated by Lord Griffiths in *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831; the "assumption of responsibility" test; and the incremental approach recognised by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605), he commented that: "The fact
f that all these approaches have been used and approved by the House of Lords in recent years suggests: (a) that it may be useful to look at any new set of facts by using each of the three approaches in turn ... (b) that if the facts are properly analysed and the policy considerations correctly evaluated the several approaches will yield the same result." This analysis sees the different
g approaches as mutually supportive rather than exclusive in their application. Each may be used to check the provisional conclusion reached by application of the other approaches. In a case where the relationship of the parties is akin to contract, the "assumption of responsibility" approach may be dominant for the reason suggested by Lord Steyn in *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, namely, that where the tortious
h duty is being asked to fill the gap left by the contractual doctrines of consideration and privity, it is natural to focus on the bilateral relationship of responsibility and reliance. But this should not preclude the court from checking its conclusion by considering the fairness and justice of the duty or by examining analogous duty situations to ensure that the imposition of a
i duty would be an incremental rather than a radical step. Conversely, the more removed the potential duty situation from the problems caused by privity of contract, the more likely it is that the threefold or incremental approaches will dominate. Thus, where the imposition of a duty on a public service is being considered, the threefold test may predominate but it may still be helpful to consider whether there was any assumption of responsibility.'

Two members of the present division of this court were sitting with Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 2)* [1998] PNLR 564, and I would reiterate now my agreement with what he said then.

[18] In recent years two other factors have emerged. The first is that it may be necessary on some occasions for a court to ask itself for what purpose a service was rendered, because that inquiry may stake out the limits of the duty of care owed by the person performing the service (see *South Australia Asset Management Corp v York Montague Ltd*, *United Bank of Kuwait plc v Prudential Property Services*, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 369–371, [1997] AC 191 at 211–212 per Lord Hoffmann). The second is that in a difficult case the court may find that principles of distributive justice, as opposed to corrective justice, may help it to identify the just solution to the problem it is invited to resolve.

[19] The researches of counsel have shown that recourse to the principles of distributive justice, familiar as they were to Aristotle, has only recently penetrated this field of English law. Lord Hoffmann drew on recent academic writings on the topic in his speech in *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, [1999] 2 AC 455, where he was concerned to resolve the conundrum posed by the decision of the Court of Appeal in that case (sub nom *Frost v Chief Constable of the South Yorkshire Police* [1997] 1 All ER 540, [1998] QB 254) which had permitted police officers at the scene of the Hillsborough football tragedy to recover compensation for suffering post-traumatic stress disorder when such recovery was denied to relatives of the dead who had suffered in the same way.

[20] Lord Hoffmann took the view that the search for principle in this area of the law had been called off in the earlier Hillsborough case, *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310. He considered that until there was legislative change the courts had got to live with the control mechanisms stated in *Alcock's* case and that any judicial developments had to take them into account. As a result, the House of Lords was engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as a system of rules which was fair between one citizen and another.

[21] He accepted that if the law of torts was there to give legal force to an Aristotelian system of corrective justice, then there was obviously no valid distinction to be drawn between physical and psychiatric injury. But because the law had fallen into an 'unsatisfactory internal state' he looked to principles of distributive justice for a solution. After introducing this topic ([1999] 1 All ER 1 at 42, [1999] 2 AC 455 at 504) he applied it ([1999] 1 All ER 1 at 48, [1999] 2 AC 455 at 510–511) when he sought reasons why liability for psychiatric injury should be extended to rescuers, if it was not available to 'spectators and bystanders'. Although he was willing to accept that the increase in claims which might result from such an extension would be modest, he said:

'... I think that such an extension would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who

a rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.' (See [1999] 1 All ER 1 at 48, [1999] 2 AC 455 at 510.)

[22] Lord Browne-Wilkinson said that he agreed that the police officers in *White's* case should not be entitled to recover, for the reasons given by Lord Steyn and Lord Hoffmann. Lord Hoffmann ended his speech by saying that he agreed with Lord Steyn's reasons, which seemed to him substantially the same as his own. Lord Steyn, for his part, did not mention the words 'distributive justice' in his speech in that case, but he did say that the decision of the Court of Appeal had introduced an imbalance in the law of tort which might perplex the man on the Underground. He ended his speech by recognising that the law on the recovery of compensation for pure psychiatric harm was a patchwork quilt of distinctions which were difficult to justify. He rejected two theoretical solutions (one being a complete retreat and the other an advance on grounds dictated by logic) and concluded that the only sensible general strategy for the courts was to say 'thus far and no further':

d 'In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible.' (See [1999] 1 All ER 1 at 39, [1999] 2 AC 455 at 500.)

[23] If Lord Steyn had been using the language of corrective justice in this speech, he would have gone on to accept, as did Lord Goff of Chieveley in his dissenting speech, that the police officers should be entitled to recover. Lord Goff considered that the claim of each plaintiff should be judged by reference to the same legal principles (see [1999] 1 All ER 1 at 28, [1999] 2 AC 455 at 488). Lord Steyn, on the other hand, considered that there were at least four distinctive features of claims for psychiatric harm which in combination might account for the differential treatment accorded by the common law to such claims, and felt that there were cogent policy considerations militating against the 'bold innovation' of abolishing all the special limited rules applicable to psychiatric harm.

[24] In his speech in *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59 (the case with which we are principally concerned on this appeal) Lord Steyn rationalised the language of the majority in *White's* case. After summarising the main issue in that case, he said:

h 'The principal theme of the judgments of the majority was based on considerations of distributive justice. In separate judgments Lord Hoffmann and I reasoned that it would be morally unacceptable if the law denied a remedy to bereaved relatives, as happened in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310, but granted it to police officers who were on duty. Lord Hoffmann expressly invoked considerations of distributive justice (see [1999] 1 All ER 1 at 42, [1999] 2 AC 455 at 503–504). Lord Browne-Wilkinson and I expressed agreement with this reasoning. In my judgment I observed: "The claim of the police officers on our sympathy, and the justice of their case, is great but not as great as that of others to whom the law denies redress." (See [1999] 1 All ER 1 at 37, [1999] 2 AC 455 at 498.) That is the language of distributive justice. The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and

difficulty a choice sometimes has to be made between the two approaches.' a
(See [1999] 4 All ER 961 at 978, [2000] 2 AC 59 at 83.)

[25] A little earlier he had reverted to one of the tests he had used in *White's* case when he said:

'Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.' b
(See [1999] 4 All ER 961 at 977, [2000] 2 AC 59 at 82.)

[26] It follows that when in *McFarlane's* case the House of Lords had to decide whether Mr and Mrs McFarlane should recover the cost of bringing up their healthy, albeit unwanted, daughter, there were at least five different legitimate techniques they might use in deciding whether the law should recognise the existence of a legally enforceable duty of care, the breach of which might lead to an award of compensation of this kind. (i) They might inquire whether the surgeon had assumed responsibility for the services he rendered when conducting the sterilisation procedure, so as to be liable for the foreseeable economic consequences for Mr McFarlane and his wife if he performed those services negligently; (ii) they might inquire what the purpose of the operation was, viz to prevent Mrs McFarlane from conceiving any more children, so that again the surgeon might be liable for the foreseeable economic consequences of his carelessness when performing an operation with that purpose; (iii) they might adopt the incremental approach of looking for established categories of negligence in this field and deciding whether it was legitimate to take the law forward one further step by analogy with those established categories; (iv) they might apply the now familiar three-stage test propounded by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605; (v) they might decide that reference to principles of distributive justice might provide a more just solution to the problem than an approach founded solely on principles of corrective justice. c
d
e
f

[27] As we shall see, in *McFarlane's* case even the contents of this list were not exhaustive of the approaches which some members of the House chose to adopt. The important thing to note is that there is no longer a single 'correct' test. As Sir Brian Neill said in *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse (No 2)* [1998] PNLR 564 at 586, however, 'if the facts are properly analysed and the policy considerations are correctly evaluated the several approaches will yield the same result'. g

[28] In *McFarlane's* case the pursuers were a married couple. They had four children, and because they did not want any more children, the husband underwent a vasectomy. Five months later a surgeon at the hospital told him that his sperm counts were negative, and that contraceptive measures were no longer necessary. For the purposes of the proceedings which went to the House of Lords on appeal, it was assumed that this advice was given negligently. The parents acted on the surgeon's advice. Eighteen months later the wife became pregnant and after a normal pregnancy and labour she gave birth to a healthy child whom the parents loved and cared for as an integral part of their family. h
i

[29] Both pursuers sought damages of £100,000 to cover the costs of bringing up the child (the parents' claim), and the second pursuer sought an additional sum of £10,000 as solatium (the mother's claim). The Lord Ordinary dismissed both claims. The Inner House allowed both claims. Four members of the House

a of Lords allowed the mother's claim but dismissed the parents' claim. The fifth, Lord Millett, would have dismissed both claims, although he would have allowed a conventional sum by way of compensation for the wrong done to these parents by denying them the freedom to limit the size of their family, together with a small claim for certain incidental expenses associated with the arrival of an unexpected child, if pleaded. Different views were expressed by the other
b members of the House about minor elements of a special damage claim.

[30] Our task has been made more difficult because the five members of the House of Lords spoke with five different voices. Before I come to analyse relevant features of the points of difference between them, I will first identify the issues on which all, or most of them, were agreed, or on which there appear to have been
c no dissentient voices. These issues, in no particular order, are as follows: (i) Public policy, as opposed to legal policy, plays no part in the search for a solution (see [1999] 4 All ER 961 at 972, 978, 993–994, 1000, [2000] 2 AC 59 at 76, 83, 100, 108). Lord Hope of Craighead, the fifth member of the House, said that the question for the court was ultimately one of law, not of social policy (see [1999] 4 All ER 961 at 988, [2000] 2 AC 59 at 95). Lord Steyn likened public policy arguments to
d 'quicksands' (see [1999] 4 All ER 961 at 978, [2000] 2 AC 59 at 83), and Lord Clyde reminded himself that public policy was long ago recognised as a 'very unruly horse' (see [1999] 4 All ER 961 at 994, [2000] 2 AC 59 at 100). Lord Millett said that limitations in the scope of legal liability arose from legal policy, where what was in issue was the admission of a new head of damages or the admission of a
e duty of care in a new situation. Legal policy in this sense was not the same as public policy, even though moral considerations may play a part in both (see [1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 108). (ii) The claim of parents should not be denied simply because they refused to arrange an abortion or the adoption of the child, when born (see [1999] 4 All ER 961 at 970, 976, 990, 997, 998, 1003, 1004, [2000] 2 AC 59 at 74, 81, 97, 104, 105, 111, 113). (iii) The so-called 'benefits
f rule' adopted in other jurisdictions, whereby an attempt is made to offset the benefit of parenthood against the cost of parenthood does not provide the route to a solution in this jurisdiction (see [1999] 4 All ER 961 at 970–972, 971, 977, 995, 996, 1005, [2000] 2 AC 59 at 74, 75, 81–82, 103, 114). Lord Hope was content to say that it could not be established that, overall and in the long run, the costs to
g the pursuers of meeting their obligations to the child during her childhood would exceed the value of the benefits derived from bringing the child up within the family, which was 'incalculable' (see [1999] 4 All ER 961 at 990–991, [2000] 2 AC 59 at 97). (iv) The birth of a child was the foreseeable consequence of a negligently performed vasectomy (see [1999] 4 All ER 961 at 970, 988, 999, 1005, [2000] 2 AC 59 at 74, 95, 107, 113). Lord Steyn said that to explain decisions denying a remedy
h for the cost of bringing up an unwanted child by saying there was no foreseeable loss was to resort to unrealistic and formalistic propositions which masked the real reasons for the decisions (see [1999] 4 All ER 961 at 977, [2000] 2 AC 59 at 82). Lord Clyde, who was concerned only with 'remoteness in relation to damnum', did not deny the parents' claim on the basis that it was not foreseeable: a sufficient
j causal connection could be made out (see [1999] 4 All ER 961 at 995, 997, [2000] 2 AC 59 at 102, 104). (v) The parents' claim was a claim for economic loss (see [1999] 4 All ER 961 at 971, 972, 975, 983, 993, 1001, [2000] 2 AC 59 at 75, 76, 79, 89, 100, 109). Lord Steyn said that the father's claim was for pure economic loss and that realistically, despite the pregnancy and childbirth, the mother's part of the claim was also for pure economic loss. In any event, he said, it would be absurd

to distinguish between the claims of the father and the mother in respect of the claim for the costs of bringing up the unwanted child (see [1999] 4 All ER 961 at 975, [2000] 2 AC 59 at 79).

[31] It is also worth noting certain issues on which one or more members of the House expressed an opinion, again with no dissentient voice: (i) There was disapproval of an argument to the effect that the parents' claim should be disallowed because the child might learn one day that the basis of recovery had been that she was not wanted (see [1999] 4 All ER 961 at 971, [2000] 2 AC 59 at 75 per Lord Slynn of Hadley). On the other hand, when considering the reaction of 'ordinary men and women' to the claim, Lord Steyn said that it would worry them that parents might be put in a position of arguing in court that the unwanted child, which they accepted and cared for, was more trouble than it was worth (see [1999] 4 All ER 961 at 977, [2000] 2 AC 59 at 82). (ii) Lord Clyde and Lord Millett rejected an argument to the effect that the parents' claim should be disallowed merely because they were obliged to maintain the child if they could (see [1999] 4 All ER 961 at 996, 1001, [2000] 2 AC 59 at 103–104, 109). (iii) Lord Slynn attached no weight to the argument that if damages claims of this kind were allowed doctors would encourage late abortions in order to protect themselves (see [1999] 4 All ER 961 at 971, [2000] 2 AC 59 at 75). (iv) Lord Millett considered that the parents' motivation when they initially sought to avoid childbirth should not be taken into account (see [1999] 4 All ER 961 at 1002, [2000] 2 AC 59 at 109–110).

[32] There can be no doubt, in my judgment, that three members of the House of Lords (Lord Slynn, Lord Steyn and Lord Hope) considered that the answer to the question whether the law ought to uphold the parents' claim lay in determining whether the facts disclosed a state of affairs where the law should recognise a legally enforceable duty of care owed by the surgeon to the parents to relieve them of the financial consequences of bringing up an unwanted child who was a healthy child.

[33] Lord Slynn used two tests, which he explained quite briefly. The first was the 'proximity' test expanded by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605. Lord Slynn said that this test was satisfied only where it was fair, just and reasonable for the law to impose the duty of care postulated. The second was the 'assumption of responsibility' test. He said that the question to be asked here was whether the doctor had assumed responsibility for the economic interest of the claimant with concomitant reliance by the claimant.

[34] He applied those tests even more briefly:

'The doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family. Whereas I have no doubt that there should be compensation for the physical effects of the pregnancy and birth, including of course solatium for consequential suffering by the mother immediately following the birth, I consider that it is not fair, just or reasonable to impose on the doctor or his employer liability for the consequential responsibilities, imposed on or accepted by the parents to bring up a child. The doctor does not assume responsibility for those economic losses. If a client wants to be able to recover such costs he or she must do so by an appropriate contract.' (See [1999] 4 All ER 961 at 972, [2000] 2 AC 59 at 76.)

a [35] Because Lord Slynn's treatment of the solution is so brief it is not clear whether he would have arrived at the same answers if the child had been seriously disabled at birth. In his survey of comparative law, he did not refer to any of the non-English 'unwanted pregnancy' cases which have been concerned with the birth of handicapped children, and when he embarked on his legal analysis of the claim (see [1999] 4 All ER 961 at 970–971, [2000] 2 AC 59 at 74–75) b he referred to a 'child by then loved, loving and fully integrated into the family' (see [1999] 4 All ER 961 at 970, [2000] 2 AC 59 at 74) and to 'joy at the birth of a healthy child, at the baby's smile and the teenager's enthusiasm' (see [1999] 4 All ER 961 at 971, [2000] 2 AC 59 at 75).

c [36] Lord Steyn expressly said that there might be force in the concession made by counsel for the health board to the effect that the rule might have to be different in the case of an unwanted child who was born seriously disabled. He solved the problem by reference to principles of distributive justice; I have quoted the critical sentence of his judgment in [25] above. His philosophical approach to the search for a solution to the conundrum is set out in the passage of his judgment which immediately follows that sentence:

d 'My Lords, to explain decisions denying a remedy for the cost of bringing up an unwanted child by saying that there is no loss, no foreseeable loss, no causative link or no ground for reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons for the decisions. And judges ought to strive to give the real reasons for their e decision. It is my firm conviction that where courts of law have denied a remedy for the cost of bringing up an unwanted child the real reasons have been grounds of distributive justice. That is, of course, a moral theory. It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply f positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.' (See [1999] 4 All ER 961 at 977–978, [2000] 2 AC 59 at 82.)

g [37] This was his primary route to a conclusion that the law did not recognise a legally enforceable duty of care of the type I have described in [32] above. Lord Steyn added: 'If it were necessary to do so, I would say that the claim does not satisfy the requirement of being fair, just and reasonable' (see [1999] 4 All ER 961 at 978, [2000] 2 AC 59 at 83).

h [38] In other words, in those very rare cases in which the solution is found by having recourse to the principles of distributive justice, the use of the expression 'fair, just and reasonable' is apt for this purpose. In *Heil v Rankin* [2000] 3 All ER 138, [2001] QB 272, when reviewing the level of damages for pain, suffering and loss of amenity in personal injuries cases, Lord Woolf MR adopted a comparable j approach:

'The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable.' (See [2000] 3 All ER 138 at 149, [2001] QB 272 at 294 (para 27).)

[39] Lord Hope articulated even more clearly the congruence of the distributive justice approach with the 'fair, just and reasonable' test propounded in the *Caparo Industries* case. In his analysis of the facts he said ([1999] 4 All ER 961 at 980, [2000] 2 AC 59 at 85) that the child in that case was a normal healthy child, and when he turned to his legal analysis of the parents' claim he said that the loss which fell to be considered under this head was the cost of rearing a normal, healthy child (see [1999] 4 All ER 961 at 983, [2000] 2 AC 59 at 89). There is nothing in his judgment (including the survey of comparative law it contains) which suggests that he had in mind the issues that arise when the unwanted child is seriously handicapped. a
b

[40] Lord Hope referred expressly to the speeches of Lord Steyn and Lord Hoffmann in *White's* case [1999] 1 All ER 1, [1999] 2 AC 455, and inquired ([1999] 4 All ER 961 at 990, [2000] 2 AC 59 at 96) how one was to apply to the present case the very general, and necessarily imprecise, principles enunciated in *White's* case. He fastened in this context on the requirements that there must be a relationship of proximity, and that the attachment of liability for the harm must be just, fair and reasonable. c

[41] As I have said at [30](iii) above, Lord Hope then tried to weigh the cost of bringing up a [healthy] child against the benefits derived by the parents from the child's presence in the family (whose value he found to be incalculable) and concluded that it could not be established that, overall and in the long run, the costs would exceed the value of the benefits. It followed that this was 'economic loss of a kind which must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedures in the hospital and the laboratory' (see [1999] 4 All ER 961 at 991, [2000] 2 AC 59 at 97). He believed that his reasons for allowing the appeal were very similar to those which Lord Steyn had given. d
e

[42] I do not consider it necessary to dwell very long on the different approaches to the parents' claim which were adopted by Lord Clyde and Lord Millett. It is sufficient for my purposes, as it was for Longmore J, that three of the members of the House of Lords used a judicial technique which involved them asking whether there was a legally enforceable duty of care to prevent the parents incurring the financial costs of bringing up a healthy, but unwanted, child. Lord Clyde preferred to focus on the 'damnum' and considered that restitution would not be reasonable, having regard to the extent of the liability which the defenders could reasonably have thought they were undertaking. Lord Millett simply concluded that the law must take the birth of a normal, healthy baby to be a blessing, not a detriment (see [1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 113–114). He said that society itself must regard the balance between cost and benefit as beneficial since it would be repugnant to its own sense of values to do otherwise: 'It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth' (see [1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 114). f
g
h

[43] Although Lord Millett did not think that the solution was to be found in a process of categorisation, whether of the nature of the delict or the loss in respect of which damages were claimed (see [1999] 4 All ER 961 at 1001, [2000] 2 AC 59 at 108), he defined the target at which the court was aiming in terms not dissimilar to those used by Lord Steyn when he described the dictates of legal policy 'which is to say "our more or less inadequately expressed ideas of what i

a justice demands''''. He mentioned a modern textbook on torts in this context and continued:

b 'Legal policy in this sense is not the same as public policy, even though moral considerations may play a part in both. The court is engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper. It is also concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases.' (See [1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 108.)

c [44] When Longmore J analysed the five speeches in the House of Lords, he believed that the tenor of Lord Slynn's language was that a parent could not recover 'for this kind of loss at all', whether the child was born healthy or disabled. For the reasons I have given in [35] above, I am not sure if I agree with him, and in any event Lord Slynn adopted a test of 'assumption of liability for economic loss', as opposed to the more well-established test of 'assumption of liability for services', on his route to a solution (see *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181 and *White v Jones* [1995] 1 All ER 691 at 715-716, [1995] 2 AC 207 at 273).

d [45] Longmore J noted that Lord Steyn had left the position of the disabled child open (see [36] above), and he thought that the element which in Lord Hope's eyes made the McFarlane parents' claim unfair, unjust or unreasonable was absent from any claim for additional costs arising from disability. On Lord Clyde's approach, the judge thought that a reasonable doctor would be appalled and embarrassed to think that his negligence imposed not merely the ordinary and welcome burden of bringing up a healthy child but also the additional element of the cost of bringing up a disabled child. Lord Millett concentrated his mind entirely on 'a normal, healthy baby'. The judge concluded:

e 'If one reads the speeches in *McFarlane*'s case as a whole, therefore, it is only Lord Slynn whose speech inexorably entails the conclusion that there should be no recovery for the cost of bringing up any child, whether healthy or disabled. The language of the other speeches at least leaves the matter open. But, to my mind, the other speeches all point to the conclusion that a disabled child brought into the world by a negligent surgeon is in so different a situation from a healthy child, that a parent should be able to recover the additional costs attributable to the disability.'

f [46] Like the judge, we have had the opportunity of considering the judgments of English judges in what are called 'wrongful birth' cases which were decided at first instance after the decision of the House of Lords in *McFarlane*'s case. These cases are different from 'failed sterilisation' cases because the opportunity that is lost to the parents in 'wrongful birth' cases is the opportunity to terminate a pregnancy which they would have enjoyed if the impugned professional services had not been negligently performed. In *Rand v East Dorset Health Authority* (2000) 56 BMLR 39 Newman J was concerned with a Down's Syndrome child. In *Hardman v Amin* [2000] Lloyd's Med Rep 498 Henriques J was concerned with a child who was born very severely disabled after his mother contracted rubella during her pregnancy. In *Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419 Toulson J was concerned with a child born with a large spina bifida lesion and hydrocephalus.

[47] All three judges held that the decision in *McFarlane*'s case did not preclude an award of compensation for child-rearing costs to these parents, although they differed when assessing the scale on which compensation should be awarded. Toulson J, in particular, after saying why he considered that *McFarlane*'s case presented no obstacle to the claim before him, said (at 430):

'I do not believe that it would be right for the law to deem the birth of a disabled child to be a blessing, in all circumstances and regardless of the extent of the child's disabilities; or to regard the responsibility for the care of such a child as so enriching in the ordinary nature of things that it would be unjust for a parent to recover the cost from a negligent doctor on whose skill that parent had properly relied to prevent the situation. If the matter were put to an opinion poll among passengers on the Underground, I would be surprised if a majority would support such a view.'

[48] Because the policy issues in 'wrongful birth' cases are different, I do not think it helpful to dwell any longer on that line of authority. Nor do I think it necessary to say very much about the approach of the courts in other jurisdictions, although each side furnished us with a most helpful summary of the position. I have already said at [16] above why I consider that the denial of a parents' claim in many US state courts does not take the matter any further, because they are applying a different system of law. We were shown, however, three US cases in state courts which did not find that a restrictive interpretation of 'proximate cause' precluded recovery, of which the most recent was a decision of the Supreme Court of Rhode Island in *Emerson v Magendantz* (1997) 689 A 2d 409. In that case the court considered that the public policy arguments which precluded the award of the cost of raising healthy children did not preclude an award of the extraordinary expenses of child rearing, going beyond the costs of rearing a normal child, when the unwanted child was disabled.

[49] In arriving at this conclusion that court expressly followed the decision of the Supreme Court of Florida in *Fassoulas v Ramey* (1984) 450 So 2d 822, which was not followed in a number of other jurisdictions on account of their 'proximate cause' rules. In *Fassoulas*' case the Supreme Court of Florida followed the reasoning later to be adopted by the House of Lords in relation to the cost of rearing a healthy, normal child. It added, however (at 824):

'We agree with the district court below that an exception exists in the case of special upbringing expenses associated with a deformed child. See *Moores v Lucas*, 405 So.2d 1022 (Fla. 5th DCA 1981). Special medical and educational expenses, beyond normal rearing costs, are often staggering and quite debilitating to a family's financial and social health; "indeed, the financial and emotional drain associated with raising such a child is often overwhelming to the affected parents." (*Ramey v Fassoulas* (1982) 414 So 2d 198 at 201). There is no valid policy argument against parents being recompensed for these costs of extraordinary care in raising a deformed child to majority. We hold these special upbringing costs associated with a deformed child to be recoverable.'

[50] Unless we are bound by authority to the contrary, I find this argument persuasive. On this side of the Atlantic I would apply the battery of tests which the House of Lords has taught us to use, and arrive at the same answer. My route would be as follows: (i) For the reasons given by Waller LJ in *Emeh v Kensington*

a and *Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044, [1985] 1 QB 1012, the birth of a child with congenital abnormalities was a foreseeable consequence of the surgeon's careless failure to clip a fallopian tube effectively; (ii) there was a very limited group of people who might be affected by this negligence: viz Mrs Parkinson and her husband (and, in theory, any other man with whom she had sexual intercourse before she realised that she had not been effectively sterilised); (iii) there is no difficulty in principle in accepting the proposition that the surgeon should be deemed to have assumed responsibility for the foreseeable and disastrous economic consequences of performing his services negligently; (iv) the purpose of the operation was to prevent Mrs Parkinson from conceiving any more children, including children with congenital abnormalities, and the surgeon's duty of care is strictly related to the proper fulfilment of that purpose; (v) parents in Mrs Parkinson's position were entitled to recover damages in these circumstances for 15 years between the decisions in *Emeh's* case and *McFarlane's* case, so that this is not a radical step forward into the unknown; (vi) for the reasons set out in (i) and (ii) above, Lord Bridge's tests of foreseeability and proximity are satisfied, and for the reasons given by the Supreme Court of Florida in *Fassoulas' case*, an award of compensation which is limited to the special upbringing costs associated with rearing a child with a serious disability would be fair, just and reasonable; (vii) if principles of distributive justice are called in aid, I believe that ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child's disability.

e [51] I can see nothing in any majority reasoning in *McFarlane's* case to deflect this court from adopting this course, which in my judgment both logic and justice demands. Although Mr Hone had a cross-appeal in which he sought full recovery for his client, and not the limited recovery ordered by the judge, he did not press his cross-appeal very vigorously, and in my judgment it would not be fair, just and reasonable to award compensation which went further than the extra expenses associated with bringing up a child with a significant disability.

f [52] What constitutes a significant disability for this purpose will have to be decided by judges, if necessary, on a case by case basis. The expression would certainly stretch to include disabilities of the mind (including severe behavioural disabilities), as well as physical disabilities. It would not include minor defects or inconveniences, such as are the lot of many children who do not suffer from significant disabilities. I have had the opportunity of reading in draft the judgment of Hale LJ, and I agree with what she says about this matter in [91] below.

g [53] In this judgment I am concerned only with the loss that arises when the child's significant disabilities flow foreseeably from his or her unwanted conception. There may well be foreseeable incidents during the mother's pregnancy and the time leading up to the birth of the child from which the child's disabilities have flowed, but these will not in the ordinary way be effective to break the chain of causation. If, on the other hand, there is evidence that a child's disabilities, discernible at birth, were caused by some new intervening cause, then the difficult and interesting issues that may arise in such a case will have to be resolved by applying well-known principles of causation to the facts of the case before the court.

h [54] A negligent surgeon should not, without more, be held liable for the economic consequences of the birth of a child with significant disabilities if the child's disabilities were brought about between conception and birth by some

ultraneous cause (for which see Lord Wright in *Lord v Pacific Steam Navigation Co Ltd, The Oropesa* [1943] 1 All ER 211 at 215, [1943] P 32 at 39). Similarly, the ordinary rules relating to contributory negligence will be applied in an appropriate case to limit recovery.

[55] For these reasons I would dismiss both the appeal and the cross-appeal.

HALE LJ.

[56] The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in *Clerk & Lindsell on Torts* (18th edn, 2000) p 15 (para 1-25). 'The fundamental principle, plain and incontestable, is that every person's body is inviolate' (see *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177). Included within that right are two others. One is the right to physical autonomy: to make one's own choices about what will happen to one's own body. Another is the right not to be subjected to bodily injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interference with them. In contrast, economic interests come very much lower in the list, and for obvious reasons:

'... in a competitive economic society the conduct of one person is always liable to have economic consequences for another and, in principle, economic activity does not have to have regard to the interests of others and is justifiable by the actor having regard to his own interests alone.' (See *Perrett v Collins* [1998] 2 Lloyd's Rep 255 at 260 per Hobhouse LJ.)

The object of much commercial activity is deliberately to harm the economic interests of competitors: only in very special situations, therefore, does the law recognise a liability to compensate those whose economic interests have been damaged.

[57] In the middle, however, are those cases where the invasion of the right to bodily integrity has caused, not only pain, suffering and loss of amenity (including freedom and autonomy) but also financial consequences, whether in the shape of loss of earnings or the like, or out-of-pocket expenditure. These are a regular and automatic component in any claim for damages for personal injuries and often form the greater part of the claim for the more severely injured.

[58] In *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59, all their Lordships, in their different ways, recognised that to cause a woman to become pregnant and bear a child against her will was an invasion of that fundamental right to bodily integrity, although they expressed themselves differently. Some highlighted the interference with bodily autonomy, others the pain, suffering and loss of amenity. Lord Millett put it most clearly:

'The damnum occurred when Mrs McFarlane conceived. This was an invasion of her bodily integrity and threatened further damage both physical and financial.' (See [1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 107.)

[59] Lord Hope of Craighead put it in terms of loss of autonomy rather than harm:

'As the pregnancy in this case was a normal one and there were no complications either during or after childbirth, there was no physical event other than the conception to which the claim can be said to be attributable. The harmful event was the conception ... The physical consequences to the woman of pregnancy and childbirth are, of course, natural processes. In

a normal circumstances they would not be considered as a harm to her or as being due to an injury. But the law will respect the right of men and women to take steps to limit the size of their family. Any objection to the claim on moral or religious grounds must be rejected, as this is an area of family life in which freedom of choice may properly be exercised.' (See [1999] 4 All ER 961 at 981, [2000] 2 AC 59 at 86–87.)

b [60] Lord Clyde took the other route:

c '... the Lord Ordinary held that the pregnancy, confinement and delivery, being natural processes did not constitute an injury. But natural as the mechanism may have been the reality of the pain, discomfort and inconvenience of the experience cannot be ignored. It seems to me to be a clear example of pain and suffering such as could qualify as a potential head of damages.' (See [1999] 4 All ER 961 at 995, [2000] 2 AC 59 at 102.)

[61] Lord Steyn took the same view:

d 'After all, the hypothesis is that the negligence of the surgeon caused the physical consequences of pain and suffering associated with pregnancy and childbirth. And every pregnancy involves substantial discomfort and pain.' (See [1999] 4 All ER 961 at 977, [2000] 2 AC 59 at 81.)

[62] Lord Slynn of Hadley relied more on autonomy:

e 'It does not seem to me to be necessary to consider the events of an unwanted conception and birth in terms of "harm" or "injury" in its ordinary sense of the words. They were unwanted and known by the health board to be unwanted events.' (See [1999] 4 All ER 961 at 970, [2000] 2 AC 59 at 74.)

f [63] Not surprisingly, their Lordships did not go into detail about what is entailed in the invasion of bodily integrity caused by conception, pregnancy and childbirth. But it is worthwhile spelling out the more obvious features. Some will sound in damages and some may not, but they are all the consequence of that fundamental invasion. They are none the less an invasion because they are the result of natural processes. They stem from something which should never have happened. And they last for a great deal longer than the pregnancy itself.

g Whatever the outcome, happy or sad, a woman never gets over it. I do not, of course, forget the serious consequences for many fathers, and will return to these later, but there are undoubted and inescapable differences between the sexes here. As the claimant in this case is the mother, I hope that I may be forgiven for considering the position of mothers first.

h [64] From the moment a woman conceives, profound physical changes take place in her body and continue to take place not only for the duration of the pregnancy but for some time thereafter. Those physical changes bring with them a risk to life and health greater than in her non-pregnant state. Those risks vary according to the age, state of health, and other characteristics of the woman, and of the unborn child. For some women, pregnancy is very dangerous, while for others happily it is not. For some women, pregnancy is generally a pleasurable experience, for others it is generally an uncomfortable time, for many it varies according to the trimester.

j [65] Along with those physical changes go psychological changes. Again these vary from woman to woman. Some may amount to a recognised psychiatric disorder, while others may be regarded as beneficial, and many are somewhere

in between. But for most they include the development of deep feelings for the new life as it grows within one, feelings which there is now evidence to suggest begin to be reciprocated by the growing child even before he is born. a

[66] Along with these physical and psychological consequences goes a severe curtailment of personal autonomy. Literally, one's life is no longer just one's own but also someone else's. One cannot simply rid oneself of that responsibility. The availability of legal abortion depends upon the opinions of others. Even if favourable opinions can readily be found by those who know how, there is still a profound moral dilemma and potential psychological harm if that route is taken. Late abortion brings with it particular problems, and these are more likely to arise in failed sterilisation cases where the woman does not expect to become pregnant. Their Lordships unanimously took the view that it was not reasonable to expect any woman to mitigate her loss by having an abortion (see [1999] 4 All ER 961 at 970, 976, 990, 998, 1004, [2000] 2 AC 59 at 74, 81, 97, 105, 113 per Lord Slynn, Lord Steyn, Lord Hope, Lord Clyde and Lord Millett respectively). Realistically, some may think, the result of their Lordships' decision could well be that some will have no other sensible option. b
c

[67] Continuing the pregnancy brings a host of lesser infringements of autonomy related to the physical changes in the body or responsibility towards the growing child. The responsible pregnant woman foregoes or moderates the pleasures of alcohol and tobacco. She changes her diet. She submits to regular and intrusive medical examinations and tests. She takes certain sorts of exercise and foregoes others. She can no longer wear her favourite clothes. She is unlikely to be able to continue in paid employment throughout the pregnancy or to return to it immediately thereafter. d
e

[68] The process of giving birth is rightly termed 'labour'. It is hard work, often painful and sometimes dangerous. It brings the pregnancy to an end but it does not bring to an end the changes brought about by the pregnancy. It takes some time for the body to return to its pre-pregnancy state, if it ever does, especially if the child is breast fed. There are well-known psychiatric illnesses associated with childbirth and the baby blues are very common. The law recognises that a woman may not recover her pre-pregnancy psychological health for at least six weeks (see s 16(4) of the Adoption Act 1976). f

[69] Quite clearly, however, the invasion of the mother's personal autonomy does not stop once her body and mind have returned to their pre-pregnancy state. The mother who gives birth is always the legal mother of the child, irrespective of whether or not she is the genetic parent (see s 27(1) of the Human Fertilisation and Embryology Act 1990). She is almost always identifiable: foundlings are extremely rare. The mother always and automatically has parental responsibility for the child (see s 2(1) and (2)(a) of the Children Act 1989). She will be criminally liable for abandoning or neglecting him (see ss 1(1), (2)(a), 17(1)(a) of the Children and Young Persons Act 1933). She cannot legally surrender or transfer her responsibility, although she can arrange for others to meet it for her (see s 2(9) of the 1989 Act). If she acts responsibly there will be no criminal liability, but short of adoption she cannot divest herself of the responsibility. Adoption is subject to many of the same problems as is abortion. Once again, their Lordships did not consider it reasonable for a wrongdoer to expect a parent to take this course. g
h
i

[70] Parental responsibility is not simply or even primarily a financial responsibility (see s 3(1) of the 1989 Act). The primary responsibility is to care for the child. The labour does not stop when the child is born. Bringing up children is hard

a work. As Browne-Wilkinson V-C said in *Surtees v Kingston-upon-Thames Royal BC, Surtees v Hughes* [1991] 2 FLR 559 at 583:

b '... the responsibilities of a parent (which in contemporary society normally means the mother) looking after one or more children, in addition to the myriad other duties which fall on the parent at home, far exceed those of other members of society. The studied calm of the Royal Courts of Justice, concentrating on one point at a time, is light years away from the circumstances prevailing in the average home. The mother is looking after a fast-moving toddler at the same time as cooking the meal, doing the housework, answering the telephone, looking after the other children and doing all the other things that the average mother has to cope with simultaneously, or in quick succession, in the normal household.'

c

[71] The obligation to provide or make acceptable and safe arrangements for the child's care and supervision lasts for 24 hours a day, 7 days a week, all year round, until the child becomes old enough to take care of himself. The law now recognises the claim of an injured person to be compensated for the costs of caring for him. When the care is provided by a family member, the claim is made by the injured person but the loss is the family member's (see *Hunt v Severs* [1994] 2 All ER 385, [1994] 2 AC 350). The family member has not been wronged. Here, however, the care is provided by the very person who has been wronged, and the legal obligation to provide it is the direct and foreseeable consequence of that wrong. It is, perhaps, an indication of the reluctance of the common law to recognise the cost of care to the carer that claims for wrongful conception and birth of healthy children have not previously been analysed in this way: thus in *McFarlane's* case, no claim was made 'in respect of any care or trouble undergone by the pursuers in the course of bringing up the child' (see (1998) 44 BMLR 140 at 142).

d

e

f [72] The law has found it much easier to focus on the associated financial costs, the out-of-pocket expenditure on food, clothing, housing, schooling and all the other multitudinous needs of the growing child, and the loss of earnings stemming from the caring role. These costs are not independent of the caring responsibility but part and parcel of it.

g [73] It is not possible, therefore, to draw a clean line at the birth. All of these consequences flow inexorably, albeit to different extents and in different ways according to the circumstances and characteristics of the people concerned, from the first: the invasion of bodily integrity and personal autonomy involved in every pregnancy. While the Lord Justice-Clerk (Cullen) in *McFarlane's* case (1998) 44 BMLR 140 at 146, did not regard the mother's financial claim as 'in some way representing the consequence of the pain and suffering experienced in pregnancy and child-birth', it obviously represents the consequences of the fundamental invasion of her rights, which was the conception itself.

h

j [74] Of course, most pregnancies are not caused wrongfully. But this case proceeds on the basis that this one was. The whole object of the service offered to the claimant by the defendant was to prevent her becoming pregnant again. They had a duty to perform that service with reasonable care. They did not do so. She became pregnant as a result. On normal principles of tortious liability, once it was established that the pregnancy had been wrongfully caused, compensation would be payable for all those consequences, whether physical or financial, which are capable of sounding in damages. (Thus, for example, psychological harm falling short of psychiatric injury would not attract compensation, although

the overall impact upon the claimant of her injuries may be reflected in the quantum of damages for pain, suffering and loss of amenity; overlapping claims for loss of earnings, extra care and costs because of another mouth to feed might have to be offset, etc.)

[75] There is nothing unusual or contrary to legal principle involved. This is clearly reflected in the decision of the Inner House in *McFarlane's* case. Scots law may express itself differently but the principles are the same. What is needed is iniuria and damnum. The iniuria was the breach of the duty of care. The damnum was the conception. Thereafter a claim lay for the natural and probable (or in English law, the foreseeable) consequences of the breach and the initial loss.

[76] A majority of their Lordships in *McFarlane's* case clearly recognised that on normal principles the claim would be allowable (indeed, the defenders had not denied this (see [1999] 4 All ER 961 at 999, [2000] 2 AC 59 at 107 per Lord Millett)). Once again, Lord Millett is the clearest:

'I do not think that the solution is to be found in a process of categorisation, whether of the nature of the delict or the loss in respect of which damages are claimed. It is true that the claims in the present case are brought under the extended *Hedley Byrne* principle (see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465). But I agree with my noble and learned friend Lord Steyn that it should not matter whether the unwanted pregnancy arises from the negligent supply of incorrect information or from the negligent performance of the operation itself. It is also true that the claim for the costs of bringing up Catherine is a claim in respect of economic loss, and that claims in delict for pure economic loss are with good reason more tightly controlled than claims in respect of physical loss. But I do not consider that the present question should depend on whether the economic loss is characterised as pure or consequential. The distinction is technical and artificial if not actually suspect in the circumstances of the present case, and is to my mind made irrelevant by the fact that Catherine's conception and birth are the very things that the defenders' professional services were called upon to prevent. In principle any losses occasioned thereby are recoverable however they may be characterised.' (See [1999] 4 All ER 961 at 1001, [2000] 2 AC 59 at 108–109.)

[77] This is a clear reference to the principle in *Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, a case which, perhaps curiously, is referred to only in the speech of Lord Steyn, and only as an example (see [1999] 4 All ER 961 at 972, [2000] 2 AC 59 at 77). Lord Steyn had also said:

'It is possible to view the case simply from the perspective of corrective justice. It requires somebody who has harmed another without justification to indemnify the other. On this approach the parents' claim for the cost of bringing up Catherine must succeed.' (See [1999] 4 All ER 961 at 972, [2000] 2 AC 59 at 82.)

[78] Not surprisingly, Lord Clyde's analysis was very similar to that of the Inner House:

'... the issue raised in the appeal is not properly one of the existence or non-existence of a duty of care. The relationship between the pursuers and

a the defenders is accepted as one which is sufficiently close as to constitute such a duty and an obligation to make reparation in the event of a breach of that duty. While in the case of the first named pursuer, whose only claim is for an economic loss, it may be tempting to approach the problem as one of the existence of a liability, the second named pursuer has some right of action which can be more readily recognised and I would be prepared to accept that

b there should be an obligation on the defenders to make reparation to her. The obligation to make reparation is, to use the words of Lord Keith of Kinkel in *Dunlop v McGowans* 1980 SLT 129 at 133, "single and indivisible". So also is the ground of action on which the respective claims of the pursuers proceed. Once the obligation to make reparation for some loss is predicated, it seems to me difficult to analyse the claim for maintenance of the child as a

c particular, and so separate, obligation.' (See [1999] 4 All ER 961 at 995, [2000] 2 AC 59 at 102.)

[79] Their Lordships' reasons for denying what would on normal legal principles be recoverable were variously and elegantly expressed. Their words have been subjected to minute analysis before us in this case and elsewhere. In

d truth, they all gave different reasons for arriving at, on this aspect of the claim, the same result. Nor are those reasons easy to assign to the traditional categories of duty, breach and damage, given that all agreed that there was some duty in the case and that if that duty had been broken, some recoverable damage had resulted.

e [80] Lord Slynn prefaced his discussion of the maintenance costs thus:

'The discussion in the American cases of the "benefits rule" ... persuades me that it should not be adopted here and it is significant that it has not been adopted in many American states.' (See [1999] 4 All ER 961 at 970, [2000] 2 AC 59 at 74.)

f His conclusion was this:

'The doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family ... I consider that it is not fair, just or reasonable to impose on the doctor or his employer liability

g for the consequential responsibilities, imposed on or accepted by the parents to bring up a child. The doctor does not assume responsibility for those economic losses.' (See [1999] 4 All ER 961 at 972, [2000] 2 AC 59 at 76.)

Given that the doctor clearly does assume some responsibility for preventing

h conception, it is difficult to understand why he assumes responsibility for some but not all of the clearly foreseeable, indeed highly probable, losses resulting.

[81] Lord Steyn gave a quite different reason:

'But one may also approach the case from the vantage point of distributive justice. It requires a focus on the just distribution of burdens and losses among members of a society. If the matter is approached in this way, it may become relevant to ask of the commuters on the Underground the following question: Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, ie until about 18 years? My

j Lords ... I am firmly of the view that an overwhelming number of ordinary

men and women would answer the question with an emphatic No. And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not ... they will have in mind that many couples cannot have children and others have the sorrow and burden of looking after a disabled child. The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would surely appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.' (See [1999] 4 All ER 961 at 977, [2000] 2 AC 59 at 82.)

[82] The traveller on the Underground is not here being invoked as a hypothetical reasonable man but as a moral arbiter. We all know that London commuters are not a representative sample of public opinion. We also know that the answer will crucially depend upon the question asked and the amount of relevant information and argument given to help answer it. The fact that so many eminent judges all over the world have wrestled with this problem and reached different conclusions might suggest that the considered response would be less emphatic and less unanimous. Distributive justice is concerned with fairness, not only between different classes of claimant and defendant, but also between different classes of potential claimant. That certainly underpinned its first appearance in the law reports in *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, [1999] 2 AC 455. This may explain why Lord Steyn compared Catherine's parents with the unwillingly childless or the parents of a disabled child: they are so much better off. If the first is wrongfully caused, there will be a remedy (although whether this extends to funding extraordinary steps to provide a child is a difficult and controversial issue); and Lord Steyn ([1999] 4 All ER 961 at 979, [2000] 2 AC 59 at 84) acknowledged that the rule might have to be different for the last. It follows that his remark that 'If it were necessary to do so, I would say that the claim [for the costs of bringing up a healthy unwanted child] does not satisfy the requirement of being fair, just and reasonable' cannot be taken as ruling out a claim such as this (see [1999] 4 All ER 961 at 978, [2000] 2 AC 59 at 83).

[83] Lord Hope regarded the claim as one for economic loss (see [1999] 4 All ER 961 at 983, [2000] 2 AC 59 at 89). *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605 was a 'vital signpost' (see [1999] 4 All ER 961 at 987, [2000] 2 AC 59 at 94). He pointed out that—

'in the field of economic loss foreseeability is not the only criterion that must be satisfied. There must be a relationship of proximity between the negligence and the loss which is said to have been caused by it and the attachment of liability for the harm must be fair, just and reasonable.' (See [1999] 4 All ER 961 at 988, [2000] 2 AC 59 at 95.)

Recent English case law to that effect must also be part of Scots law. Nevertheless, his conclusion was in some respects an echo of the conclusion of the Lord Ordinary (Gill) at first instance:

a '... they are now bringing the child up within the family. There are
benefits in this arrangement as well as costs. In the short term there is the
pleasure which a child gives in return for the love and care which she
receives during infancy. In the longer term there is the mutual relationship
b of support and affection which will continue well beyond the ending of the
period of her childhood. In my opinion it would not be fair, just or
reasonable, in any assessment of the loss caused by the birth of the child, to
leave these benefits out of account. Otherwise the pursuers would be paid
far too much. They would be relieved of the cost of rearing the child. They
would not be giving anything back to the wrongdoer for the benefits. But
the value which is to be attached to these benefits is incalculable. The costs
c can be calculated but the benefits, which in fairness must be set against them,
cannot. The logical conclusion, as a matter of law, is that the costs to the
pursuers of meeting their obligations to the child during her childhood are
not recoverable as damages. It cannot be established that, overall and in the
long run, these costs will exceed the value of the benefits. This is economic
loss of a kind which must be held to fall outside the ambit of the duty of care
d which was owed to the pursuers ...' (See [1999] 4 All ER 961 at 983 at
990–991, [2000] 2 AC 59 at 97.)

Although he uses the language of duty, he also regarded his reasons as similar to those given by Lord Steyn. I take this to mean that he concentrates upon whether a particular type of damage is within the scope of the duty rather than the
e existence of the duty itself.

[84] Lord Clyde hesitated to adopt an approach analysing the claim in terms of the existence of a duty to compensate (see [1999] 4 All ER 961 at 994–995, [2000] 2 AC 59 at 101–102). He preferred to rely on the idea of reasonable
f restitution (see [1999] 4 All ER 961 at 997, 998, [2000] 2 AC 59 at 104, 105). He was concerned that—

'The result of the decision of the Inner House is that the pursuers have the enjoyment of a child, unintended but not now unwanted, free of any cost to themselves and maintained at the expense of the defenders. It can be argued that the result is to be justified by treating the existence of the child as a windfall which simply has to be disregarded. Alternatively it can be argued
g that the benefit of the child is something which either cannot in principle be taken into account or even cannot be evaluated, and accordingly the defenders should be held liable for the whole loss suffered by the pursuers without any deduction. That may seem to be a slightly more attractive proposition than the view that the benefit should altogether outweigh the loss. But that the pursuers end up with an addition to their family, originally
h unintended but now, although unexpected, welcome, and are enabled to have the child maintained while in their custody free of any cost does not seem to accord with the idea of restitution or with an award of damages which does justice between both parties.' (See [1999] 4 All ER 961 at 997–998, [2000] 2 AC 59 at 105.)
j

He also considered that reasonable restitution must take some account of proportionality (see [1999] 4 All ER 961 at 998, [2000] 2 AC 59 at 106).

[85] Lord Millett ([1999] 4 All ER 961 at 1001, [2000] 2 AC 59 at 109) rejected the last argument: '... it is a commonplace that the harm caused by a botched operation may be out of all proportion to the seriousness of the operation or the

condition of the patient which it was designed to alleviate.' The same might be said of many accidents at work or on the roads. Lord Millett's reasons for rejecting this 'novel head of damages' (see [1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 108) were entirely clear:

'In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forego the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.' (See [1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 113–114.)

He recognised, however, that the benefit to society and the benefit to the individuals are two different things, because he continued:

'This does not answer the question whether the benefits should be taken into account and the claim dismissed or left out of account and full recovery allowed. But the answer is to be found in the fact that the advantages and disadvantages of parenthood are inextricably bound together. This is part of the human condition. Nature herself does not permit parents to enjoy the advantages and dispense with the disadvantages.' (See [1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 114.)

[86] Longmore J in this case concluded that only Lord Slynn had unequivocally based his decision on the extent of the duty of care and in a way which led inexorably to the conclusion that there should be no recovery for the cost of bringing up any child, whether healthy or disabled. The language of the other speeches at least left the matter open. Having recited their reasoning at some length, I agree with him. Having accepted the existence of some duty, they are considering whether a particular type of damage is recoverable if the duty is broken.

[87] At the heart of it all is the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. A child brings benefits as well as costs; it is impossible accurately to calculate those benefits so as to give a proper discount; the only sensible course is to assume that they balance one another out. No one wants a situation in which a parent who thoroughly dislikes her child and the predicament in which she has been placed, but does her duty, is at an advantage compared with the parent who falls in love with her child at birth (as most do) and willingly reconciles herself to her fate. No one wants a situation in which the parent who disparages her child is at an advantage compared with one who sees the best in him. The only solution, as Lord McCluskey in the Inner House said ((1998) 44 BMLR 140 at 158) and Lord Millett agreed, is to ignore the benefits altogether or to assume that they cancel out the claim.

[88] There are many who would challenge that assumption. They would argue that the true costs to the primary carer of bringing up a child are so enormous that they easily outstrip any benefits. As Lord McCluskey also said (at 157–158):

a 'The "principle" that the value of a child should be held to outweigh all the financial outlay incurred in bringing up the child might well appeal to those who can afford to make such outlay without any, or any undue, financial hardship. But even in our civilisation there are some for whom an unwanted and unplanned pregnancy is a financial disaster and may bring an end to a chosen way of life with financial and personal losses.'

b [89] The notion of a child bringing benefit to the parents is itself deeply suspect, smacking of the commodification of the child, regarding the child as an asset to the parents. (Indeed counsel for the health board went so far as to argue before the Inner House that expenditure on a child was 'spent on nourishing an asset' (see (1998) 44 BMLR 140 at 143). But if, as Lord Millett observed, society is bound to regard its new member as an asset, whatever the views and experience of the parents, an equally rational response might have been to attribute a conventional sum as the benefit to be assumed to be gained from the pleasure of a child's company, the pride in his achievements, the hope of reciprocation of family feelings, the passing on of one's genes. This is a solution sometimes adopted by the law when faced with a rationally necessary but impossible task.

c Lord Millett would have adopted it for the 'true nature of the wrong done' to the pursuers, the denial of an important aspect of their personal autonomy.

d [90] The solution of deemed equilibrium also has its attractions and is in any event binding upon us. Indeed, it provides the answer to many of the questions arising in this case. The true analysis is that this is a limitation on the damages which would otherwise be recoverable on normal principles. There is therefore no reason or need to take that limitation any further than it was taken in *McFarlane's* case. This caters for the ordinary costs of the ordinary child. A disabled child needs extra care and extra expenditure. He is deemed, on this analysis, to bring as much pleasure and as many advantages as does a normal healthy child.

e Frankly, in many cases, of which this may be one, this is much less likely. The additional stresses and strains can have seriously adverse effects upon the whole family, and not infrequently lead, as here, to the break up of the parents' relationship and detriment to the other children. But we all know of cases where the whole family has been enriched by the presence of a disabled member and would not have things any other way. This analysis treats a disabled child as

f having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more.

g [91] It also provides a solution to the problem of degree: how disabled does the child have to be for the parents to be able to make a claim? The answer is that the law has for some time distinguished between the ordinary needs of ordinary

h children and the special needs of a disabled child. Thus, for the purposes of the services to be provided under Pt III of the Children Act 1989, a child is taken to be 'in need' if, among other things, 'he is disabled' (s 17(10)(c)). For this purpose—

j 'a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed ...' (See s 17(11).)

This or very similar definitions have been used since the legislation establishing the welfare state in the late 1940s to identify those whose special needs require special services. Local social services authorities are used to operating it, for

example when maintaining the register of disabled children required by para 2 of Sch 2 to the 1989 Act. I see no difficulty in using the same definition here. a

[92] Another question is when the disability must arise. Mr Stuart-Smith QC argued that there was no rational cut-off point, as any manner of accidents and illnesses might foreseeably affect a child throughout his childhood. But that is part of the ordinary experience of childhood, in which such risks are always present, and the balance of advantage and disadvantage is deemed to be equal. b
The two serious contenders are conception and birth. The argument for conception is that this is when the major damage was caused, from which all else flows. This was what the defendant undertook to prevent. But there are at least two powerful arguments for birth. The first is that although conception is when the losses start, it is not when they end. The defendant also undertook to prevent pregnancy and childbirth. c
The normal principle is that all losses, past, present or future, foreseeably flowing from the tort, are recoverable. The second is that it is only when the child is born that the deemed benefits begin. And it is those deemed benefits which deny the claim in respect of the normal child. In practice, also, while it may be comparatively straightforward to distinguish between ante and post-natal causes of disability, it will be harder to distinguish between ante and post-conception causes. Further, the additional risks to mother and child (for example because of the mother's age or number of previous pregnancies) may be among the reasons for the sterilisation. I conclude that any disability arising from genetic causes or foreseeable events during pregnancy (such as rubella, spina bifida, or oxygen deprivation during pregnancy or childbirth) up until the child is born alive, and which are not novus actus interveniens, will suffice to found a claim. d

[93] Finally, I must say something about fathers. Most children still live in two-parent households in which the father plays an important part in their lives. Even when they live apart, we attach a great deal of importance to trying to preserve as good and as close a relationship as possible between the child and the parent with whom he is not living. We also expect a financial contribution from that parent. But this is not a debate in which the differences between the sexes can be ignored. The primary invasion of bodily integrity and autonomy is suffered by the mother. If the object of the operation was to prevent that particular mother becoming pregnant, the proximity between her and the defendant is as close as it can be. Even if the object of the operation (and later advice) was to render the father infertile, the proximity between his partner and the defendant is quite close. In both cases the nature of the harm to her is entirely clear and predictable, although it may vary in degree. Of the two types of harm, one can only be suffered by her. The other in my view is properly conceptualised as the obligation to care for and bring up the child. That too is, in the great majority of cases, primarily born by her. However, there are cases where it is shared, more or less equally, or where the primary carer is the father. My tentative view is, however, that if there is a sufficient relationship of proximity between the tortfeasor and the father who not only has but meets his parental responsibility to care for the child, then the father too should have a claim. e
However, the issue does not arise in this case, and so it is unnecessary to express a concluded view. f

[94] On this question, too, the deemed equilibrium, which denies damages for bringing up a normal child, is not unhelpful to the analysis. The ordinary parental transaction in respect of ordinary children, in which one parent provides most of the care and the other provides most of the out-of-pocket expenditure, can be left g
h
j

- a* out of account (this is perhaps fortunate, for the evidence is that in all too many families those varying contributions are nowhere near in equilibrium and the major burden, both caring and financial, is borne by only one parent). The difference between a normal and a disabled child is primarily in the extra care that they need, although this may bring with it extra expenditure. It is right, therefore, that the parent who bears those *extra* burdens should have a claim.
- b* [95] Longmore J considered that such a claim would not 'stick in the gullet'. I agree. Whatever the commuter on the Underground might think of the claim for Catherine McFarlane, it might reasonably be thought that he or she would not consider it unfair, unjust or disproportionate that the person who had undertaken to prevent conception, pregnancy and birth and negligently failed to do so were held responsible for the extra costs of caring for and bringing up a disabled child.
- c* [96] For those reasons, as well as those given by Brooke LJ, I would dismiss this appeal.

SIR MARTIN NOURSE.

[97] I agree.

Appeal and cross-appeal dismissed. Permission to appeal to the House of Lords refused.

Dilys Tausz Barrister.

Morris v KLM Royal Dutch Airlines

[2001] EWCA Civ 790

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, PETER GIBSON AND LATHAM LJ

12, 13 MARCH, 17 MAY 2001

Carriage by air – Carriage of passengers – International carriage – International convention imposing liability on carrier for ‘bodily injury’ to passenger arising from ‘accident’ – Claimant travelling on aircraft operated by defendant – Fellow passenger indecently assaulting claimant while sleeping – Claimant suffering mental injury but not physical injury – Whether claimant suffering ‘accident’ – Whether ‘bodily injury’ including mental injury – Carriage by Air Act 1961, Sch 1, Pt I, art 17.

When she was 15 years old, the claimant, M, flew unaccompanied from Kuala Lumpur to Amsterdam on an aircraft operated by the defendant airline. She fell asleep, and awoke to discover the man sitting next to her touching her left thigh. Although M sustained no physical injury, she became very distressed, and was later diagnosed as suffering from a clinical depression. She brought an action for damages against the airline, relying on art 17^a of the Warsaw Convention 1929 (as set out in Sch 1 of the Carriage by Air Act 1961). Under that provision, the carrier was liable for damage sustained in the event of the death or wounding of a passenger or any other ‘bodily injury’ suffered by a passenger if the ‘accident’ which caused the damage so sustained took place on board the aircraft or in the course of the operations of embarking or disembarking. On applications by both parties for summary judgment, the judge found for M on the question of liability. The airline appealed, contending that the indecent assault on M was not an ‘accident’ within the meaning of art 17 since it was not related to the operation of the aircraft or characteristic of air travel. Although M did not accept that that was the correct test, she contended that it was satisfied on the facts of the case. She further submitted that ‘bodily injury’—‘lésion corporelle’ in the French text—included mental injury and accordingly was not confined, as the airline contended, to physical injury.

Held – (1) There was no doubt that the accident that had befallen M exemplified a special risk inherent in air travel and that, whatever the precise test might be, it constituted an ‘accident’ within the meaning of art 17. Circumstances were rare that resulted in a 15-year old girl settling down to sleep in close proximity to an unknown man. M could therefore satisfy the requirement, if so it was, of demonstrating that the ‘accident’ related to, or was characteristic of, carriage by air (see [27], [29]–[31], below).

(2) On the true construction of art 17 of the convention, ‘bodily injury’ meant physical injury. There was nothing to suggest that in 1929 claims for mental injury or distress—other than in consequence of the death or physical injury of the claimant or someone related to him—were encountered in any of the jurisdictions of the parties to the convention. No mention had been made of liability for mental injury in the course of the negotiations that resulted in the convention, and it was a rational deduction that the drafters had not contemplated

^a Article 17 is set out at [4], below

- a psychic injury. They were correct, at the time, not to envisage claims for such injury as an area of liability that required to be addressed in the convention, for decades were to elapse before any such claim was advanced against an air carrier. Those considerations led to the firm conclusion that when those who had drafted the convention used the phrase 'lésion corporelle'/'bodily injury', they had intended it to have its natural meaning, namely physical injury, and had not intended that it would extend to a different type of harm, namely mental injury.
- b The phrase had for the drafters a uniform meaning, and changes that had since occurred in the attitude of different jurisdictions to liability for causing mental injury could not effect a change in the meaning to be accorded to that phrase in the convention. It followed in the instant case that M's claim was not open to her under the convention, and accordingly the appeal would be allowed (see [96], [97] and [100]–[104], below).
- c

Notes

For liability of carriers for injury to passengers, see 2 *Halsbury's Laws* (4th edn reissue) para 1559.

- d For the Carriage by Air Act 1961, Sch 1, Pt I, art 17, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 168.

Cases referred to in judgment

Air France v Saks (1985) 470 US 392, US SC.

- e *Buchanan (James) & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 3 All ER 1048, [1978] AC 141, [1977] 3 WLR 907, HL.

Chaudhari v British Airways plc (1997) Times, 7 May, [1997] CA Transcript 590.

Daddon v Air France (1984) 1 S & B Av R VII/141, Israel SC.

Eastern Airlines Inc v Floyd (1991) 499 US 530, US SC.

El Al Israel Airlines Ltd v Tsui Yuan Tseng (1999) 525 US 155, US SC.

- f *Fenton v J Thorley & Co Ltd* [1903] AC 443, HL.

Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.

King v Bristow Helicopters Ltd [2001] 1 Lloyd's Rep 95, Ct of Sess.

Kotsambasis v Singapore Airlines Ltd (1997) 42 NSWLR 110, NSW SC.

Landress v Phoenix Mutual Life Insurance Co (1934) 291 US 491, US SC.

- g *Maugnie v Cie Nationale Air France* (1977) 549 F (2d) 1256, US Ct of Apps.

McLoughlin v O'Brian [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.

Price v British Airways (1992) 23 Avi Cas 18,465, US District Ct (NY SD).

Sidhu v British Airways plc, Abnett (known as Sykes) v British Airways plc [1997] 1 All ER 193, [1997] AC 430, [1997] 2 WLR 26, HL.

- h *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, [1931] All ER Rep 666, HL.
Swiss Bank Corp v Brink's-MAT Ltd [1986] 2 All ER 188, [1986] QB 853, [1986] 3 WLR 12.

Wallace v Korean Air (2000) 214 F (3d) 293, US Ct of Apps.

White v Chief Constable of the South Yorkshire Police [1999] 1 All ER 1, [1999] 2 AC 455, [1998] 3 WLR 1509, HL.

- j *Zicherman v Korean Air Lines Co Ltd* (1996) 516 US 217, US SC.

Cases also cited or referred to in skeleton arguments

Curley v American Airlines Inc (1994) 22 F (3d) 1092, US District Ct (NY SD).

Langadinos v American Airlines Inc (2000) 199 F(3d) 68, US Ct of Apps.

Levy v American Airlines Inc (1994) 22 F (3d) 1092, US Ct of Apps.

Pittman v Icelandair Inc (1999) 528 US 818, US SC.

Tsevas v Delta Airlines Inc (1 December 1997, unreported), US District Ct (Ill ED).

Appeal

The defendant, KLM Royal Dutch Airlines, appealed from the decision of Judge Carter QC at Bury County Court on 1 December 2000 giving summary judgment on liability to the claimant, Kelly Morris, in proceedings for damages brought by her against the defendant under art 17 of the Warsaw Convention 1929. The facts are set out in the judgment of Lord Phillips of Worth Matravers MR.

Charles Haddon-Cave QC and *Robert Lawson* (instructed by *Beaumont & Son*) for the defendant.

Nicholas Braslavsky QC and *Andrew Singer* (instructed by *Kippax Beaumont Lewis, Bolton*) for the claimant.

Cur adv vult

17 May 2001. The following judgment was delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR (giving the judgment of the court).

[1] This is an appeal from a judgment of Judge Carter QC, given in the Bury County Court sitting at Bolton on 1 December 2000. The material facts, which are agreed, are as follows.

[2] On 6 September 1998 Kelly Morris, the claimant, who was born on 24 September 1982 and was almost 16 years of age, boarded the defendant's aeroplane at Kuala Lumpur on a flight to Amsterdam. She had visited her uncle in Kuala Lumpur and was travelling as an unaccompanied minor. She was seated next to two men who were speaking French to each other. After a meal, she fell asleep and woke to discover the hand of the man next to her touching her left thigh from the hip to the knee. He was caressing her between her hip and knee and his fingers dug into her thigh. She got up, walked away, and told an air hostess what had occurred. She became very distressed and on her return to her home in Bolton she went to see a doctor, Dr Cooling. He found that she was suffering from a clinical depression amounting to a single episode of a major depressive illness. Fortunately she has made a full recovery.

[3] In this action the claimant claims damages in respect of her illness. She does not allege that she suffered any physical injury. Her claim is based on art 17 of the Warsaw Convention 1929, as amended at The Hague in 1955 (the convention). The convention is incorporated into English law as Sch 1 to the Carriage by Air Act 1961. The claimant's claim turns on important issues in relation to the interpretation of art 17. Before Judge Carter each party claimed that those issues fell to be determined in a manner that entitled that party to summary judgment. Judge Carter resolved those issues in favour of the claimant and gave judgment in her favour on liability, with damages to be assessed.

THE ISSUES

[4] Article 17 of the convention provides that:

'The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the

a aircraft or in the course of any of the operations of embarking or disembarking.’

[5] The first issue is whether the claimant’s illness was caused by an *accident* within the meaning of art 17. The second issue is whether her illness constituted *bodily injury* within the meaning of art 17. The meaning of these three words, in the context of art 17, have been analysed repeatedly, and on occasion at very great length, in the courts of a number of signatories to the convention. Some of the jurisprudence consists of detailed analysis of the architecture of what were found, at the end of the day, to constitute blind alleys. We propose to take advantage of the conclusions reached as a result of that analysis without duplicating the exercise that was required to reach those conclusions.

c PRINCIPLES OF INTERPRETATION

[6] The starting point in interpreting art 17 must be to consider the natural meaning of the language of the article itself. The English text of the convention, as scheduled to the 1961 Act, is a translation of the French text, which is also scheduled to the Act. The French is the original text of the convention and s 1(3) of the 1961 Act provides that if there is any inconsistency between the two texts, the French text is to prevail.

d [7] In interpreting the article, it is necessary to consider the convention as a whole and to give it a purposive interpretation: see *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 704, [1981] AC 251 at 279 per Lord Diplock. Later in his speech, Lord Diplock, referring to the convention, said:

e ‘The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 3 All ER 1048 at 1052, [1978] AC 141 at 152, “unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance”.’ (See [1980] 2 All ER 696 at 706, [1981] AC 251 at 281.)

g [8] Lord Diplock went on to observe that it is legitimate to have regard to the ‘travaux préparatoires’ or ‘legislative history’ in order to resolve ambiguities or obscurities in the enacting words. As to this, Lord Wilberforce had earlier remarked:

h ‘... there may be cases where such travaux préparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled: first, that the material involved is public and accessible, and, secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention.’ (See [1980] 2 All ER 696 at 703, [1981] AC 251 at 278.)

j [9] Lord Hope of Craighead clearly had this passage in mind when he stated in *Sidhu v British Airways plc, Abnett (known as Sykes) v British Airways plc* [1997] 1 All ER 193 at 202, [1997] AC 430 at 442, referring to the convention, that:

‘It is sufficient to say that cautious use may be made of this material, the availability to the public of which is not in doubt. But it will only be helpful

if, after proper analysis, it clearly points to a definite intention on the part of the delegates as to how the point at issue should be resolved.' a

[10] Not only is it legitimate to look at the travaux préparatoires as a guide to the interpretation of a statute. It is also legitimate to have regard to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. This principle of public international law is now embodied in art 31.3(b) of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964), which came into force, with prospective effect, on 27 January 1980. b

[11] Finally, assistance should be sought from the relevant jurisprudence both of this country and of other jurisdictions. c

[12] The doctrine of precedent requires this court to follow decisions of the House of Lords and the Court of Appeal of this country, where applicable. While they are not binding, respect falls to be paid to relevant decisions of courts of other signatories to the convention. In an ideal world the convention should be accorded the same meaning by all who are party to it and careful consideration must be given to the reasoning of courts of other jurisdictions, particularly those of high standing, that have grappled with the same problems that are raised by this appeal. d

THE MEANING OF 'ACCIDENT'

[13] The same word is used in both the English and the French texts and there has been no suggestion that the meaning of that word differs in the two languages. On behalf of the defendant, Mr Haddon-Cave QC, contended that the indecent assault suffered by the claimant could not properly be described as an accident. He submitted that— e

'accident must involve an unexpected or unusual event or happening which is external to the passenger and which relates to the operation of the aircraft or could be regarded as a characteristic of air travel.' f

[14] The latter part of this definition cannot be derived from the ordinary meaning of 'accident'. Mr Haddon-Cave submitted that the requirement that the accident must be related to air travel could be deduced from (i) the travaux préparatoires, (ii) a purposive approach to interpretation and (iii) a significant body of United States authority. In argument he relied principally on this final factor. g

[15] Mr Braslavsky QC, for the claimant, was happy to address the meaning of 'accident' on the basis of the American authorities. He submitted (i) that the leading decision of the United States Supreme Court did not justify a finding that there was a requirement that the accident had to be related to air travel but (ii) that if there was such a requirement, it was abundantly satisfied on the facts of this case. h

[16] The case on which both parties principally relied was *Air France v Saks* (1985) 470 US 392. The claimant suffered loss of hearing in her left ear as a result of injury which she alleged was caused by the operation of the air pressurisation system as the aircraft lost height before landing. The issue was whether this was an 'accident' within the meaning of art 17. The Supreme Court held that it was not. The court drew a distinction between the use of the word 'accident' to describe an event causing hurt or loss and the use of the same word to describe j

a the occurrence of the hurt or loss itself, citing the following passage from the speech of Lord Lindley in *Fenton v J Thorley & Co Ltd* [1903] AC 443 at 453:

b 'The word "accident" is not a technical legal term with a clearly designed meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.'

c [17] The court went on to comment ((1985) 470 US 392 at 398–399):

d 'In Article 17, the drafters of the Warsaw Convention apparently did make an attempt to discriminate between "the cause and the effect"; they specified that air carriers would be liable if an accident caused the passenger's injury. The text of the Convention thus implies that, however we define "accident", it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone. American jurisprudence has long recognized this distinction between an accident that is the cause of an injury and an injury that is itself an accident. See *Landress v Phoenix Mutual Life Ins. Co.* ((1934) 291 US 491).' (O'Connor J's emphasis.)

e [18] The court went on to consider the travaux préparatoires to see whether these threw any light on the nature of the 'accident' that the convention required should be demonstrated to give rise to liability and concluded (at 403) that 'Like the text of the Convention, however, the records of its negotiation offer no precise definition of "accident"'.
f

[19] The court then considered jurisprudence of both the courts of America and of other signatories to the convention before giving its own definition (at 405):

g 'We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries. *Maugnie [v Cie Nationale Air France]* ((1977) 549 F (2d) 1256 at 1262). For example, lower courts in this country have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers.'
h

[20] In referring, with approval, to the inclusion in the definition of 'accident' of torts committed by fellow passengers, the court said nothing to suggest that those torts had, in some respect, to relate to the operation of the aircraft or to be a characteristic of air travel, although this could be said to have been a feature of cases cited by the court by way of illustration of such accidents. The court concluded (at 406):
j

'But when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.'

[21] These words described the circumstances in which the claimant had sustained her injury and the court concluded, in consequence, that her claim was not made out. a

[22] Although the Supreme Court did not suggest that an 'accident' had, in some respect, to be related to or a characteristic of air travel, subsequent decisions in the United States imposed this requirement. Thus, in *Price v British Airways* (1992) 23 Avi Cas 18,465, the District Court for the Southern District of New York rejected a claim by a passenger who had been injured in a fight with another passenger on the ground that the accident which caused the damage had no relationship with the operation of the aircraft. Mr Haddon-Cave relied on this, and other cases to like effect, in contending that, even if the assault suffered by the claimant in the present case was an 'accident', it had no relationship with the operation of the aircraft and thus involved no liability on the part of the defendant. b

[23] In *Chaudhari v British Airways plc* (1997) Times, 7 May, [1997] CA Transcript 590 the Court of Appeal in this country founded on the decision in *Saks*' case when rejecting a claim under art 17 of a disabled passenger who had sustained an injury as a result of falling while leaving his seat to go to the lavatory in the course of a flight. Leggatt LJ held that the plaintiff's accident— c

'was not caused by any unexpected or unusual event external to him, but by his own personal, particular or peculiar reaction to the normal operation of the aircraft.'

[24] The definition of 'accident' in *Saks*' case gives that word a natural and sensible meaning in the context in which it appears and has been approved by this court. We propose to apply it in the present case. d

[25] There is nothing in *Saks*' case that justifies the requirement that an 'accident' must have some relationship with the operation of the aircraft or carriage by air. Nor do we consider that a purposive approach to interpretation requires that gloss on the word. Article 20 of the convention provides: e

'The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.'

[26] Liability under art 17 only arises in relation to an accident that occurs on board the aircraft or in the course of embarking or disembarking. Thus the accident will occur at a time when the passenger is in the charge of the carrier. In those circumstances it seems to us to be a logical and reasonable scheme of liability that, whatever the nature of the accident, a passenger should be entitled to be compensated for its consequences where the carrier is not able to discharge the burden imposed by art 20. f

[27] It is not, however, necessary to decide this point, for we agree with Mr Braslavsky that, on the facts of this case, the claimant can satisfy the requirement, if so it be, of demonstrating that the 'accident' that occurred related to or was a characteristic of her carriage by air. This can be demonstrated by reference to a recent case of very similar facts. This is a decision of the United States Court of Appeal, Second Circuit, on appeal from another decision of the District Court for the Southern District of New York—*Wallace v Korean Air* (2000) 214 F (3d) 293. The basis of the plaintiff's claim under art 17 was that she had been sexually assaulted by the passenger seated next to her—the details of the assault appear sufficiently from the passage that we are about to cite. The court was concerned with a preliminary issue of whether or not this constituted an g

a 'accident'. The majority of the court drew attention to the fact that, since *Saks*' case, two lines of authority had developed. One held that there was a requirement that the accident should have some relationship with air travel; the other did not. The majority observed that 'this Talmudic debate is academic in the unique circumstances of this case' and went on to give the following explanation for finding in favour of the plaintiff on the issue:

b "Turning to the particular facts that give rise to an "accident" in this case, it is plain that the characteristics of air travel increased Ms Wallace's vulnerability to Mr Park's assault. When Ms Wallace took her seat in economy class on the KAL flight, she was cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator. The lights were turned down and the sexual predator was left unsupervised in the dark. It was then that the attack occurred. Equally important was the manner in which Mr Park was able to carry out his assault. While Ms Wallace lay sleeping, Mr Park: (1) unbuckled her belt; (2) unbuttoned her shorts; (3) unzipped her shorts; and (4) squeezed his hands into her underpants. These could not have been five-second procedures even for the nimblest of fingers. Nor could they have been entirely inconspicuous. Yet it is undisputed that for the entire duration of Mr Park's attack not a single flight attendant noticed a problem. And it is not without significance that when Ms Wallace woke up, she could not get away immediately, but had to endure another of Mr Park's advances before clambering out to the aisle. In sum, recognizing the flexibility called for by *Saks*, we are satisfied that Mr Park's assault on Ms Wallace was, in the language of *Saks*, "an unexpected or unusual event or happening that [was] external to the passenger" ((1985) 470 US 392 at 405). As such, it constituted an "accident" for purposes of Article 17 of the Warsaw Convention.'

f [28] Mr Haddon-Cave sought to distinguish this decision on its facts. He submitted that in the present case there were no facts found that created any relationship between the assault on the claimant and the fact that she was being carried by air. It had not been found that she was in a cramped space in close proximity to the 'predator', nor that the lights were dimmed, nor that the assault continued over a significant period of time. He added that there were other situations where strangers came into close physical proximity—on the railway, in the underground or in the cinema.

g [29] We were not persuaded by these submissions. All that the authorities relied upon by the defendant require is that the accident should be brought about or facilitated by some special feature of air travel, not that that feature should be unique. Judges do not travel exclusively in first-class seats and can take judicial notice of the fact that those who travel economy have to accept relatively cramped conditions which bring them into close proximity with their neighbours. Circumstances are rare that result in a 15-year-old girl settling down to sleep in close proximity to an unknown man. Indeed, as Mr Braslavsky pointed out, the youth of the claimant was an additional special feature that was absent in *Wallace's* case.

j [30] Mr Braslavsky drew our attention to a standard form used by the defendant in relation to the carriage of unaccompanied minors. This includes a space for entry of the name of the minor's 'escort in flight'. This suggests, as one would expect, that the defendant accepts a degree of responsibility for the care of unaccompanied minors in flight.

[31] We have no doubt that the accident that befell the claimant exemplified a special risk inherent in air travel and that, whatever the precise test may be, it constituted an 'accident' within the meaning of that word in art 17. Judge Carter reached the same conclusion, but on the wider basis that an unusual event or happening external to the passenger constitutes an 'accident' whether or not it is a characteristic of air travel. This was a conclusion shared by Judge Pooler, who delivered a minority judgment in *Brandi Wallace* in which he gave his own reasons for concurring with the decision of the majority.

BODILY INJURY

The issue

[32] The defendant's case is that 'bodily injury' in art 17 means injury that results in some form of physical damage to the structure of the body and does not extend to illness of the mind. The claimant's case is that 'bodily injury' encompasses both physical injury and mental injury. The conclusion of Judge Carter appears from the following short paragraph in his judgment (at p 7):

'... what the parties believed in 1929 by bodily injury is not an end to the matter. The decisions which have held that hijack or other forms of modern terrorism amount to an accident are not said to be wrong because hijack was not anticipated or thought of in 1929. In the same way, why should mental illness without physical injury not amount to bodily injury although mental illness may not have been thought of in this context in 1929.'

[33] The judge also observed that he was following the majority in the recent decision of the Inner House of the Court of Session in *King v Bristow Helicopters Ltd* [2001] 1 Lloyd's Rep 95, a case that we shall have to consider in detail in due course.

[34] The analogy drawn by Judge Carter between a hijack and mental illness is not necessarily apt. Both 'accident' and 'bodily injury' are generic descriptions. It does not follow from the fact that a hijack falls, in the context of the convention, within the genus of 'accident' that mental illness can be drawn within the genus of 'bodily injury'. That question is one which requires detailed analysis. This analysis involves consideration of a number of other articles of the convention, and it may be helpful to set these out at this stage, together with art 17, using the English text:

'CHAPTER III LIABILITY OF THE CARRIER

Article 17

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air ...

Article 19

a The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

Article 20

b The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 21

c If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability ...

Article 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

d (2) In the cases covered by Article 17, the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.'

THE DISTINCTION BETWEEN PHYSICAL INJURY AND MENTAL INJURY

e [35] This appeal has proceeded on the premise that there is a distinction between physical injury and mental injury; that physical injury involves damage or adverse change to the structure of the body, whereas mental illness adversely affects the wellbeing of the mind without organic change to the body.

f [36] This was undoubtedly the general belief in the 1920s, when the terms of the Warsaw Convention were negotiated. Today it is recognised that the picture is less clear. In *McLoughlin v O'Brian* [1982] 2 All ER 298 at 301, [1983] 1 AC 410 at 418 Lord Wilberforce observed:

g 'Although we continue to use the hallowed expression "nervous shock", English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact.'

h [37] More recently in *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1 at 5, [1999] 2 AC 455 at 463, Lord Griffiths said:

j 'As medical science advances we realise how difficult it is to separate out the physical and psychiatric consequences of trauma, and I believe the law would do better to regard both as personal injury ...'

[38] In *Mullany on Tort Liability for Psychiatric Damage* (1993) p 18 the authors comment:

'It should be noted that *physical* symptoms resulting from shock, such as strokes, miscarriages, peptic ulcerations or increased blood pressure, will fall outside the category of recognisable psychiatric illness. This does not mean

that such harm is not compensable, merely that it is conceptually distinct from damage to the mind.' (Author's emphasis.)

[39] *Munkman on Damages for Personal Injuries and Death* (10th edn, 1996), also draws a distinction between physical and mental injury. In a footnote at p 118, however, the author notes:

'But no doubt long-term malfunctioning also produces physical changes in parts of the brain or its chemistry. Some psychiatric treatments are physical (eg drugs, electro-convulsant therapy) ... The latest investigations indicate that many mental disorders are due to excess or deficiency of complex chemicals in the brain, and the trend is towards the use of drugs which counteract this. No one knew why ECT worked—perhaps this too had a chemical effect—but it gave relief in many depressive cases though there has been much ill-informed criticism of it.'

[40] These passages lead to the reflection that it is possible that every mental illness may, in time, be shown to be accompanied by and consequent upon some change to the physical structure of the body, so that mental illness can properly be described as a type of physical injury. That stage has not yet been reached, however, and this appeal must be approached on the premise that mental illness and physical injury are distinguishable and that the claimant, as she accepts, suffered no physical injury.

THE NATURAL MEANING OF 'BODILY INJURY'/'LÉSION CORPORELLE'

[41] Mr Haddon-Cave submitted that the meaning of 'bodily injury', and of the primary French phrase 'lésion corporelle', was clear and unambiguous, so that reference to external aids to interpretation was neither necessary nor permissible. In his skeleton argument he put the matter thus:

'... the words "wounding ... or any other bodily injury" are inapposite linguistically to describe purely mental illness or injury. They both connote physical injury as opposed to mental or spiritual injury. In the case of "bodily injury" this is reinforced by the express reference back to "wounding" by inclusion of the words "any other". The French text uses the words "blessure ou de toute autre lésion corporelle" which have the same meaning.' (Author's emphasis.)

[42] Mr Braslavsky countered:

'It is incorrect to treat the use of the word "corporelle" in the French text as necessarily distinguishing between injuries to the body and injuries to the mind. Nor does it follow that such was the intention of the legislators. There is no reason to interpret narrowly. It is entirely capable of being interpreted as covering any injury whatever which can properly be regarded as affecting the body. Such a construction would be capable of including psychological injury.'

[43] Mr Haddon-Cave's submission was ambitious. Most who have previously considered the phrase, whether in English or in French, have recognised that it is ambiguous. 'Lésion' and 'injury' can be used, without qualifying adjective, to describe physical damage to the body. Each word can also be used, however, to describe a much wider range of prejudice. Thus the first meaning of 'lésion' given by the 1981 edition *Petit Robert* dictionary is 'atteinte portée aux intérêts de' and the first two meanings of 'injury' given by the 1973 edition of the *Shorter Oxford English*

a Dictionary are 'wrongful action or treatment; violation or infringement of another's rights'. There is an issue as to whether the addition of the adjective 'corporelle'/'bodily' was designed to restrict the meaning of the noun to physical damage to the body or to restrict it less stringently to harm having an effect upon the body, comprehending both physical injury and mental illness.

b [44] In support of the wider meaning of the phrase, Mr Braslavsky, following in the footsteps of prior analysts of the language, drew attention to the fact that art 17 of the convention is dealing with the death of or injury affecting the *person* of the passenger, in contrast to art 18, which is dealing with the loss of or damage to *property*. He submitted that the use of the adjective 'corporelle'/'bodily' was explicable by a wish to underline the contrast between these two types of prejudice.

c [45] We accept that there is sufficient ambiguity in the phrase 'lésion corporelle'/'bodily injury' to open the door to the meaning for which Mr Braslavsky contends, if the purposive approach, which must be brought to the interpretation of the convention, drives one to the conclusion that this was the meaning that the parties to the convention intended the words to bear. None the
d less, we consider that the interpretation contended for by Mr Haddon-Cave is that which gives the words their natural meaning in their context. 'Bodily injury' bears the natural meaning of injury to the body. 'Wounding' is a specific type of injury to the body. 'Wounding ... or any other bodily injury' naturally embraces all varieties of physical injury but does not, without stretching its natural
e meaning, extend to mental illness. Equally, the effect of the addition of the adjective 'corporelle' to the word 'lésion' is not merely to make it plain that the type of harm described is that which affects the body. 'Lésion', when used in the context of harm affecting the body, bears the natural meaning of physical harm. This point is made by Dr Georgette Miller in her work *Liability in International Air Transport* (1977) pp 127–128:

f 'A much stronger argument in favour of considering that Article 17's conditions are not met when there is mental injury alone is provided by the use of the word "lésion". "Lésion" is classically defined as: "Changement morbide quelconque survenu dans les organes". Another authoritative, but
g more recent definition is: "Changement grave dans les caractères anatomiques et histologiques d'un organe sous l'influence d'une maladie, d'un accident." The two definitions emphasise the fact that an organ is affected. Their physical connotations are obvious. This is illustrated by constructing the expression "lésion mentale". If one accepts the literal definitions, it would be difficult to argue that "lésion mentale" refers to mental injury because of the physical connotations of the word "lésion". Perhaps "lésion mentale" could
h be interpreted as a poorly worded reference to an injury to the brain. Such an interpretation would avoid the antinomy between the terms since both would refer to a physical object. The word "lésion" is also used as an abstract term in French law. The physical connotations of the literal meaning are then absent. An example of the utilisation of "lésion" in an abstract or
j figurative sense is the "lésion" of a right, such as the right to obtain a fair price in some contracts of sale. Another instance is the requirement that no claim for damages may be sustained if it does not relate to the 'lésion' of a legally protected interest. There is no ambiguity as to the sense in which "lésion" is used in Article 17. It cannot be argued that it is used abstractly, thus allowing the requirement that the word must have physical implications to be

disregarded. It appears from its context that Article 17 refers to the physical world by listing the occurrences of death, wounding, and "toute autre lésion corporelle" as conditions for the carrier's liability under the Convention. If "lésion corporelle" is to be consistent with the preceding words, "lésion" must be taken in its literal sense, with its physical connotations. Consequently, an interpretation of Article 17 based purely on the literal meaning of the words would lead to the conclusion that the requirement of "lésion corporelle" is not satisfied by mental injury alone.'

[46] Dr Miller goes on to observe that the French courts would not necessarily apply the literal meaning of art 17 but, adopting what we would describe as a purposive approach, might give the words a more liberal construction so as to include mental injury. We turn to consider whether external indications suggest that the natural meaning of the words in question should be stretched to embrace mental injury.

TRAVAUX PRÉPARATOIRES

[47] A detailed account of the travaux préparatoires is to be found in the judgments of the three members of the Inner House in *King's* case. The notable feature of the travaux is that there is not, from beginning to end, any mention by any of those taking part in the exercise of negotiating the terms of the convention of the scope of the injuries which ultimately formed the subject matter of art 17. This led the Lord President to observe ([2001] 1 Lloyd's Rep 95 at 107) that, applying the approach to the use of travaux préparatoires laid down by the House of Lords in *Fothergill's* case:

'... this Court would simply have to conclude that the travaux préparatoires could be of no assistance since it is accepted that the question of psychological injury is not discussed in them.'

[48] Lord Rodger, nonetheless, went on to apply a wider approach to the use of travaux préparatoires by considering whether any inferences could validly be drawn from the fact that no mention was made of mental injuries in the travaux. He concluded (at 109) that any inferences would be based on speculation rather than fact, and would not provide a sound factual basis for inferring that the signatories' intention was to limit the scope of 'bodily injury' so as to exclude psychological injury.

[49] Lord Reed carried out a similar exercise, and concluded (at 142):

'The travaux préparatoires do not support any theory that the signatories to the Warsaw Convention had a specific intention either to include or to exclude liability for psychiatric disorders. They do, on the other hand, confirm that arts 17, 18 and 19 should be read as a whole, concerned respectively with passengers, goods and delay.'

[50] We agree that the travaux préparatoires do not afford the type of clear indication of intention that enables them to be used to resolve the ambiguity that exists in this case. At the same time we believe that the fact that no mention was made of mental injury is not without significance when one comes to consider the overall purpose and scheme of the convention. We will return to it in that context in due course.

SUBSEQUENT PRACTICE IN THE APPLICATION OF THE CONVENTION

a [51] We have been referred to no case raising the issue whether mental injury falls within or without the scope of art 17 prior to *Daddon v Air France* (1984) 1 S & B Av R VII/141, although references indicate that this became a live issue in the United States in the 1970s.

b [52] Thus there is no evidence of settled practice on the part of the signatories to the convention indicating whether or not they considered that claims for mental illness fell within the scope of art 17. We shall, in due course, comment on the significance of the absence of such evidence.

[53] What did occur was a series of occasions on which consideration was given to revising the terms of the Warsaw Convention. These included:

c Periodic consideration by the Legal Committee of the International Civil Aviation Organisation, which was established in 1947;

A conference at The Hague in 1955 which resulted in a Protocol revising certain provisions of the convention. The United Kingdom gave effect to this Protocol by the 1961 Act;

d An agreement concluded in Montreal in 1966 under which the signatories agreed to increase their liability limit per passenger and to waive their rights under art 20(1) of the convention. This agreement only applied to flights with a connecting point in the United States;

e A conference in Guatemala in 1971, which led to a number of countries, including the United Kingdom, signing a Protocol making certain amendments to the convention. This Protocol has, however, not been ratified by the United Kingdom and is not yet in force;

A conference in Montreal in 1999 which adopted a new convention on air law which has not yet come into force in this country.

f [54] Details of these events are set out in the judgments of Lord Rodger and Lord Reed in *King's* case. It suffices to state that on occasion there was inconclusive discussion on the desirability of making it clear whether or not the provisions of art 17 extended to an accident of which the only consequence was mental injury. Article 17(1) was revised by the 1999 Montreal Convention to provide:

g 'The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

h [55] We have been informed that the travaux préparatoires of that convention are to include the following statement:

j 'With reference to Article 17 paragraph 1 of the Convention, the expression "bodily injury" is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air.'

[56] These events afford no assistance in determining whether or not the signatories of the Warsaw Convention intended, in 1929, that 'bodily injury' in art 17 should comprehend injury that was purely mental.

THE OBJECTS AND SCHEME OF THE WARSAW CONVENTION

[57] If a purposive approach is to be given to the interpretation of the provisions of the convention it is first necessary to identify the object which those who were party to it were attempting to achieve. The preamble to the French text of the convention recorded: a

‘Ayant reconnu l'utilité de régler d'une manière uniforme les conditions, du transport aérien international en ce qui concerne les documents utilisés pour ce transport et la responsabilité du transporteur.’ b

[58] The English text was headed: ‘Convention for the Unification of Certain Rules relating to International Carriage by Air.’

[59] It is beyond doubt that the primary object of the convention was to bring about a degree of uniformity in relation to the legal liability of carriers by air. It is less easy to identify how far that uniformity was intended to extend. c

[60] Chapter III of the convention deals with the ‘Liability of the Carrier’. The scheme of the chapter is to identify a number of events giving rise to damage and to make uniform provisions in relation to some aspects of liability in relation to such damage. Those events are, so far as the person of the passenger is concerned, death or bodily injury caused by an accident on board the aircraft or in the course of any of the operations of boarding or disembarking (art 17). d

[61] The uniform provisions that apply to such damage have the following effect: (i) the carrier is liable for the damage unless he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures (art 20); (ii) the carrier’s liability is limited (art 22) unless it is proved that the damage was caused intentionally or recklessly with knowledge that damage would probably result (art 25); and (iii) the carrier’s liability is extinguished if action is not brought within two years (art 29). e

[62] The terms of the convention make it plain that some aspects of liability remain to be governed by the domestic law applicable in the individual case, namely: (i) the effect of contributory negligence (art 21); and (ii) the persons who have the right to bring suit and their respective rights (art 24(2)). f

[63] The express terms of the convention leave unanswered some major questions as to the degree of uniformity which is to be achieved. g

[64] One such question is whether the provisions of the convention define exclusively the events which can give rise to liability on the part of the carrier. The House of Lords has recently answered this question in the affirmative: *Sidhu’s* case. The supreme courts of both Israel and the United States deliberately left this question unresolved in decisions to which we shall be making detailed reference in due course, but the United States Supreme Court has since reached the same conclusion as the House of Lords in *Sidhu’s* case—see *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155. h

[65] A second question is whether arts 17, 18 and 19 create causes of action, or, where the convention does not have direct effect, require signatories to create causes of action. j

[66] This country has given effect to the Warsaw Convention by the Carriage by Air Act 1932 and to the Warsaw Convention as amended by the Hague Protocol by the 1961 Act. In *Swiss Bank Corp v Brink’s-MAT Ltd* [1986] 2 All ER 188 at 189, [1986] QB 853 at 856, Bingham J observed that one obvious purpose of the convention—

a 'is to enable a plaintiff to recover damages even though, in the absence of the convention and the 1961 Act, he might have no cause of action which would entitle him to succeed. His right of action is not dependent on proving negligence or any breach of contract in any ordinary sense. So the convention confers an obvious advantage on a plaintiff.'

b [67] We have no difficulty with the conclusion that the convention was intended to create a uniform set of circumstances in which a carrier by air would be obliged to pay compensation for *damage* sustained. That, however, raises the question of what *damage*. Articles 17 and 18 each stipulate that the carrier is 'liable for damage ['dommage' in French] sustained' in an event which, itself, may involve a type of damage—bodily injury in the case of art 17; destruction of or
c damage to goods in the cause of art 18.

[68] In *Fothergill's* case [1980] 2 All ER 696 at 700, 710, [1981] AC 251 at 273, 286 Lord Wilberforce and Lord Fraser respectively said, obiter, that 'damage'/'dommage' in arts 17, 18 and 19 meant monetary or economic loss. Bingham J accepted that this was correct in *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 All ER 188 at 189–190, [1986] QB 853 at 857. If this is indeed correct, 'dommage' has a uniform
d meaning in the convention—a meaning which would appear to preclude any award for pain, suffering and loss of amenities in relation to an injury caused in the course of carriage by air. Such a result is not fanciful. In 1929 the domestic law of a number of the signatories to the convention restricted the damage in respect of which damages were recoverable for personal injury to pecuniary loss.
e Yet Mr Haddon-Cave did not advance this argument in support of a contention that the claimant had no right to recover general damages for mental injury. Nor were we referred to any authority in which it was argued, let alone held, that liability in damages under art 17 did not extend beyond liability for economic loss.

f [69] Before us both counsel accepted as correct the recent analysis on this difficult topic of the United States Supreme Court in *Zicherman v Korean Air Lines Co Ltd* (1996) 516 US 217. The issue in that case was whether a claimant was entitled to recover under art 17 damages for 'loss of society' in respect of the death of a relation in a plane crash. Justice Scalia, delivering the unanimous opinion of the court, observed (at 221):

g 'It is obvious that the English word "damage" or "harm"—or in the official text of the Convention, the French word "*dommage*"—can be applied to an extremely wide range of phenomena, from the medical expenses incurred as a result of Kole's injuries (for which every legal system would provide tort compensation) to the mental distress of some stranger who reads about
h Kole's death in the paper (for which no legal system would provide tort compensation). It cannot seriously be maintained that Article 17 uses the term in this broadest sense, thus exploding tort liability beyond what any legal system in the world allows, to the farthest reaches of what could be denominated "harm". We therefore reject petitioners' initial proposal that
j we simply look to English dictionary definitions of "damage" and apply that term's "plain meaning."'

[70] The court then went on to conclude (at 223–225) that there was only one realistic solution to the problem, which was—

'that "*dommage*" means (as it does in French legal usage) "legally recognizable harm," but that Article 17 leaves it to adjudicating courts to

specify what harm is cognizable ... The most natural reading of this Article is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states.' a

[71] All three members of the Inner House in *King's* case accepted that the analysis in *Zicherman's* case was correct and, in the absence of any jurisprudence to support the obiter observations in *Fothergill's* case, so shall we. b

[72] The meaning of 'damage/dommage' in art 17 formed a significant element in the reasoning of the Inner House in *King's* case and it is now time to turn to consider that decision, and three decisions in other jurisdictions that bear directly on the issue that we have to resolve. c

[73] *Daddon's* case involved two appeals which were heard together by the Israel Supreme Court in 1984. They are reported in an English translation from the Hebrew text. Israel became party to the Warsaw Convention in 1949. Long after the two-year period of prescription under art 29 had expired, claims for damages were brought by passengers in respect of 'mental anguish' allegedly sustained as a result of being held captive by hijackers at Entebbe Airport in 1976. Air France argued that the claims arose from 'bodily injury' within the terms of art 17 and were time-barred by virtue of art 29. The passengers argued that claims for mental anguish did not constitute claims arising from 'bodily injury', that they were not covered by the convention and that they could consequently be brought without the restraint of the convention's two-year time limit. The Supreme Court held that 'bodily injury' under art 17 extended to include mental injury and that the claims were time-barred. In reaching this conclusion the Supreme Court considered a considerable body of American case law and academic writing on the point. The court concluded that the legislative history was of little assistance because— d
e
f

'apparently, the parties to the convention had no intention whatsoever in this connection, either because most of the states at that time had not yet recognised mental anguish as a cause of action for the obtaining of compensation, or by reason of the fact that the parties to the convention did not contemplate the possibility of mental anguish which was not accompanied by physical injury as a result of an air accident.' (See (1984) 1 S & B Av R VII/141 at VII/152.) g

[74] The court then observed that—

'the need has arisen for a renewed examination of the aims of the convention and the application thereof, while taking into account the changes which have taken place in the factual infrastructure which serves as the foundation for it since the signing of the convention. A different method of interpretation would result in the convention marking time in preserving the principles enunciated in it, without having the power to serve the needs of modern realities.' h
j

[75] The changes in the factual infrastructure that the court identified included the rapid development of civil air transportation and a growing tendency in common law jurisdictions to recognise the validity of claims for damages in relation to 'mental anguish' unaccompanied by any physical injury.

a The conclusion of the court appears in the following passage of the judgment delivered by Judge D Levine (at VII/153):

b 'In view of all the foregoing, and particularly in the light of the rapid development of air transport, in all its branches, and the ever-increasing tendency which manifests itself around the world and in Israel to recognise the duty to compensate pure mental anguish, we must pose for ourselves the question—what is the desirable judicial policy we should apply in regard to a proper interpretation of the term 'bodily injury' for purposes of art 17 of the convention. In view of the objects of the convention as described above, and on the background of the above mentioned developments, it would be proper, in my opinion, from the point of view of the aforesaid judicial policy, to interpret art 17 of the convention in the widest possible way so that it would be possible in pursuance thereof to award compensation also for pure mental anguish.'

c [76] The approach of the Supreme Court to the interpretation of art 17 has been criticised in subsequent cases, including *King's case* [2001] 1 Lloyd's Rep 95 at 100, 122 and 144 per Lord Rodger, Lord Cameron and Lord Reed respectively. We, like Lord Reed (at 144)—

d 'agree with the comment of Stein, J.A. in the Australian case of *Kotsambasis v. Singapore Airlines Ltd.* ((1997) 42 NSWLR 110 at 121): "It seems to me however that this poses the wrong question. It is impermissible to construe the Convention in the light of the changes in civil aviation transport since 1929 and the current domestic law view of mental or psychological injury. Rather the construction should seek to ascertain the intention of the drafters and signatories as expressed by Marshall J. in *Floyd*. What may be seen as a desirable policy goal cannot be given effect to by the courts unless it was within the intention of the signatories to the Convention. If domestic law notions are utilised by national courts as an aid to construction of the Convention, the stated purpose of achieving uniformity will be diminished."

e [77] The effect of an international convention is, necessarily, that the agreement it contains will 'mark time' in accordance with its terms. In so far as developments of individual domestic laws render it outmoded, the remedy is to amend it. Such amendment in relation to art 17 was considered, but not pursued, when the Montreal Convention was negotiated.

f [78] In *Eastern Airlines Inc v Floyd* (1991) 499 US 530, the issue was whether damages for a condition of mental distress, unaccompanied by physical injury, induced by apprehension on the part of passengers that their plane was about to ditch in the Atlantic Ocean, were recoverable under art 17 of the convention. The Supreme Court resolved conflicting findings on the point on the part of a number of inferior courts by holding that they were not. In reaching this unanimous conclusion the Supreme Court was influenced by a number of considerations.

g [79] First, the Supreme Court concluded, as have we, that the more natural meaning of the words 'lésion corporelle'/'bodily injury' was *physical* injury but that the phrase was ambiguous (at 542):

h 'In sum, neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that "lésion corporelle" should be translated other than as "bodily injury"—a narrow meaning excluding

purely mental injuries. However, because a broader interpretation of “*lésion corporelle*” reaching purely mental injuries is plausible, and the term is both ambiguous and difficult ... we turn to additional aids to construction.’ a

[80] The Supreme Court then considered the travaux préparatoires and concluded that the absence of any reference to mental injury was indicative that the signatories had no specific intention to permit recovery for purely mental injury (at 544–545): b

‘Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.’ c

[81] The Supreme Court (at 551) derived no assistance from the subsequent history of the convention, and disapproved the approach of the Israel Supreme Court in *Daddon’s* case. d

[82] Thus the Supreme Court concluded that there was no reason to depart from the more natural, and narrower, meaning of ‘*lésion corporelle*’/‘bodily injury’. In conclusion the court expressed the view (at 552) that its interpretation better accorded with the convention’s stated purpose of achieving uniformity of rules, although we read this rather as a comment on the effect of the court’s conclusion than as an additional reason for it. e

[83] *Floyd’s* case was followed by the Supreme Court of New South Wales in *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110, which involved an appeal against an award of general damages awarded in respect of psychological injury sustained by a passenger as a consequence of an incident in which an engine of the aircraft in which she was travelling caught fire. In the leading judgment, after referring to this decision, Meagher JA said (at 115): f

‘I am of the opinion that the term “bodily injury” was not intended to, and on a proper construction of the Convention does not, include purely psychological injury.’ g

[84] Finally we turn to *King’s* case in which the relevant issue was whether the pursuer could recover damages under art 17 in respect of post-traumatic stress disorder that he suffered in consequence of a helicopter accident. The Lord President and Lord Cameron held that damages were recoverable. Lord Reed, dissenting, held that they were not. It is not easy to do justice, in summary form, to the detailed and erudite analysis of the Lord President and the supporting judgment of Lord Cameron. We believe, however, that it is possible to identify the following propositions that led the majority to conclude that ‘bodily injury’ embraced both physical and mental injury, rather than bearing the narrower meaning of physical injury. (i) The natural meaning of the phrase, in its context, is the wider rather than the narrower meaning. (ii) A purposive approach to construction favours the wider rather than the narrower meaning. (iii) The narrower meaning contrasts with the heads of damage that are recoverable in a manner that is anomalous. (iv) No conclusion can be drawn from the fact that no mention was made of mental injury in the travaux préparatoires. We propose to consider each of these propositions in turn. h
j

THE NATURAL MEANING OF 'LÉSION CORPORELLE'/'BODILY INJURY'

a [85] Lord Rodger accepted ([2001] 1 Lloyd's Rep 95 at 105) that the meaning which we favour had 'an immediate appeal to the reader' and that it conformed with a recognised meaning of 'lésion'. But he rejected that meaning because, he said, it would make 'corporelle' superfluous. We do not accept that reasoning. Given that 'lésion' can mean bodily injury or other forms of injury such as financial harm, as Lord Rodger recognised, 'corporelle' serves to exclude any forms of injury other than that which is 'corporelle'. Lord Rodger went on to say that the adjective 'corporelle' would have served to exclude pure patrimonial, as opposed to personal injury. In our view that is a somewhat far-fetched purpose to attribute to the use of 'corporelle' in this context, which might be thought plainly to exclude patrimonial loss. Lord Rodger, however, thought that his approach was supported by the broad interpretation adopted in German-speaking countries and by the views of one member of the German delegation at the conference in Warsaw, Dr Otto Riese. But the German version of the text carries little weight, given the supremacy of the French text with which the English text is consistent, and that version was acknowledged to be a 'free translation'. Further, caution must be applied to the views expressed subsequently by one delegate for the reason which Lord Rodger himself gave, that delegates at a conference may not actually all share a common view on the point in issue (at 107).

[86] The Lord President's analysis has not shaken our conclusion that the natural meaning of 'lésion corporelle'/'bodily injury' is physical injury.

e [87] Lord Cameron's conclusion on this matter appears in the following short passage (at 119):

'Looking to the language of art. 17 alone I do not find anything in the phrase "in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger" which necessarily limits "bodily injury" to the extent of excluding psychiatric illness altogether from its ambit or indeed psychiatric illness consequent upon physical injury. While "wounding" imports the concept of external violence applied to the body, the following phrase with the use of the introductory words "any other" can denote a more extended meaning. The use of the word "bodily" insofar as it serves to govern the word "injury" is understandable in a scheme which differentiates between the carrier's liability in the carriage of persons and in the carriage of his baggage, and, in particular, sets differing monetary limits for liability.'

h [88] While we accept that 'bodily injury' does not necessarily exclude purely psychiatric illness, we remain of the opinion that it does so if given its natural meaning. In this we have the support of Lord Reed (at 135).

A PURPOSIVE APPROACH TO CONSTRUCTION

j [89] Lord Rodger quoted (at 99) a statement of Lord Macmillan in *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 at 350, [1931] All ER Rep 666 at 677 to the effect that international conventions have to be construed on 'broad principles of general acceptance'. This led him to conclude ([2001] 1 Lloyd's Rep 95 at 105) that:

'On that basis I see no reason why the phrase "any other bodily injury" or "toute autre lésion corporelle" should be interpreted narrowly; rather, it should be interpreted as covering any injury whatever which can properly be

regarded as affecting the body. So construed, the phrase would be capable of including psychological injury.'

[90] For ourselves we do not see that it is axiomatic that the broad principle of 'general acceptance' militates in favour of a broad rather than a narrow interpretation of bodily injury.

[91] Lord Cameron (at 124) considered it significant that it was contemplated that nations other than the original signatories would adhere to the convention at later dates. This led him to the following conclusion:

'In that event, it seems to me that where the Convention uses general terms, it ought to be concluded that, unless the context in which the general term appears makes the matter plain beyond doubt, the terms are to be construed in accordance with the domestic law of the Court which is then seised of the passenger's action. Moreover, this would also mean that if the domestic law of a particular signatory nation were subsequently to be altered, so that purely psychic or psychological injury came to be recognized as giving rise to a cause of action, the Courts of that jurisdiction would thereafter be free to apply those changed rules to actions raised under art. 17 which came before them.'

[92] This seems to us a novel principle of statutory interpretation which is at odds with the objective of achieving general uniformity.

A NARROW MEANING OF 'BODILY INJURY' CONFLICTS WITH RECOVERABLE HEADS OF DAMAGE

[93] This line of reasoning was based upon the conclusion of the United States Supreme Court in *Zicherman*'s case that the heads of damage recoverable under art 17 fall to be determined under domestic law. The consequence of this conclusion is that those jurisdictions which recognise pain and suffering consequent upon physical injury as a cognizable head of damages can award damages in respect of mental injury that is consequent upon physical harm. This led both the Lord President ([2001] 1 Lloyd's Rep 95 at 115) and Lord Cameron (at 125) to conclude that it was anomalous if the convention precluded recovery for mental injury that was a direct consequence of an accident. This anomaly was all the greater if the convention permitted recovery for physical injury caused by shock rather than physical impact.

[94] We agree that it is, to a degree, anomalous to permit recovery in respect of mental injury consequent upon physical injury and to permit recovery of physical injury consequent mental injury, but not to permit recovery for mental injury which is directly caused by an accident. None the less this was an anomaly that persisted in common law jurisdictions until well after 1929. Furthermore, in many jurisdictions recovery could not be made for any non-pecuniary consequences of personal injury. For these reasons we do not consider that the suggested anomalies assist in the identification of the intended meaning of body injury in 1929.

THE SIGNIFICANCE OF SILENCE

[95] We have referred to the conclusion of the Supreme Court in *Floyd*'s case that those who drafted the convention would most probably have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery. In fact no mention was made of mental injury in the travaux préparatoires. Lord Rodger's reaction to this appears in the following paragraph ([2001] 1 Lloyd's Rep 95 at 109):

a ‘The argument is that the expression “lésion corporelle” is ambiguous and
that, since many systems at the time did not recognize recovery for pure
mental injury, the draftsmen would have felt compelled to make an express
reference to it if they had intended to include it. That is, of course, a possible
construction to put on the historical record. Another possible construction
b would be to say that, if the delegates actually wished to exclude liability for
pure psychological injury, those who would have been most concerned to
clarify the position would have been the delegates of countries whose
domestic legal systems actually recognized the possibility of awarding
damages for pure psychological injury. It would have been passengers suing
in their Courts who would have recovered such damages. Passengers suing
c in Courts of a legal system which did not award damages for pure
psychological injuries would not have recovered. I do not, for a moment,
assert that this is the correct way to construe the silence in the Warsaw
minutes. All I am concerned to do is to point out that, since the record is
silent, one can devise various hypotheses to explain that silence. But they are
simply hypotheses. The argument put forward by the Supreme Court is
d ultimately based on speculation rather than on fact.’

CONCLUSIONS

[96] We consider that it is highly significant that no mention was made of
liability for mental injury in the course of the negotiations that resulted in the
Warsaw Convention. Equally significant is the fact that no claim for mental
e injury appears to have been made against a carrier by air until the initiation of a
number of such claims in the United States in the 1970s—nearly half a century
after the convention was concluded.

[97] The signatories to the Warsaw Convention in 1929 consisted of a wide
variety of civil and common law countries. They were seeking to agree to a
degree of uniformity in relation to the legal liability of carriers by air. In arts 17,
18 and 19 they set out the events which were perceived to be likely to give rise to
legal liability. In this context causing mental injury unaccompanied by any
physical injury was a non-event. We have seen nothing to suggest that in 1929
claims for mental injury or distress—other than in consequence of the death or
physical injury of the claimant or someone related to the claimant—were
g encountered in any of the jurisdictions of the parties to the convention. At our
request some evidence in relation to this was provided after the hearing of the
appeal, in the form of sections 9-37 to 9-42 of the *International Encyclopaedia of
Comparative Law* (1971). This was a somewhat scanty source of evidence on a
matter which we consider to be fundamental to any consideration of the
h intention of the signatories to the Warsaw Convention in 1929.

[98] The Encyclopaedia demonstrates that in 1929 there was a divide between
jurisdictions which recognised claims for ‘dommage moral’—non-pecuniary loss,
and those which only recognised claims for ‘dommage materiel’—pecuniary loss,
arising from death or personal injury. Within this area the approaches of
j individual jurisdictions covered a wide spectrum. Sino-Soviet jurisdictions
tended to reject claims for non-pecuniary loss in respect of death or personal
injury. France and Belgium had civil codes sufficiently general to allow
compensation to be awarded for ‘dommage moral’ and, today, ‘in each of these
two countries generous awards are made to victims of personal injuries
themselves and also to members of the family both where the immediate victim
has been killed and even where he has only been injured’ (section 9-39).

Common law countries in general awarded damages for 'dommage moral' to the victims of personal injury but not to relatives in the case of injury or wrongful death.

[99] This material suggests that claims for damages for causing personal injury or death, on one basis or another, would have been recognised by all the signatories to the convention. What it does not make clear is whether in 1929, in the jurisdictions of any of the signatories, claims were made and accepted for mental injury which was not a consequence of death or physical injury. This was a question explored by the Supreme Court in *Floyd's case* (1991) 499 US 530 at 539, who commented:

'We find it noteworthy, moreover, that scholars who read "lésion corporelle" as encompassing psychic injury do not base their argument on explanations of this term in French cases or French treatises or even in the French Civil Code; rather, they chiefly rely on the principle of French tort law that any damage can "giv[e] rise to reparation when it is real and has been verified." 2 Planiol & Ripert [Traité élémentaire de droit Civil], at pt. 1, No. 868. We do not dispute this principle of French law. However, we have been directed to no French case prior to 1929 that allowed recovery based on that principle for the type of mental injury claimed here—injury caused by fright or shock—absent an incident in which *someone* sustained physical injury. Since our task is to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties," (*Air France v Saks* (1985) 470 US 392 at 399), we find it unlikely that those parties' apparent understanding of the term "lésion corporelle" as "bodily injury" would have been displaced by a meaning abstracted from the French law of damages. Particularly is this so when the cause of action for psychic injury that evidently was possible under French law in 1929 would not have been recognized in many other countries represented at the Warsaw Convention.'

[100] The lack of evidence of claims for causing mental injury, unrelated to death or physical injury, suggests that such claims were unknown in 1929. We do not find this surprising. Only a decade or so earlier those suffering severe cases of what we would recognise as post-traumatic stress disorder as a result of trench warfare were being condemned as 'lacking in moral fibre', if they were not being shot for desertion.

[101] The Lord President described as 'speculation' the conclusion that the signatories to the Warsaw Convention made no mention of mental injury because 'the drafters simply could not contemplate a psychic injury unaccompanied by physical injury' (*Floyd's case* (1991) 499 US 530 at 544). It seems to us to be a rational deduction that, when considering the events which might give rise to claims for damages, the drafters did not contemplate psychic injury. They were correct, at the time, not to envisage claims for psychic injury as an area of liability that required to be addressed in the convention, for decades were to elapse before any such claim was advanced against an air carrier.

[102] These considerations lead us to the firm conclusion that when those who drafted the Warsaw Convention used the phrase 'lésion corporelle/bodily injury' they intended that phrase to have its natural meaning—physical injury. They did not intend that it would extend to a different type of harm, mental injury. The phrase had for the drafters a uniform meaning. Changes that have since occurred in the attitude of different jurisdictions to liability for causing

a mental injury cannot effect a change in the meaning to be accorded to the phrase in the convention.

[103] If and when the 1999 Montreal Convention comes into force there may be scope for argument, on the basis of the travaux préparatoires evidencing the consideration that was given to mental injury, that those who drafted the convention intended the meaning of the phrase 'bodily injury' to turn on the b jurisprudence of the individual state applying that convention. We do not consider that this course is open to those who have to interpret that phrase in the Warsaw Convention. In that convention the phrase means 'physical injury'.

[104] It follows that the claim advanced by the claimant is not one that is open to her under the convention and, for this reason, we would allow this appeal.

Appeal allowed.

Kate O'Hanlon Barrister.

Costello v Chief Constable of Derbyshire Constabulary

[2001] EWCA Civ 381

COURT OF APPEAL, CIVIL DIVISION

ROBERT WALKER, KEENE LJ AND LIGHTMAN J

5, 22 MARCH 2001

Conversion – Possession – Stolen property – Police lawfully seizing and retaining car in possession of claimant – Police refusing to return car to claimant after exhaustion of statutory purposes for which car held – Judge dismissing action by claimant for return of car on grounds that car stolen to his knowledge – Whether thief or receiver of stolen property acquiring possessory title to that property protected by law.

In July 1996 the police lawfully seized a car in the belief that it was stolen. The car was then in the possession of the claimant, C, who was registered as its keeper. No criminal proceedings were brought against C. The statutory purposes for which the police held the car were exhausted on 5 January 1997, and C subsequently asked for its return. The police, however, continued to hold the car, contending that C had been aware that it had been stolen and that accordingly they were entitled to refuse his request, even though the true owner of the car was unknown. In subsequent proceedings brought by C against the police for the return of the car and for damages for wrongful detention, the judge found that C had indeed been aware that the car was stolen and was therefore precluded from maintaining his claim to it. Accordingly, the claim was dismissed, and C appealed to the Court of Appeal. In seeking to uphold the judge's decision, the police contended that no possessory (or other title) in stolen property vested in the thief or a subsequent receiver, and that accordingly on the seizure of such property the police became possessory owners with the obligation only to return it to the true owner if ascertained. Alternatively, they contended that, if possessory title did vest in a thief or receiver, the rule requiring property to be restored to the person with such title did not apply to the restoration of property to a thief or receiver.

Held – Save so far as legislation otherwise provided, possession meant the same thing and was entitled to the same legal protection whether or not it had been obtained lawfully or by theft or by other unlawful means. It vested in the possessor a possessory title which was good against the world save as against anyone setting up or claiming under a better title. In the case of theft the title was frail, and likely to be of limited value, but it remained none the less a title to which the law afforded protection. The frailty of protection was reflected in decisions which established that, if the stolen property in the possession of the thief or receiver was seized by the police and transferred by them to someone else pursuant to statutory authority (but not otherwise), the transferee obtained the possessory title in defeasance of that of the thief or receiver. However, neither public policy nor a natural moral disinclination to recognise the entitlement of a thief, receiver or other wrongdoer to the protection by the law of his possession, afforded sufficient ground to deprive a possessor of such recognition and protection. Moreover, save where it would be unlawful for any reason for the police to transfer property to the claimant or it would be unlawful for the claimant

- a to be in possession of it (eg when the goods consisted of controlled drugs or a gun and the claimant lacked the necessary authorisation to have possession of them), the court could not withhold equitable relief in the form of a mandatory order for its delivery up to the person legally entitled to possession, whether or not he was a thief or a receiver of stolen property. Accordingly, in the instant case C was entitled to an order for delivery up of the car and for damages for the wrongful failure to deliver it up to him since 5 January 1997. The appeal would therefore be allowed (see [31] and [34]–[37], below).

Buckley v Gross (1863) 3 B & S 566, *R v D'Eyncourt* (1888) 21 QBD 109 and *Webb v Chief Constable of Merseyside Police*, *Porter v Chief Constable of Merseyside Police* [2000] 1 All ER 209 considered.

- c Dictum of Roskill LJ in *Malone v Comr of Police of the Metropolis* [1979] 1 All ER 256 at 272 and *Solomon v Metropolitan Police Comr* [1982] Crim LR 606 disapproved.

Notes

For possessory title, see 35 *Halsbury's Laws* (4th edn reissue) para 1222.

d Cases referred to in judgments

Armory v Delamirie (1772) 5 Stra 505, [1558–1774] All ER Rep 121, 93 ER 664.

Betts v Metropolitan Police District Receiver [1932] 2 KB 595.

Bird v The Town of Fort Frances [1949] OR 292, Ont HC.

Bowmakers Ltd v Barnet Instruments Ltd [1944] 2 All ER 579, [1945] KB 65, CA.

- e *Buckley v Gross* (1863) 3 B & S 566, 32 LJQB 129, 122 ER 213.

Curtis v Perry (1802) 6 Ves 739, 31 ER 1285, LC Ct.

Field v Sullivan [1923] VLR 70, Vic SC.

Irving v National Provincial Bank Ltd [1962] 1 All ER 157, [1962] 2 QB 73, [1962] 2 WLR 503, CA.

Malone v Comr of Police of the Metropolis [1979] 1 All ER 256, [1980] QB 49, [1978] 3 WLR 936, CA.

- f *Parker v British Airways Board* [1982] 1 All ER 834, [1982] QB 1004, [1982] 2 WLR 503, CA.

R v D'Eyncourt (1888) 21 QBD 109, DC.

Rowland v Divall [1923] 2 KB 500, [1923] All ER Rep 270, CA.

- g *Solomon v Metropolitan Police Comr* [1982] Crim LR 606.

Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.

Webb v Chief Constable of Merseyside Police, *Porter v Chief Constable of Merseyside Police* [2000] 1 All ER 209, [2000] QB 427, [2000] 2 WLR 546, CA.

h Appeal

By notice dated 17 April 2000, the claimant, Jason Paul Costello, appealed with permission of Mantell LJ from (i) the decision of Judge Styler at Derby County Court on 23 November 1999 dismissing his claim against the defendant, the Chief Constable of Derbyshire Constabulary, for the return of a car seized by the police on 12 July 1996 and for damages for wrongful detention since 5 January 1997, and (ii) the judge's decision on 14 December 1999 refusing the claimant's application for a rehearing. The facts are set out in the judgment of Lightman J.

G M Jarand (instructed by Bemrose & Ling, Derby) for the claimant.

Fiona Barton (instructed by Weightmans, Leicester) for the Chief Constable.

22 March 2001. The following judgments were delivered.

LIGHTMAN J (giving the first judgment at the invitation of Robert Walker LJ).

Introduction

[1] This is an appeal from two judgments of Judge Styler sitting in the Derby County Court. The action relates to a Ford Escort car (the Ford) seized by a member of the Derbyshire Constabulary pursuant to s 19 of the Police and Criminal Evidence Act 1984 in the belief that it was stolen. In the action against the defendant, the Chief Constable of the Derbyshire Constabulary (the police), the claimant Mr Costello claims the return of the Ford and damages for wrong detention. The Ford was seized on 12 July 1996 when in the possession of the claimant and it is common ground that the police were entitled under s 22 of the 1984 Act to retain the Ford for the statutory purposes there stated until 5 January 1997 when those purposes were exhausted. The question raised is whether they continued to be entitled to retain it thereafter. The police contend that the Ford was to the knowledge of the claimant stolen and that, though the true owner is unknown (and accordingly the Ford cannot be returned to him), on this ground they are entitled to refuse to return the Ford to the claimant. There are two parts to this question, namely one of fact whether the Ford was to the knowledge of the claimant stolen; and (if that issue of fact is resolved in favour of the police) one of law whether the claimant is entitled to recover the Ford from the police notwithstanding the fact that it was stolen.

[2] The learned judge in his first judgment dated 23 November 1999 held that the Ford was to the knowledge of the claimant stolen and that this fact in law precluded the claimant from maintaining his claim to the Ford. Some three days later the Court of Appeal gave judgment in the case of *Webb v Chief Constable of Merseyside Police*, *Porter v Chief Constable of Merseyside Police* [2000] 1 All ER 209, [2000] QB 427. The claimant thereupon made an application for a rehearing on the ground that the decision in *Webb's* case required the court to uphold his claim to the return of the Ford. In a second judgment dated 14 December 1999 the learned judge refused this application. He also refused permission to appeal, but the Court of Appeal granted permission on 13 April 2000.

The issue of fact

[3] The facts of this case can be stated shortly. On 12 July 1996 the police received a report of a stolen Volkswagen Corrado (the Corrado). It was sighted in Vernon Street, Derby and on arrival there the police found the claimant together with two other persons in the Ford. The Ford had the registration number C66 FOV. On the arrival of the police, the claimant tried to drive away: a short chase followed; and when the Ford came to a halt one of the occupants (an unknown youth) made off and the other (a Mr Gareth Scott) was arrested and charged (and later convicted) of the theft of the Corrado and a radio cassette found in the Ford. The police seized the Ford pursuant to s 19 of the 1984 Act, interviewed the claimant and released him on bail. No criminal proceedings were subsequently commenced against him.

[4] On 22 July 1996 the Ford was examined by the police vehicle examiner, Det Con Potts. He found that the vehicle identification number (VIN) had been welded in (the original having been obliterated) and the engine number had been ground off. Under the back seat of the Ford he found what has aptly been

a called a car ringing kit. The Ford windows were all etched C66 FOV. It is not known when that etching took place.

[5] Inquiries revealed that a Mr Dennis Mortimer had been registered on 20 August 1985 as keeper of C66 FOV and that in 1987 the Ford was converted to a turbo. On 23 February 1995 a Mr Darren Duckley was registered as keeper of the Ford and on the same day the registration number was changed to DAZ 8273.
b On 19 April 1995 a Ms Claire Leach was registered as keeper of DAZ 8273, and on 14 November 1995 the claimant's then girlfriend was registered as keeper. On 13 December 1995 the registration number was changed back to C66 FOV and on 13 February 1996 the claimant was registered as keeper (according to his evidence) on the break-up of his relationship with his girlfriend and his purchase of the Ford from her.
c

[6] In forming the view which he did that the Ford was stolen, the judge placed great weight on the facts that the VIN had been welded in and the obliteration of the original and that the engine number had been ground off. The claimant on this appeal maintains that he should not have done so because there might be an honest and innocent explanation for both. The obliteration of the
d VIN could have been attributable to a change of bodyshell and the original engine could have been replaced (though this scarcely explains the grinding off). Notwithstanding the theoretical possibility of an honest and innocent explanation, the judge was entitled to place on these facts in the context of the full circumstances of this case the weight which he did. The judge also placed weight
e on the expert evidence of a Mr Haigh, a consulting engineer called by the police. The thrust of his evidence was that the Ford bore the tell-tale signs of a stolen ringed vehicle to anyone with any expertise in vehicles. The claimant complains that the judge accepted this evidence notwithstanding the fact that Mr Haigh also said elsewhere in his evidence that he was not saying that the Ford was stolen.
f The two passages in the expert's evidence are consistent. The question whether the Ford bore the tell-tale signs was a question for the expert in stolen cars; the question whether in fact the Ford was stolen was a question, not for the expert, but for the judge. In answering that question the judge was entitled to accept the evidence of the expert and give it the appropriate weight. I see no substance in this complaint. The claimant further complained that neither the police evidence
g nor the judge paid any attention to the etching on the Ford windows, but in particular having regard to the fact that there was no evidence as to when the etching took place this fact in the circumstances of this case can have had little (if any) significance.

[7] The claimant questioned whether the judge can have properly reached
h the conclusion which he did on the burden of proof appropriate to substantiating the serious allegations of theft and knowledge of theft on the part of the claimant. In my judgment the judge was entitled to reach the conclusion he did that the burden of proof was discharged on the evidence to which I have already referred. But that evidence did not stand alone. The claimant in his evidence at the trial
j gave his account of the purchase of the Ford by his girlfriend. He said that at the home of a friend of his whom he saw regularly called David Spencer she agreed to buy the Ford from certain (unnamed) friends of Mr Spencer. Mr Spencer had seven convictions for handling stolen cars and shortly thereafter (in May 1996) was sent to prison for two years for car ringing. The claimant himself knew a great deal about motor vehicles and made something of a living buying, doing up and selling motor vehicles, and before his girlfriend bought the Ford he inspected

it. His behaviour on 12 July 1996 was (to put it at its lowest) highly suspicious and he gave unsatisfactory (and indeed false) evidence at the trial. a

[8] Against this background it is hardly surprising that the learned judge held without hesitation that the Ford was stolen and that the claimant at all times knew this. Looking at the evidence as a whole it seems to me that the judge was fully entitled to reach this conclusion and his decision is not open to question on this appeal. b

Issue of law

[9] Counsel for the claimant stated that at the commencement of the hearing before him, the judge said words to the effect that the Ford was obviously stolen, and he complained that the conduct of the judge in saying this precluded (at any rate the appearance of) a fair trial. But counsel adduced no evidence that the judge made this statement or that any complaint about it was made at the hearing, and the judge was not invited (as he should have been) prior to the hearing of this appeal to comment on this attribution to him. In these circumstances it is not open to the claimant to raise this matter on this appeal. But even if it was open to him and the judge indeed did make some such statement, it is to be borne in mind that, having pre-read the skeletons and papers, it was perfectly proper (if not inevitable) that the judge had formed a provisional view before coming into court and, if it was proper for him to have formed this view, it must equally have been proper for the judge to inform the parties of his view so long as he did not give the impression that he had a closed mind on this issue. For this disclosure enabled the parties to know the way he was currently thinking and accordingly where attention needed to be focused (most particularly by the claimant) at the trial to change his mind. c
d
e

[10] I now turn to the question of law whether the claimant, who was in possession of the Ford when it was seized by the police, is entitled to its return and damages for wrongful detention since 5 January 1997. The seizure was pursuant to the provisions of s 19(2)(a) and (3)(a) and the subsequent retention pursuant to s 22(1) and (2) of the 1984 Act. These sections read as follows: f

'19. General power of seizure etc.—(1) The powers conferred by subsections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises. g

(2) The constable may seize anything which is on the premises if he has reasonable grounds for believing—(a) that it has been obtained in consequence of the commission of an offence ...

(3) The constable may seize anything which is on the premises if he has reasonable grounds for believing—(a) that it is evidence in relation to an offence which he is investigating or any other offence ... h

22. Retention.—(1) Subject to subsection (4) below, anything which has been seized by a constable or taken away by a constable following a requirement made by virtue of section 19 or 20 above may be retained so long as is necessary in all the circumstances. j

(2) Without prejudice to the generality of subsection (1) above—(a) anything seized for the purposes of a criminal investigation may be retained ... (i) for use as evidence at a trial for an offence; or (ii) for forensic examination or for investigation in connection with an offence; and (b) anything may be retained in order to establish its lawful owner, where there are reasonable

a grounds for believing that it has been obtained in consequence of the commission of an offence.'

[11] These statutory provisions update earlier statutory provisions and both have been the subject of judicial consideration in cases to which I will refer. They place on a statutory footing and supplement the common law powers of the police (see *Malone v Comr of Police of the Metropolis* [1979] 1 All ER 256, [1980] b QB 49). The provisions vest in the police no title to the property seized but only a temporary right to retain property for the specified statutory purposes.

[12] The leading authority in the field under consideration is the decision of the Court of Appeal in *Webb v Chief Constable of Merseyside Police*, *Porter v Chief Constable of Merseyside Police* [2000] 1 All ER 209, [2000] QB 427. In that case the police under the provisions of the 1984 Act seized money in the possession of the claimants on suspicion that it constituted the proceeds of drug trafficking. The claimants were not however convicted of drug trafficking. Convictions would have triggered statutory powers for the confiscation of the money. The claimants sued for recovery of the money. The Court of Appeal held that, once c the statutory power to seize and detain the money was exhausted, in the absence of evidence that anyone else was entitled to the money and of any legislative provision to the contrary effect, the claimants could rely on their right to possession at the date of seizure by the police as conferring sufficient title to recover the money from the police and that the police were not entitled to retain the money even if they could establish on the balance of probability that the money was the proceeds of drug trafficking. The illegality of the means of e acquisition of the money gave rise to no public policy defence to the claimants' claim. May LJ (with whose judgment Hale and Pill LJ agreed) said:

f '... if goods are in the possession of a person, on the face of it he has the right to that possession ... His right to possession may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police right to retain the goods comes to an end, the right to possession of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession.' (See [2000] 1 All ER 209 at 225, g [2000] QB 427 at 448.)

'Illegality'

Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 340 is the leading authority on the effect of illegality upon civil relationships. The essential principles are to be found in the majority opinion of Lord Browne-Wilkinson, with whom h Lord Jauncey of Tullichettle and Lord Lowry agreed. Lord Browne-Wilkinson said: "From these authorities the following propositions emerge. (1) Property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract. (2) A plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim j to a property right. (3) It is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the plaintiff has acquired legal title under the illegal contract that is enough." (See [1993] 3 All ER 65 at 85–86, [1994] 1 AC 340 at 370.) These principles apply equally to legal and equitable rights. The law has in this respect moved on since the enunciation of what is referred to as Lord Eldon LC's wider principle as

expressed, for instance, in *Curtis v Perry* (1802) 6 Ves 739 at 746, 31 ER 1285 at 1288 to the effect that equity will assist neither party to an illegal transaction. It was on this point that the minority in *Tinsley v Milligan* (Lord Keith of Kinkel and Lord Goff of Chieveley) disagreed with the majority. Lord Browne-Wilkinson explained the shift in the law in these terms: "In my judgment, the explanation for this departure from Lord Eldon LC's absolute rule is that the fusion of law and equity has led the courts to adopt a single rule (applicable both at law and in equity) as to the circumstances in which the court will enforce property interests acquired in pursuance of an illegal transaction, viz, the *Bowmakers* rule (see *Bowmakers Ltd v Barnet Instruments Ltd* [1944] 2 All ER 579, [1945] KB 65). A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if he can establish his title without relying on his own illegality." (See [1993] 3 All ER 65 at 90, [1994] 1 AC 340 at 375.) ... The main principle in *Tinsley v Milligan* is expressed by reference to an underlying agreement to which both the claimant and the defendant are parties. In the present appeals, there is no such underlying agreement. The chief constable claims no title to the money. If it is supposed, for the sake of illustration only, that Roy Webb acquired the money in issue in his appeal in one or more unlawful transactions consisting of the sale by him of controlled drugs, possession of the money passed to him and there is no question of him seeking to enforce unlawful transactions. The hypothetical transactions are complete and he was in possession of the money notwithstanding the illegality. He does not have to rely on anything more than his right to possession as against the chief constable. It is irrelevant that illegality surrounding his acquisition of the money was pleaded in defence or emerged in evidence. He is not seeking to enforce an illegal agreement.' (See [2000] 1 All ER 209 at 219, 221, [2000] QB 427 at 441–442, 444.)

[13] May LJ went on to consider the submissions of the police that there should be available to the police in such circumstances a defence of public policy entitling them to withhold the proceeds of criminal activity from the plaintiffs. He said ([2000] 1 All ER 209 at 223–224, [2000] QB 427 at 446–447):

'In my judgment, the court should not extend the law in the way suggested. Although from the chief constable's perspective the money is the proceeds of crime, from another perspective the court should not, in my view, countenance expropriation by a public authority of money or property belonging to an individual for which there is no statutory authority. There is statutory machinery for the prosecution of those who deal in drugs and for the confiscation upon conviction of the proceeds of their drug dealing. There is statutory machinery for the confiscation upon conviction of the proceeds of other serious crime. There is statutory machinery for the forfeiture of the cash proceeds of drug trafficking which are being imported into or exported from the United Kingdom. There is no statutory power to confiscate the proceeds of drug dealing within the United Kingdom where the person entitled to possession of the money is not convicted of a drug trafficking offence. I recognise that there may be circumstances where for a variety of reasons a prosecution may not take place. But that does not, in my view, justify expropriation by means of a defence to a civil claim for return of money which has been seized from persons who are not convicted. It is one thing to prosecute to conviction and to take positive steps authorised by statute to confiscate the proceeds of crime from the convicted defendant. It is

a quite another to resist the claim of an innocent person by asserting some or all of the ingredients of what might have been a prosecution; or to effect confiscation in this way from a convicted person against whom statutory confiscation machinery has not been used ... Stephenson LJ said: "The common law can develop in many ways, but I would accept it as clear law that, generally speaking, the right or power to deprive a defendant of his property even for a time, whether in criminal or in civil proceedings, for the purpose of punishing him by forfeiture or compensating the victim of his wrongdoing by any form of restitution can only be conferred by express and unambiguous statutory provisions." (See (*Malone v Comr of Police of the Metropolis*) [1979] 1 All ER 256 at 264, [1980] QB 49 at 61–62.)

- c [14] Three general propositions of law are clearly established by *Webb's* case.
- (i) The fact of possession of a chattel of itself gives to the possessor a possessory title and the possessor is entitled to rely on such title without reference to the circumstances in which such possession was obtained: his entitlement to do so is not prejudiced by the fact that he obtained such possession unlawfully or under an illegal transaction. His claim can only be defeated by proof of a title superior to his possessory title. (ii) In the case of competing claims to ownership (in the case of personalty as in the case of realty), titles are relative and the issue falls to be determined by reference to the relative strengths of the two claims and the party with the better title (however frail it may be) is entitled to succeed. (iii) The statutory power of the police conferred by s 19 of the 1984 Act to seize goods and by s 22 of that Act to retain them so long as is necessary in all the circumstances places in suspension or temporarily divests all existing rights to possession over the period of the detention, but does not otherwise affect those rights or vest in the police any permanent entitlement to retain the property in the police. The limited right of the police to retain property for the statutory purpose and their obligation thereupon to return it to the 'owner' is unaffected by any perceived public policy consideration that the fruits of his criminal activities ought to be withheld from a criminal.

- [15] For completeness I should add two qualifications. First there is a limited statutory qualification to the second of these principles created by s 8 of the Torts (Interference with Goods) Act 1977 which permits a defendant in an action for wrongful interference to show in accordance with rules of court that a third party has a better right than the claimant as respect all or any part of the interest claimed by the claimant or in right of which he sues. It is clear from the terms of the Law Commission Report to which this section gives effect and the provisions of the section for joinder of such third party as a party to the proceedings that the third party must be identified and that the purpose is to have the issue of his title and any claim he may have against the defendant resolved once and for all in the existing proceedings (see e.g. *Clerk and Lindsell on Torts* (18th edn, 2000) pp 765–766 (paras 14-89–14-90)). This statutory provision has no application in this case since the police cannot identify any third party with a better title than the claimant. Secondly a party cannot assert a right to immediate possession against a defendant if his possession of the goods would be illegal or it would be illegal for the defendant to give him possession (see the cases cited in *Clerk and Lindsell*, p 749 (para 14-51)). This qualification has no application on the facts of this case, but is relevant to one of the contentions made by the police.

[16] Since the claimant in this case was in possession of the car when it was seized by the police, it might be expected to follow from the principles which I

have stated that when the right of the police to detain it expired, the police were in this case obliged to return the car to the claimant. But the police seek to establish and rely on two exceptions or qualifications to these principles, to each of which I must refer in turn.

Possession of stolen goods

[17] The first suggested exception or qualification is that no possessory (or other) title in stolen property vests in the thief or a subsequent receiver of stolen property and that accordingly on seizure of stolen property the police become possessory owners and have no obligation to restore the stolen property to the person from whom they seized it: their obligation is limited to restoring to the true owner if ascertained. The question has long been regarded as open whether there is such an exception or qualification and it continues to be raised (e.g. in *Winfield and Jolowicz on Tort* (10th edn, 1975) p 603 and *Salmond and Heuston on the Law of Torts* (21st edn, 1996) pp 109–110). Indeed there is a note of a decision of Milmo J in *Solomon v Metropolitan Police Comr* [1982] Crim LR 606 that public policy and the doctrine of ‘ex turpi culpa non oritur actio’ preclude a thief from recovery. This is the view adopted by David Feldman *The Law Relating to Entry, Search and Seizure* (1986) p 313 (para 11.41). The decision in *Webb’s* case is distinguishable on the ground that the purchaser of the drugs (or other person who made payment for them) in that case clearly intended the claimant to obtain full possession (and accordingly full possessory rights) to the monies paid over. There could be no suggestion that the proceeds were stolen and that by reason of this fact some lesser form of possession or possessory right arose.

[18] The authorities relied on by *Feldman* and the police in this case are twofold, namely *Buckley v Gross* (1863) 3 B & S 566, 122 ER 213 and *Field v Sullivan* [1923] VLR 70. In *Buckley v Gross* the issue related to the ownership of certain tallow. The tallow had been kept at warehouses which caught fire; it melted and flowed down the sewers into the river where part of it was collected by a man with no right to it; and he sold it to the claimant. The police stopped the claimant and took him before a magistrate. The magistrate discharged the claimant. Under s 29 of the Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) the magistrate had power, where the real owner was known, to make an order for the detention and subsequent delivery of goods ‘charged to be stolen or fraudulently obtained’ to the rightful owner, and where the owner was unknown to order delivery to the receiver of the Metropolitan Police Force who was authorised, in the absence of a claim made by the real owner within 12 months, to sell them. Pursuant to these statutory provisions the magistrate made an order for the detention of the goods. The tallow became a nuisance and the police sold the tallow to the defendant before the 12 month period expired. The claimant then sued the defendant to recover it. Blackburn J at the trial directed a verdict for the defendant with leave to the claimant to move to enter judgment if the Court of Queen’s Bench should be of the opinion that he could maintain his action. The court held that he could not.

[19] Cockburn CJ said:

‘Under these circumstances it appears to me plain that, by virtue of the authority vested in him by the statute, an order was made by the justice, within the scope of his authority and jurisdiction, with respect to dealing with this tallow, and whether the police were or were not warranted in selling it within twelve months is immaterial. The plaintiff, who had nothing

a but bare naked possession (which would have been sufficient against a wrong doer) had it taken out of him by virtue of this enactment. As against the plaintiff, therefore, the defendant derives title, not from a wrong doer, but from a person selling under authority of the justice, whether rightly or not is of no consequence. I wholly disagree with the doctrine of the plaintiff's counsel, that if the policeman did anything *ultra vires*, that would revest the possession of this tallow in the plaintiff. He had no title beyond what mere possession gave, and, so soon as the goods were taken from him by force of law, there was a break in the chain of that possession.' (See (1863) 3 B & S 566 at 572–573, 122 ER 213 at 215–216.)

b [20] Crompton J said:

c 'This action must be founded on possession; here the possession was divested out of the plaintiff, and he cannot revert to a right of property to re-establish it. I agree with my Lord Chief Justice that where possession is lawfully divested out of a man, and the property is ultimately converted by a person who does not claim through an original wrong doer, the party whose possession was so divested had no property at the time of the conversion. Here, in my mind, the plaintiff's possession was gone. The goods were properly taken from him ...' (See (1863) 3 B & S 566 at 573, 122 ER 213 at 216.)

d [21] Blackburn J said:

e 'I do not wish to question the doctrine laid down in several cases, that possession of personal property is sufficient title against a wrong doer; nor that it is no answer to the plaintiff in such a case to say that there is a third person who could lawfully take the chattel from him; and I do not know that it makes any difference whether the goods had been feloniously taken or not. But, assuming that to be the law, the plaintiff has not brought himself within it ... I draw the inference of fact that the justice was satisfied that this tallow had come from the warehouses, and I hold that, as matter of law, the police were bound to keep it for the true owner, because they had ascertained that there was a true owner, and who he was. Their possession was the possession of the true owner and not of the wrong doer, whose possession was terminated by their taking possession. It is therefore not necessary to consider whether the sale of the tallow to the defendants by the police was right or wrong. If wrong, the true owner may complain against them; if not, no one else can, but at all events, not the plaintiff, who was himself a wrong doer.' (See (1863) 3 B & S 566 at 574–576, 122 ER 213 at 216.)

f g h [22] All three judgments support the proposition that a thief obtains a good possessory title as against a wrongdoer against him, but that, if possession is lawfully divested from him and vested in another, his prior possession will not avail him to recover possession. Cockburn CJ held that the lawful divesting of the claimant and vesting in the defendant in that case was effected by the sale by the police to the defendant in exercise of the statutory power of sale vested in them by the order of the magistrate. Blackburn J decided that the police held the tallow for and on behalf of the warehousemen. Crompton J may have taken (and according to the report of this case in 32 LJQB 129 did take) the view that irrespective of any order of the magistrate the vesting by the police of possession in the defendant was sufficient to divest the claimant of possession. Later authorities to which I will refer attach critical importance to the existence of the magistrate's order in a contest

such as existed between the claimant and defendant in *Buckley v Gross*. It should be said that the variations in the reports of the judgments in this case (referred to in the judgment of Macfarlan J in *Field v Sullivan* [1923] VLR 70 at 83) raise questions as to the reliability of various reports. I have selected the report in 36 B & S 556, 122 ER 213 because it is the report used and quoted by the Court of Appeal in the later case of *Irving v National Provincial Bank Ltd* [1962] 1 All ER 157, [1962] 2 QB 73 to which I will subsequently refer.

[23] The provisions of the 1839 Act fell for consideration again in the case of *R v D'Eyncourt* (1888) 21 QBD 109. The question arose whether the magistrate had jurisdiction under that Act to direct the delivery of goods which were seized by the police but were not the subject of any charge to the person (a Mary Ryan) from whom they were seized. In that case some £108 was seized as money obtained by false pretences, but the charges were confined to £8 alone. The magistrate directed that the balance of £100 be delivered up to her. The court quashed the decision holding that the 1839 Act conferred no jurisdiction to make any order save in respect of goods the subject of a charge. Wills J (at 125) however added:

'As to 8l. odd, the defendant appears to have admitted that the sums of which it consisted were property to be returned to the [identified] persons from whom she conceded that she had received them. As to the rest of the sum [of £100 odd] now in the hands of the police authorities, it seems clear, upon the facts stated to us, that it ought to be given to Mary Ryan; and it is clear that the possession she once had would give her the right to recover the money from any one who could not shew a better title. This would be so, even if the money had been obtained by false pretences from persons who with knowledge of the facts advisedly abstained from making any claim, or if nothing could be shewn as to who was really entitled. The possessory right may perhaps go further. It is not necessary to express any opinion upon this point. We have no reason to suppose that the police authorities will not do what is right in the matter ...'

[24] The judgments in *Buckley v Gross* and *R v D'Eyncourt* were considered by the Supreme Court of Victoria in the case of *Field v Sullivan* [1923] VLR 70. In that case the claimant claimed in return of goods seized by the police believing them to be stolen. The theft was not established and the claimant as the party in possession at the time of the seizure was held entitled to their return. Macfarlan J (with whom Cussen J agreed) said as follows (at 84–85):

'... If A. is in possession of goods, he is *primâ facie* in lawful possession of them, and *primâ facie* has the right to that possession; in the absence of any evidence to the contrary, in any proceedings that possession is proof of ownership; but that possession may be divested out of him, either lawfully or unlawfully. If unlawfully, his right of possession remains. As against the person who unlawfully deprived him of possession (B.), or those claiming through him (C), A.'s possession (even if wrongful) up to the time of seizure, is sufficient evidence to establish his right to possession; nor can those persons set up that the goods were in A.'s possession, but were really the property of X., though, of course, if B. took possession on behalf of and with the authority of X., who is shown to be the true owner, that might be set up to show that B.'s seizure was not unlawful. If the divesting is lawful, A.'s right of possession may be destroyed entirely, or may be merely suspended

a or temporarily divested ... So where the law permits them to be seized or
detained for a certain time, or for a certain purpose, or until a certain event,
A.'s right to possession is suspended or temporarily divested and the right
of possession is vested in, or A.'s right to possession is displaced by, the right of
possession in the person authorized to seize them or detain them for the
period during which he is authorized. In other words, A.'s property and right
b to possession are made subject to the right of the police or other person
seizing under the authority of the law to detain them during the period
during which the detention is authorized; when that time expires, and no
lawful order has been made for the disposition, his right to possession, if
nothing more appears, again operates. I say "if nothing more appears," for
it may appear by evidence that A. never had a right of possession, as in
c *Buckley v. Gross* ((1863) 3 B & S 566, 122 ER 213), and that therefore there was
no suspended right of possession to revive or again operate.'

He went on to quote the passage from the judgment of Wills J in *R v D'Eyncourt*
to the effect that the obligation even extended to monies obtained by false
pretences and concluded (at 87): 'Whether the last quoted passage is consistent
d with the dicta in *Buckley v. Gross* it is unnecessary to consider here, as plaintiff's
possession has not been shown to be wrongful.'

[25] In *Betts v Metropolitan Police District Receiver* [1932] 2 KB 595 the police seized
from the claimant certain cloth believing it to be stolen from Carter Paterson and
delivered it to Carter Paterson, without any order under the Police (Property)
e Act 1897 which was in substantially the same terms as the 1839 Act. The claimant
sued the receiver and Carter Paterson, and du Parc J held that, since the theft
could not be established and the delivery had been made without any order under
the 1897 Act, the claimant in right of his possession at the time of seizure (subject
only in case of the receiver to a limitation defence) was entitled to succeed in
conversion against both defendants.

f [26] The judgment of Cockburn CJ in *Buckley v Gross* was referred to and
approved and applied by the Court of Appeal in *Irving's* case [1962] 1 All ER 157,
[1962] 2 QB 73. In that case the dispute arose as to certain goods seized by the
police when in the possession of the claimant in which neither the claimant nor
the defendant could establish that they were the true owners. Pursuant to the
g provisions of s 1 of the 1897 Act the court of summary jurisdiction directed that
goods should be delivered to the defendant as the person who appeared to be the
lawful owner. The claimant sued the defendant claiming ownership of the
goods. The Court of Appeal rejected the claim. Holroyd Pearce LJ said ([1962] 1
All ER 157 at 159, [1962] 2 QB 73 at 78-79):

h '[The 1897] Act was passed in substitution for an earlier Act, the
Metropolitan Police Courts Act, 1839, which by s. 29, made similar provisions.
It provides practical machinery to deal with a practical situation ... Although
the Act does not, until the expiration of six months, affect the right of any
person to take proceedings, it does alter the fact of possession. When an
j order has been made by a tribunal under the Act for delivery of property to
a claimant, the Act cannot have intended the claimant to remain a bailee for
the former possessor. The claimant has, by due process of law, after inquiry,
had physical possession transferred to him. It is still open to anyone during
the ensuing six months to claim the goods from him, provided that they can
establish their right to do so. Had the Act intended, it could have preserved
the prior rights of possession in the former possessor. But it has not done so,

and previous possession of goods now in the hands of another does not raise a presumption of present title in the previous owner, unless the person who has received them from him has done so as a wrongdoer, or as agent or bailee of the previous owner ... This view of the matter is in accordance with the dictum of COCKBURN, C.J., in *Buckley v. Gross* ((1863) 3 B & S 566, 122 ER 213).’

After setting out the passage which I have quoted, he continued:

‘Those observations of the learned chief justice make it clear, in my view, that, under this Act, as under the earlier Act, the plaintiff can no longer rely on a presumption from his previous possession. Therefore, the burden is on the plaintiff to prove that he is entitled to the notes or to damages for their conversion. If he cannot discharge that burden, he fails in the action. The learned county court judge rightly held that his story on that matter was not to be believed, and that he failed to discharge the onus of proof. I would dismiss this appeal.’ (See [1962] 1 All ER 157 at 160, [1962] 2 QB 73 at 80.)

[27] Willmer LJ ([1962] 1 All ER 157 at 161, [1962] 2 QB 73 at 82) said: ‘I come, therefore, to the same conclusion as the learned county court judge, namely, that the effect of the magistrates’ order is to shift the burden of proof.’

[28] Davies LJ said:

‘I entirely agree ... It seems to me plain on the wording of the Police (Property) Act, 1897, s. 1, that the effect of the magistrates’ order made in this case was to vest the possession of these notes in the defendants, and, of course, naturally and consequently, to divest the plaintiff of any possessory title that he might have had, not merely before the police seized the notes, but up to the time when the magistrates made the order ... The only other thing I would say is this. I agree entirely with what my Lords have said about the dictum of COCKBURN, C.J., in *Buckley v. Gross* ((1863) 3 B & S 566, 122 ER 213); and with regard to the other authority which was cited to us, namely, *Betts v. Metropolitan Police District Receiver and Carter Paterson & Co., Ltd.* ([1932] 2 KB 595) the facts of that case, so far as a relevant comparison can be made, are as different from this case as they possibly can be. In *Betts*’ case, no order under the statute had been made, and it was for that reason, of course, that DU PARCQ, J., directed the jury and gave judgment as he did. It is, I think, implicit in the learned judge’s judgment in that case that if an order under this Act had been made in *Betts*’ case, then the position would have been not as it was there, but would have been as, in the opinion of this court, it is in this case.’ (See [1962] 1 All ER 157 at 161–162, [1962] 2 QB 73 at 82–83.)

[29] Donaldson LJ in *Parker v British Airways Board* [1982] 1 All ER 834 at 836–837, [1982] QB 1004 at 1009–1010 explained the balancing exercise required of the law in the situation under consideration and how the balance should be struck:

‘[In *Armory v Delamirie* (1772) 5 Stra 505, [1558–1774] All ER Rep 121] Pratt CJ ruled—“That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover” ... The rule as stated by Pratt CJ must be right as a general proposition, for otherwise lost property would be subject to a free-for-all in which the physically weakest would go to the wall

a ... One might have expected there to be decisions clearly qualifying the
general rule where the circumstances are that someone finds a chattel and
thereupon forms the dishonest intention of keeping it regardless of the rights
of the true owner or of anyone else. But that is not the case. There could be
a number of reasons. Dishonest finders will often be trespassers. They are
unlikely to risk invoking the law, particularly against another dishonest
b taker, and a subsequent honest taker is likely to have a superior title (see, for
example, *Buckley v Gross* (1863) 3 B & S 566, 122 ER 213). However, he
probably has some title, albeit a frail one because of the need to avoid a
free-for-all. This seems to be the law in Ontario, Canada (see *Bird v The Town
of Fort Frances* [1949] OR 292).'

c In fact in the case of *Bird v The Town of Fort Frances* [1949] OR 292 at 300–301
the court expressly reserved the question whether such a title was obtained if the
wrongful taker had a felonious intent and the taking was felonious.

[30] In the case of *Webb v Chief Constable of Merseyside Police*, *Porter v Chief Constable
of Merseyside Police* [2000] 1 All ER 209 at 225, [2000] QB 427 at 448, May LJ referred
d to the decision in *Field v Sullivan*:

'Possession

As to entitlement to possession, there is an instructive analysis in the
decision of the Supreme Court of Victoria in *Field v Sullivan* [1923] VLR 70.
The essence of an extended passage in the judgment of Macfarlan J is that if
e goods are in the possession of a person, on the face of it he has the right to
that possession (see at 84–87). His right to possession may be suspended or
temporarily divested if the goods are seized by the police under lawful
authority. If the police right to retain the goods comes to an end, the right
to possession of the person from whom they were seized revives. In the
absence of any evidence that anybody else is the true owner, once the police
f right of retention comes to an end, the person from whom they were
compulsory taken is entitled to possession.'

The reference cannot be treated as any form of approval of the reservations
expressed by Macfarlan J where possession has been unlawfully obtained.

[31] In my view on a review of the authorities, (save so far as legislation
g otherwise provides) as a matter of principle and authority possession means the
same thing and is entitled to the same legal protection whether or not it has been
obtained lawfully or by theft or by other unlawful means. It vests in the possessor
a possessory title which is good against the world save as against anyone setting
up or claiming under a better title. In the case of a theft the title is frail, and of
h likely limited value (see e.g. *Rowland v Divall* [1923] 2 KB 500, [1923] All ER Rep
270), but none the less remains a title to which the law affords protection.
Support for this proposition can be found in the dicta of Wills J in *R v D'Eyncourt*
and Donaldson LJ in *Parker's case*. The decision in *Buckley v Gross* and the dicta of
all three judges that a wrongdoer is entitled to protection against a wrongdoer
j accords with the proposition; Blackburn J inclined to agree that possession was
protected even if obtained by a felonious taking; and in view of the differences in
the reports of the judgment of Crompton J (and the later decision on the
significance of a magistrate's order in *Betts' case*) I do not think that his judgment
takes the matter further. If *Buckley v Gross* is no obstacle in the way of acceptance
of the proposition, then *Field v Sullivan* cannot be an obstacle either, for it merely
leaves open the effect of *Buckley v Gross*. The frailty of the protection is reflected

in the decisions in *Buckley v Gross* and *Irving v National Provincial Bank Ltd* that, if the stolen property in the possession of the thief or a receiver is seized by the police and pursuant to statutory authority possession is transferred to someone else (but not otherwise), the transferee obtains the possessory title in defeasance of that of the thief or receiver. There are authorities (e.g. *Bird's* case) which reveal a natural moral disinclination (on occasion expressed in terms of public policy) to recognise the entitlement of a thief, receiver or other wrongdoer to the protection by the law of his possession, and one decision (namely *Solomon v Metropolitan Police Comr* [1982] Crim LR 606) refusing such protection. But it is clear from *Webb's* case that such a disinclination and public policy do not afford a sufficient ground to deprive a possessor of such recognition and protection. This conclusion is in accord with that long ago reached by the courts that even a thief is entitled to the protection of the criminal law against the theft from him of that which he has himself stolen (see e.g. *Smith and Hogan Criminal Law* (9th edn, 1999) p 522). I accordingly reject the first suggested exception or qualification.

Exceptions to the obligation to restore

[32] The second suggested exception or qualification is that, even if a possessory title vests in the thief or receiver, there are exceptions to the rule requiring property to be restored to the person entitled to a possessory title and that those exceptions should extend to the restoration of property to a thief or receiver. Authority for the existence of exceptions is to be found in the judgment of du Parc LJ in *Bowmakers Ltd v Barnet Instruments Ltd* [1944] 2 All ER 579, [1945] KB 65. After stating the general rule that a man's right to possession of an article will be enforced notwithstanding the fact that the article came into his possession by reason of an illegal contract, he went on to say:

'It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books. No doubt there are others, but it is unnecessary, and would we think be unwise, to seek to name them all or to forecast the decisions which would be given in a variety of circumstances which may hereafter arise.' (See [1944] 2 All ER 579 at 583, [1945] KB 65 at 72.)

[33] What Pill LJ in *Webb's* case [2000] 1 All ER 209 at 226, [2000] QB 427 at 449 described as echoes of that approach are to be found in the judgment of Roskill LJ in *Malone v Comr of Police of the Metropolis* [1979] 1 All ER 256 at 272, [1980] QB 49 at 71 where he said that it would not be right, in circumstances where the claimant's initial possession of foreign currency forming part of the cash seized was unlawful, to grant him equitable relief in the form of a mandatory injunction for the return of the foreign currency. May LJ in *Webb's* case said that without deciding he doubted if the view of Roskill LJ could stand in the face of *Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340. In this case it is necessary to decide this question.

[34] In my judgment, when considering the observations of du Parc and Roskill LJJ, it is important to bear in mind that they were made at a time when the question was very much alive how far a court should protect a wrongdoer in asserting his rights of ownership. In particular there were powerful voices dating from the time of Lord Eldon LC to the effect that equity should withhold its support. The House of Lords in *Tinsley v Milligan* (as appears from the passage which I have quoted) held that law and equity must now speak with one voice in

- a* protecting that ownership based on possession. The exceptions to which du Parcq LJ refers must in my view be confined to cases where it would be unlawful for any reason for the police to transfer the property to the claimant or it would be unlawful for the claimant to be in possession of it (eg when the goods consist of controlled drugs or a gun and the claimant does not have the necessary authorisation to have possession of them); but where no such exception applies, the court
- b* cannot withhold equitable relief in the form of a mandatory order for its delivery up to the person legally entitled to possession, whether or not he be a thief or a receiver of stolen property. I therefore also reject the second suggested exception or qualification.

Conclusion

- c* [35] I accordingly hold that the claimant was entitled to the return of the Ford on 5 January 1997 and that he is entitled to an order for its delivery up and for damages for the wrongful failure to deliver it up to him since 5 January 1997 to be assessed by the district judge. The claim to exemplary damages made in the claimant's reply has no basis in law or fact, and accordingly the assessment is not
- d* to include any element of exemplary damages.

KEENE LJ.

[36] I agree.

ROBERT WALKER LJ.

- e* [37] I also agree

Appeal allowed. Permission to appeal refused.

Kate O'Hanlon Barrister.

Trevelyan v Secretary of State for the Environment, Transport and the Regions

[2001] EWCA Civ 266

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, SIMON BROWN AND LONGMORE LJ

30, 31 JANUARY, 23 FEBRUARY 2001

Highway – Classification – Definitive map – Modification of deletion order – Secretary of State ordering deletion of bridleway from definitive map – Local authority seeking modification of order replacing bridleway with footpath – Inspector concluding that he had no power to make modification sought by local authority and finding that no right of way had ever existed – Whether inspector having power to confirm Secretary of State's order deleting bridleway subject to modification replacing bridleway with footpath – Whether inspector required to give special weight to entry of right of way on definitive map when determining whether it existed in fact – Wildlife and Countryside Act 1981, s 53, Sch 15.

The owners of a parcel of land applied to the local authority, under s 53(5)^a of the Wildlife and Countryside Act 1981, for an order deleting from the definitive map a bridleway which passed through their land on the grounds that it had never been a right of way. The authority concluded that there was insufficient evidence of use by horse riders to justify its designation as a bridleway, but that there was sufficient evidence of use on foot to justify its inclusion on the definitive map as a footpath. The landowners appealed to the Secretary of State under Sch 14 to the 1981 Act. He allowed the appeal and directed the authority to make an order deleting the way from the definitive map. The authority duly made the order, but under the relevant procedure it could not take effect until confirmed by the Secretary of State who was first required to consider any representations or objections made in relation to it. After objections were made, the Secretary of State appointed an inspector to hold a local inquiry to determine whether or not to confirm the order. Despite the Secretary of State's earlier decision, the authority remained of the view that, while no bridleway existed, the evidence demonstrated that there was a right of way in the form of a footpath. Accordingly, at the inquiry it urged the inspector to confirm the Secretary of State's order, subject to a modification which would replace the deleted bridleway with a footpath. An association, of which the appellant, T, was the deputy director, objected to the order, contending that the bridleway was properly marked on the definitive map and should not be deleted or modified. Alternatively, it supported the modification proposed by the authority. The inspector held that that modification fell outside his powers, derived from Sch 15^b to the 1981 Act, to confirm an order with modifications. He further concluded that, in any event, there had never been a right of way of any description along the bridleway, save for a small stretch. Accordingly, he confirmed the order subject to a modification which left that stretch on the definitive map. T, acting on behalf of the association, appealed to the High Court, but that appeal was dismissed. He therefore

a Section 53 is set out at [5], below

b Schedule 15, so far as material, is set out at [18], below

a appealed to the Court of Appeal, contending that the inspector had erred in concluding that it was not open to him under Sch 15 to confirm the order subject to a modification which substituted a footpath for the bridleway. He further contended that the inspector had erred in principle in, inter alia, attaching no weight at all to the fact that the bridleway had been entered on the definitive map, and that he should instead have treated it as highly material evidence of the
b existence of a right of way. In seeking to uphold the inspector's decision, the Secretary of State contended, inter alia, that the modification sought by the authority would result in a fundamentally different order, and could not therefore be described as 'confirming' an order subject to modification.

c **Held** – (1) When confirming an order by the Secretary of State to delete a bridleway from the definitive map, an inspector had power under Sch 15 to the 1981 Act to make a modification replacing the bridleway with a footpath. The scheme of the procedure under Sch 15 was that if, in the course of the inquiry, facts came to light which persuaded the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent
d representations and objections leading to a further inquiry. It would be undesirable in principle and difficult in practice to fetter his power to do that by a test which required evaluation of the modification to see whether the inspector could truly be said to be 'confirming' the original order. It followed in the instant case that T had been correct to challenge the inspector's decision as to the ambit of his
e power. However, the inspector's conclusion had not affected his decision. Instead, he had decided that the evidence was clearly inconsistent with the right of way, depicted as the bridleway, ever having existed as such (see [23]–[25], [47] and [48], below).

(2) Where the Secretary of State or an inspector appointed by him had to
f consider whether a right of way which was marked on a definitive map in fact existed, he should start with an initial presumption that it did. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures had been followed, and therefore that such evidence existed. At the end of the day, when all the
g evidence had to be considered, the standard of proof required to justify a finding that no right of way existed was no more than the balance of probabilities. Evidence of some substance had, however, to be put in the balance if it was to outweigh the initial presumption that a right of way existed. Proof of a negative was seldom easy, and the more time that elapsed, the more difficult would be the
h task of adducing the positive evidence that was necessary to establish that a right of way had been marked on a definitive map by mistake. In the instant case, the inspector had directed himself that clear and cogent evidence was necessary to remove a public right of way from the definitive map and that it had to be demonstrated that a mistake had been made. He had found, on the evidence, that
j it was beyond the bounds of credibility that a right of way had existed over the material portion of the bridleway. That conclusion was a finding of fact which, unless demonstrated to be perverse, manifestly satisfied the test required to justify a finding that the bridleway had been marked on the definitive map as a right of way in error. Accordingly, the appeal would be dismissed (see [38], [42], [46]–[48], below); dictum of Richards J in *R v National Assembly for Wales, ex p Robinson* (2000) 80 P & CR 348 disapproved.

Notes

For the effect of the definitive map, and for restrictions upon confirming orders with modifications, see respectively 21 *Halsbury's Laws* (4th edn reissue) paras 264, 275.

For the Wildlife and Countryside Act 1981, s 53, Sch 15, see 20 *Halsbury's Statutes* (4th edn) (1999 reissue) 453, 468.

Cases referred to in judgments

R v National Assembly for Wales, ex p Robinson (2000) 80 P & CR 348.

R v Secretary of State for the Environment, ex p Hood [1975] 3 All ER 243, [1975] QB 891, [1975] 3 WLR 172, CA.

R v Secretary of State for the Environment, ex p Simms, R v Secretary of State for the Environment, ex p Burrows [1990] 3 All ER 490, [1991] 2 QB 354, [1990] 3 WLR 1070, CA.

Rubinstein v Secretary of State for the Environment (1989) 57 P & CR 111.

Appeal

John Trevelyan, suing on behalf of himself and all other members of the Ramblers' Association, appealed with permission of Laws LJ from the decision of Latham J on 20 January 2000 ([2000] 2 PLR 49) dismissing his appeal from the decision of an inspector appointed by the respondent, the Secretary of State for the Environment, Transport and the Regions, on 1 April 1999 confirming, subject to a modification, the order made by the Secretary of State on 21 December 1994 directing Lancashire County Council to delete from the county definitive map a way known as bridleway 8 where it passed through land known as Sawley Lodge in the parish of Sawley. The facts are set out in the judgment of Lord Phillips of Worth Matravers MR.

George Laurence QC and *Rhodri Price Lewis* (instructed by *Brooke North*, Leeds) for the appellant.

John Hobson QC (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

23 February 2001. The following judgments were delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

[1] This is an appeal from the Queen's Bench Division, Crown Office List against the judgment of Latham J ([2000] 2 PLR 49).

[2] Some 20 years ago, for the benefit of those who enjoy walking in the countryside, the Lancashire County Council (the county council) designated as a long-distance footpath the Ribble Way, which follows the course of the river of that name. In so doing they followed rights of way depicted as such on the relevant definitive map. So long as a right of way is shown on that map, its existence is conclusively demonstrated. Legislation provides, however, a procedure that can lead to the deletion from a definitive map of rights of way that have been marked on it in error. Mr and Mrs Lord live in Sawley Lodge in the parish of Sawley and own the land around it. They bought their home in 1976. The Ribble Way passes through their land along bridleway 8. This proved unwelcome, for some who walked along this bridleway trespassed from it and committed acts of vandalism. Mr and Mrs Lord then discovered evidence which led them to conclude

a that bridleway 8 had been marked on the definitive map in error where there was, in fact, no right of way. In 1985 they began the appropriate procedure to get deleted from the definitive map that part of bridleway 8 which crossed their land. I shall describe this part from now on simply as 'bridleway 8', although in due course I shall have to address the fact that it did not include the easternmost section of bridleway 8. The procedure that Mr and Mrs Lord put in train followed
b a course more tortuous and lengthy than the Ribble Way, but culminated in an order made by the respondent on 1 April 1999 deleting a large part of bridleway 8 from the definitive map. Mr Trevelyan, the appellant, was until recently the deputy director of the Ramblers' Association. He appealed to Latham J to have the respondent's order quashed. That appeal failed. He now appeals to us with the permission of Laws LJ who rightly took the view that the case raises a point
c of principle as to the correct approach to be adopted when considering whether a right of way should be deleted from the definitive map.

The facts

d [3] I shall adapt the clear statement of the relevant facts and statutory provisions set out by Latham J in his judgment, for these are not contentious.

[4] The definitive map in question was published on 10 August 1973. It was prepared pursuant to the provisions of the National Parks and Access to Countryside Act 1949. Section 27 required the relevant authority, in this case Lancashire County Council, to survey land over which a right of way was alleged
e to subsist and to prepare a map showing such a right of way whenever in its opinion such a right of way subsisted, or was reasonably alleged to have subsisted, at the relevant date. For the purposes of the present case, the relevant date was 22 September 1952. In order to carry out this duty, s 28 of that Act required the county council to consult with rural district councils. Section 29 then required a draft map to be prepared and advertised, and made provision for
f objections and determination by the county council of such objections. In the light of such objections, the county council was empowered to modify the map. A right was then given by s 29(5) for objections to any such modification to be dealt with by way of appeal to the Secretary of State, who was, in turn, empowered to hold a local inquiry under s 29(6). At the completion of that
g process, s 30 provided for the preparation of a provisional map; and s 31 entitled any person aggrieved to appeal to quarter sessions. By s 32, the county council was then obliged to prepare the definitive map. By s 32(4), designation of a right of way on such a map was deemed to be conclusive evidence that there was at the relevant date the right of way so designated. Section 33 required the county council to keep the definitive map under review, and provided for amendment
h by way of addition or modification but not deletion.

[5] The relevant authorities were first given power to delete a right of way in limited circumstances by Sch 3 to the Countryside Act 1968. The power to delete with which this appeal is concerned was, however, given by s 53 of the Wildlife and Countryside Act 1981 which provides as follows:

j '(2) As regards every definitive map and statement, the surveying authority shall—(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably

practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event. a

(3) The events referred to in subsection (2) are as follows ... (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification ... b c

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of application under this subsection. d

[6] Schedules 14 and 15 to the 1981 Act make complicated provision for the procedures to be adopted in the event of any issues arising under s 53 of that Act. By Sch 14, an authority to whom any application is made for an order under s 53 is to investigate the matter and come to a determination. If the authority decides not to make an order, the applicant may appeal to the Secretary of State who is to give such directions as appear to him necessary in the light of his decision on the appeal. By Sch 15, where an authority has made an order, but there are objections, the order is to be submitted to the Secretary of State, who may appoint an inspector to hold an inquiry and to determine whether or not to confirm the order. In circumstances which I shall consider in greater detail in due course, it is open to the inspector to confirm an order with modifications. If the order is confirmed, but with modifications, and there are objections to the modifications, the Secretary of State is again required to hold a local inquiry or give the objectors an opportunity to be heard by an inspector before coming to a final decision. Paragraph 12 of the Schedule entitles any person aggrieved by the confirmation of an order, on the grounds that it is outside the powers of s 53 or 54, to appeal to the High Court. This is the jurisdiction invoked in the present proceedings. e f g h

[7] The right of way in question was not delineated on any maps before the coming into force of the 1949 Act. The survey of the relevant area for the purposes of that Act was carried out by Mr W Proctor, who was the Sawley parish representative on the Bowland Rural District Council (the rural district council), which was responsible for the survey on behalf of the county council. This was done between December 1950 and February 1951. Information supplied by Mr Proctor led the rural district council to record a right of way for those on foot or horseback running from the public highway in Sawley, along the drive leading to Sawley Lodge, and then across open fields, generally following the line of the River Ribble, through woods, eventually returning to the public highway. Its length was approximately three miles. It was identified on the definitive map as j a

a bridleway 8. The survey form delineating the route of the right of way did not include any explanation as to the nature of the evidence supporting the claim.

[8] The land over which it ran had originally formed part of the Sawley Estate, which had, until 1949, been owned by Mr Fattorini. After his death it was split up. The land over which the western half of the claimed bridleway passed was purchased in August 1950 by Mr and Mrs Hindley. When, as a result of the survey, the county council produced the draft definitive map in 1953, including b bridleway 8, Mr and Mrs Hindley objected to the map on two grounds. First they objected to the alignment of bridleway 8, on the grounds that it should have been shown running closer to the river; second, they objected to the inclusion of part of another bridleway, bridleway 20. These objections were accepted by the county council; and, eventually, the requisite amendments were duly recorded in c 1965 in the notice given by the county council of proposed modifications to the draft definitive map.

[9] In 1967, Mrs Fernie bought Sawley Lodge; and in 1970 Mr Fernie bought the remainder of the land which had been owned by Mr and Mrs Hindley across which part of the claimed bridleway ran. In July 1970 the provisional map was d published, retaining the modification to bridleway 8 to which I have already referred. Mr Fernie applied to quarter sessions under s 31(1) of the 1949 Act on the grounds that there was no public right of way along part of bridleway 8, and another bridleway, no 16. He also applied on the same grounds in relation to parts of two footpaths, numbered 11 and 17. He withdrew his objection in relation to bridleways 8 and 16; and the county council accepted that there was e no right of way over the relevant parts of the two footpaths, which were deleted. The definitive map was accordingly published on 10 August 1973, including bridleway 8.

[10] In 1976, Mr and Mrs Fernie sold the land to Mr and Mrs Lord. The latter became concerned about the bridleway when it was included on the first f Ordnance Survey map published after the definitive map, in 1979. The use of the bridleway increased, with instances of trespass and vandalism. They complained to the county council in 1980. The county council, however, had in mind their plan for the Ribble Way, which, it was proposed, should include bridleway 8. It was concerned that walkers would be put at risk by the use of the bridleway by horse riders, and suggested that the right of way be downgraded to a footpath. Mr and g Mrs Lord were not prepared to agree. None the less, they reluctantly accepted the positioning of Ribble Way signs along bridleway 8, on the understanding that that would be entirely without prejudice to their contention that no public right of way of any description existed along the route.

[11] In 1985 Mr and Mrs Lord applied to the county council under s 53(5) of h the 1981 Act for an order deleting bridleway 8 from the definitive map on the grounds that it had never been a right of way. The county council considered that there was insufficient evidence of use by horse riders to justify its designation as a bridleway, but that there was sufficient evidence of use on foot to justify it being included on the definitive map as a footpath. The applicants appealed to j the Secretary of State for the Environment. Before the appeal was considered, Taylor J in *Rubinstein v Secretary of State for the Environment* (1989) 57 P & CR 111 held that because of the conclusive nature of inclusion of a right of way on the definitive map as at the relevant date, s 53(3)(c)(iii) of the 1981 Act could only involve consideration of evidence relating to matters after the relevant date, for example the physical destruction of the land over which the right of way was said to exist. The Secretary of State accordingly dismissed Mr and Mrs Lord's appeal

[12] However, the decision in *Rubinstein's* case was overruled by the Court of Appeal in *R v Secretary of State for the Environment, ex p Simms*, *R v Secretary of State for the Environment, ex p Burrows* [1990] 3 All ER 490, [1991] 2 QB 354. The court held, in effect, that if evidence came to light to show that a mistake had been made in drawing up the definitive map, then such a mistake could be corrected in either of the three ways envisaged in s 53(3)(c) of the 1981 Act. The objective of these provisions was to ensure that the definitive map provided as accurate a picture as possible of the relevant rights of way. a
b

[13] Mr and Mrs Lord were advised that they could submit a new application to delete bridleway 8, which they did. The county council, on considering the evidence, again concluded that a right of way existed, but that it was a right of way on foot and not on horseback. Mr and Mrs Lord exercised their right of appeal under Sch 14 to the 1981 Act to the Secretary of State, who allowed the appeal on 21 December 1994 and directed the county council to make an order to delete bridleway 8 from the definitive map. c

[14] At this point complications ensued which it is unnecessary to recount. Suffice it to say that an order was made in due course by the county council which complied with the Secretary of State's direction. Under the relevant procedure, this order could not take effect until confirmed by the Secretary of State. Before confirmation, the Secretary of State had to consider any representations or objections duly made in relation to it. Objections were made and the Secretary of State exercised his statutory power to appoint an inspector to hold a local inquiry into the matter. This had the effect of delegating to the inspector the task of deciding whether or not the order should be confirmed, with or without modifications. d
e

[15] Despite the decision of the Secretary of State, the county council remained of the view that, while no bridleway existed, the evidence demonstrated that there was a right of way in the form of a footpath. Accordingly at the inquiry they urged the inspector to confirm the Secretary of State's order, subject to a modification that would replace the deleted bridleway with a footpath. The Ramblers' Association objected to the order, contending that the bridleway was properly marked on the map and should not be deleted or modified. Alternatively, they supported the modification proposed by the county council. The South Pennine Packhorse Trails Trust also objected to the order on the ground that it could not be demonstrated that there had been any error in depicting bridleway 8 on the definitive map. f
g

[16] The inspector, after a seven-day inquiry, gave his first decision on 18 December 1997. In this he concluded that there was no right of way of any description along bridleway 8, save for a stretch from the public highway along Sawley Lodge Drive to the junction with another bridleway, bridleway 16. He therefore proposed to make the order with a modification so as to leave this short stretch of bridleway 8 on the map. This triggered the right to make further objections, which were considered at a further public inquiry, as a result of which the inspector upheld his original decision in a letter of 1 April 1999. Although the latter was the final order, against which the appellant applied to Latham J, the relevant reasoning was contained in the original decision letter of 18 December 1997. h
j

The options open to the inspector and the decision that he reached

[17] The order challenged before the inspector directed that bridleway 8 should be deleted from the definitive map. It was undoubtedly open to the inspector to confirm the order, or alternatively to decide that the order should not be confirmed. He was in doubt, however, as to whether it was open to him to

- a accede to the submission of the county council that he should modify the order by substituting a footpath for bridleway 8.

[18] The powers of the inspector were derived from Sch 15 to the 1981 Act, which provides, in so far as relevant:

'Opposed orders

- b 7.—(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.

(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either—(a) cause a local inquiry to be held; or ...

- c (3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.

Restriction on power to confirm orders with modifications

- d 8.—(1) The Secretary of State shall not confirm an order with modifications so as—(a) to affect land not affected by the order; (b) not to show any way shown in the order or to show any way not so shown; or (c) to show as a highway of one description a way which is shown in the order as a highway of another description, except after complying with the requirements of sub-paragraph (2).'

- e [19] Subparagraph 2 makes provision for representations and objections to the proposed modification and a further public inquiry to consider these.

- f [20] The inspector, acting on behalf of the Secretary of State, was rightly satisfied that he could and should act pursuant to para 8(1)(b) in confirming the order subject to a modification which left on the definitive map the portion of bridleway 8 which followed the course of Sawley Lodge Drive. His doubts as to his power to make the modification proposed by the county council were expressed in the following passage of his decision letter:

- g 'The County Council were, nevertheless seeking to modify the Order to show the Order path as a footpath to the north of the junction with bridleway 16. Their justification for this was that the Secretary of State's decision requiring the Order to be made, with which they disagreed, was only part of the procedural process of Schedules 14 and 15 of the 1981 Act leading to the testing of all the available evidence both written and oral at a public inquiry. However, it does not seem to me, that an Order, which as
h written, quotes Section 53(3)(c)(iii) and states "that there is no public right of way over land shown in the Map and Statement as a highway of any description" and does not proceed with the alternative wording of the sub-section, can be modified to show a public right of way, other than for the retention of parts of bridleway 8. I regard this as fundamental in this case.'

- j [21] On behalf of Mr Trevelyan, Mr Laurence QC submitted that the inspector had erred in concluding that it was not open to him to confirm the order subject to a modification which substituted for bridleway 8 a footpath. He accepted that this could not be done under para 8(1)(c) because there was no 'way which is shown in the order' for which a footpath could be substituted. He argued, however, that the proposed modification fell within para 8(1)(b) in that it showed a way not shown in the order.

[22] For the Secretary of State, Mr Hobson QC, supported the conclusion of the inspector. He argued that to depict a footpath in place of bridleway 8, when the order directed that the bridleway should be deleted, could not be described as *confirming* the order subject to modification. It was making a fundamentally different order. a

[23] If Mr Hobson's submission is correct, the consequence, as he accepted, was that, if the inspector had been satisfied that there was a right of way on foot along the course of bridleway 8, but that this was the limit of the right of way, he would have been bound to decide that the original order should not be confirmed, leaving on the definitive map a bridleway that should not be there. This would be a manifestly unsatisfactory state of affairs. In my judgment, the scheme of the procedure under Sch 15 to the 1981 Act is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a test which requires evaluation of the modification to see whether the inspector can truly be said to be *confirming* the original order would be undesirable in principle and difficult in practice. Accordingly I consider that Mr Laurence was correct to challenge the decision of the inspector as to the ambit of his powers. b
c
d

[24] This might have been of some moment, for the inspector stated that he regarded his conclusion as 'fundamental in this case'. It does not, however, appear to me that his conclusion had any effect on his decision. The inspector decided that the evidence was clearly inconsistent with the right of way depicted as bridleway 8 ever having existed as such. His decision letter then continued: e

'The question remains as to whether an error in recording a path as a public bridleway which, by definition, includes public footpath rights of way, reads across to those rights. I take the view that the error was in the recording of a right of way of whatever rights and consequently find myself persuaded that the provisions of Section 53(3)(c)(iii) have been satisfied in relation to the order path apart from the very southernmost part between point A and the junction with bridleway 16.' f

[25] It seems to me, and Mr Laurence did not gainsay this, that the inspector found in terms that it would be erroneous for the definitive map to portray a right of way of any kind along the course of what had been depicted as bridleway 8. g

The reasons for the inspector's decision

[26] The inspector received a substantial body of evidence as to the nature and extent of the user made of the path depicted as bridleway 8, both before and after 1952. There was no positive evidence that it had ever been used by horses, nor any clear evidence that such user would even have been a physical possibility. There was considerable evidence of its use as a footpath, but the evidence conflicted as to whether this was under license or in assertion of a public right of way. Latham J summarised this and other evidence in his judgment. I do not find it necessary to repeat that exercise for this reason. Mr Laurence conceded that he could not contend that the inspector's decision was perverse. He accepted that there was evidence which might have supported the decision reached by the inspector even had he applied himself correctly to its consideration. Mr Laurence submitted, however, that there were two errors of principle in the inspector's h
j

a approach. But for those errors he might have reached a different decision. It followed that his decision should be quashed.

[27] I propose now to consider in turn each of the alleged errors.

The effect of the definitive map

b [28] Under the scheme set out in the 1949 Act the depiction of a right of way on the definitive map was intended to establish conclusively, once and for all, the existence of that right of way. The Court of Appeal in *Ex p Simms* decided, however, that Parliament had had second thoughts. Mr Laurence has reserved the right to challenge that decision should he have the opportunity in the House of Lords. In this court he accepts, as he must, that the 1981 Act provides for the removal of rights of way from the definitive map if it is shown that they were depicted on it by mistake.

c [29] Mr Laurence submits that, although the definitive map is to that extent no longer conclusive as to the existence of a right of way, it is cogent evidence of the existence of any right of way shown on it. His primary challenge to the inspector's decision is that the inspector attached no weight at all to the fact that d bridleway 8 had been entered on the definitive map when he should have treated this as highly material evidence of the existence of a right of way.

[30] The inspector found that there was no reason to doubt that the proper statutory procedures were carried out in relation to the depiction of bridleway 8 on the definitive map. Mr Laurence showed us what those procedures must have e involved.

[31] They involved a parish survey of the relevant area by Cllr Proctor, a meeting of Sawley Parish Council, and the provision by Cllr Proctor of details of rights of way, including bridleway 8, to the clerk to the rural district council. The clerk signed a form on which the details of bridleway 8 that had been f provided by Cllr Proctor were set out. That form had a space for insertion of the reasons for believing that the bridleway was public, but nothing was entered in this space. The rural district council in its turn passed the information on to the West Riding County Council, which was then the surveying authority. The entry by the county council of bridleway 8 on the definitive map showed that they were satisfied, if not that it subsisted, at least that it was reasonably alleged to g subsist. Thereafter, there were opportunities to challenge the draft map, but in so far as bridleway 8 was concerned, such challenges as were made were subsequently compromised or abandoned. When the definitive map was finally published in August 1973, all involved anticipated that it would conclusively and permanently establish the existence as a right of way of bridleway 8. It was in the light of this h history that Mr Laurence submitted that the very fact of the depiction of bridleway 8 on the definitive map should have carried very significant evidential weight with the inspector.

[32] Latham J ([2000] 2 PLR 49) accepted that the fact of the inclusion of the right of way on the definitive map was 'obviously some evidence of its existence' j but continued (at 58):

'The fact of the inclusion of the right of way on the definitive map is obviously some evidence of its existence. But the weight to be given to that evidence will depend upon an assessment of the extent to which there is material to show that its inclusion was the result of inquiry, consultation, or the mere *ipse dixit* of the person drawing up the relevant part of the map. In

the present case, there was nothing to suggest that any significant probative material existed at the time to support Mr Proctor's survey ...'

[33] Mr Laurence submitted that the judge's approach to the definitive map erred in principle. It was wrong to discount it simply because there was no evidence of the basis upon which bridleway 8 had been entered on it. It was of the nature of things that such evidence might be lost with the passage of time, in which event an assumption should be made that such evidence had none the less existed. Mr Laurence invoked a statement by Lord Denning MR in *R v Secretary of State for the Environment, ex p Hood* [1975] 3 All ER 243 at 248, [1975] QB 891 at 899-900: 'The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975.'

[34] Latham J's decision in the present case was recently followed by Richards J in *R v National Assembly for Wales, ex p Robinson* (2000) 80 P & CR 348. He said (at 356):

'The factual position in Trevelyan was materially identical to that in the present case. Mr Proctor's survey form delineating the route of the right of way did not include any explanation as to the nature of the evidence supporting the claim. That is equally true here. I have already referred to the fact that the relevant section on the survey record card is blank. A passage at the end of paragraph 39 of the decision letter suggests that the National Assembly took the view that there could have been more evidence of public use at the time of inclusion of the footpath on the definitive map than exists now. Any such view would be pure speculation. There is nothing to show that reliance was placed at the time on anything beyond the mere existence of the footpath. That being so, no weight could properly be attached to the mere fact that the footpath was included on the definitive map. By attaching weight to the fact of inclusion, the National Assembly fell into error.'

[35] Mr Laurence submitted that this passage compounded the error of approach of Latham J.

[36] I consider that the approach of Latham and Richards JJ to the weight to be given to the definitive map was, as Mr Laurence has submitted, wrong in principle. In the course of argument the court drew the attention of counsel to s 32 of the Highways Act 1980, which does not appear to have featured in discussion below. This provides:

'A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the rendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.'

[37] Both counsel agreed that this provision was applicable by analogy to the weight to be attached to the definitive map in the context of the inspector's task of considering whether, having regard to all the available evidence, he was satisfied that the right of way depicted as bridleway 8 did not exist.

a [38] Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.

c [39] These considerations are reflected in guidance published by the Secretary of State for the Environment, circular 18/90, and the Secretary of State for Wales, Welsh Office circular 45/90, after the decision of the Court of Appeal in *Ex p* d *Simms*:

e '... in making an application for an order to delete or downgrade a right of way, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map is in error by the discovery of evidence, which when considered with all other relevant evidence clearly shows that a mistake was made when the right of way was first recorded ... Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative map and statement of the highest attainable accuracy. The evidence needed to remove a public right from such an authoritative record, will need to be cogent. The procedures for identifying and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years, without being questioned earlier.'

The inspector's approach

h [40] The approach of the inspector to the standard of proof appears from the following passages of his decision letter, which followed a detailed assessment of all the evidence:

j 'Looked at in the context of the evidence of the persons working on or for the estate or those holding exclusive rights such as the Yorkshire Fly Fishers' Club, a clear impression builds up of a situation in which it seems to me to be beyond the bounds of credibility to accept that a public right of way existed over the Sawley Estate to the north of the junction with the Dockber Road in the first half of the century ...

I agree that the evidence needed to remove a public right of way from the Definitive Map and Statement needs to be clear and cogent and demonstrate that a mistake had been made in the original claim and recording. I have noted all the representations and objections on the matter but I am not persuaded, on the balance of the evidence that a public bridleway existed

from the junction with bridleway 16, northwards to point N and the junction with footpath 18, on the line of the order route, or the route originally claimed, prior to 1952. I am consequently, persuaded that a mistake was made during the Sawley parish survey and that the order path was recorded in error as a public bridleway.'

[41] I would make the following comments in relation to these passages.

[42] The statement 'I am not persuaded, on the balance of the evidence, that a public bridleway existed' is unhappily worded. Taken in isolation, those words suggest that the inspector considered that he should confirm the order unless satisfied on balance of probabilities that there was a bridleway. But it is not right to take those words in isolation. The inspector directed himself that clear and cogent evidence was necessary to remove a public right of way from the definitive map and that it had to be demonstrated that a mistake had been made. This was necessarily, albeit implicitly, a recognition of the evidential effect of the definitive map. The finding by the inspector that it was, on the evidence, 'beyond the bounds of credibility to accept that a right of way existed' over the material portion of bridleway 8 was a finding of fact that, unless demonstrated to be perverse, manifestly satisfied the test required to justify a finding that the bridleway had been marked on the definitive map as a right of way in error. For these reasons, I would reject the first ground of challenge made by Mr Laurence to the decision letter.

Anomalies

[43] As an independent ground of challenge to the inspector's decision, Mr Laurence contended that he failed to take into account the fact that the order deleting bridleway 8 resulted in a number of anomalies on the definitive map. Two footpaths, nos 28 and 29, linked with bridleway 8. The removal of the bridleway had the result that these ended in cul-de-sacs. Furthermore bridleway 8 continued for half a mile or so to the east of the land affected by the order. The result of the order was, so Mr Laurence contended, to end this section in a cul-de-sac.

[44] The inspector referred to the fact that confirmation of the order would produce anomalies in relation to the two footpaths, but Mr Laurence submitted that this reference failed to accord to them their proper significance. The inspector should have given more detailed consideration to whether the order could be reconciled with these anomalies. I do not agree. The inspector's reference demonstrates that he did apply his mind to the significance of the two footpaths. He clearly considered that they did not outweigh the import of the other evidence. It was open to him so to conclude.

[45] Mr Laurence also complained that the inspector made no reference to the anomaly created by the isolated eastern section of bridleway 8. It is true that the inspector did not refer to this when dealing with anomalies. He had, however, given consideration to this section of the bridleway earlier in his decision letter. In the course of considering the significance of an early map, Ordnance Survey 1908-1909, he commented that he found it particularly significant that the map showed a bridlepath on the line of the eastern section of bridleway 8 that crossed by a ford to the north side of the Ribble rather than continuing along the course of the disputed part of the bridleway. This was a matter that the inspector could properly weigh against any suggestion that there was no explanation for the eastern section of bridleway 8.

- a* [46] Latham J was not impressed by the argument based on anomalies. He pointed out that the eastern section of bridleway 8 did not fall within the area of the map that the inspector was required to consider. Had he considered the evidence in relation to it, he might have concluded that the eastern section of the bridleway had also been depicted in error. I share his conclusion that the fact that the order produced the anomalies identified by Mr Laurence does not invalidate the inspector's decision. I would dismiss this appeal.
- b*

SIMON BROWN LJ.

[47] I agree.

LONGMORE LJ.

- c* [48] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

R (on the application of Toth) v Solicitors Disciplinary Tribunal a

[2001] EWHC Admin 240

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT) b

STANLEY BURNTON J

19 FEBRUARY, 28 MARCH 2001

Solicitor – Disciplinary proceedings – Disciplinary tribunal – Power to refer case to Office for the Supervision of Solicitors – Applicant making complaint against solicitors to Solicitors Disciplinary Tribunal – Tribunal declining to determine whether prima facie case made out and referring case to Office for the Supervision of Solicitors – Whether tribunal having power to refer case before certifying that prima facie case established – Solicitors (Disciplinary Proceedings) Rules 1994, rr 4, 28. c

T, a party to litigation, alleged that the solicitors acting for his opponents had acted improperly in the course of the litigation, and made a complaint to the Solicitors Disciplinary Tribunal under r 4(1)(a)(iii)^a of the Solicitors (Disciplinary Proceedings) Rules 1994, SI 1994/288. Rule 4(4)(i) provided that applications under r 4(1)(a)(i)–(iv) 'shall be considered by a solicitor member of the Tribunal who shall certify whether a prima facie case is established in which event the procedure set out in Part III shall apply'. Part III, which was headed 'General', included r 28(a)^b. Under that rule, the tribunal 'may at any stage of the proceedings against a solicitor ... in which the application is not made on behalf of the [Law] Society refer the case to the Society for consideration by the [Office for the Supervision of Solicitors (OSS)] ... and may adjourn the application pending the consideration thereof by [the OSS] in case it should see fit to lodge a further application against the respondent or to undertake on behalf of the original [applicant] the prosecution of his application'. The tribunal informed T that two solicitors and a lay member had declined to reach a conclusion as to whether or not a prima facie case had been established, but that they believed that the matters raised should be investigated and that the OSS was the appropriate body to conduct the investigation. T applied for judicial review, contending that there were no 'proceedings' for the purposes of r 28(a) until a solicitor member of the tribunal had made a certification under r 4(4), and that accordingly the power to refer a case to the OSS could only be exercised after the tribunal had decided that a prima facie case had been established. He further contended that r 28 did not permit a reference and consequential adjournment in order for the OSS to investigate generally matters raised by an application. d
e
f
g
h

Held – On the true construction of r 28(a) of the 1994 rules, the tribunal's power to refer a case to the OSS and to adjourn an application applied both before and after certification under r 4(4)(i). The word 'proceedings' in r 28 had a very wide meaning: 'proceedings' in the tribunal began with the making of an application under r 4. Moreover, the heading of Pt III of the rules did not indicate that that Part applied other than generally. In the case of applications under r 4(1)(c), (d), j

a Rule 4, so far as material, is set out at [7] and [8], below

b Rule 28 is set out at [9], below

a and (e) there was no preliminary consideration of the application under r 4(4). Part III therefore had to apply to such applications without any express words of application such as were found in r 4(4)(i). Furthermore, in the case of those applications which were subject to the certification of a *prima facie* case procedure, some provisions of Pt III applied before certification. That was clearest in the case of r 7^c, which expressly applied to service under r 4, and therefore to service on a solicitor under r 4(4)(iii) before certification of a *prima facie* case. Rule 31(a)^d and (b) applied both before and after certification, as did rr 29^e and 30^f. In addition, there was no justification for there being any difference between the meaning of 'proceedings' in r 30 and in r 28. In both cases, the word covered the procedure of the tribunal from the moment that an application was made to it. It followed that the words in r 4(4)(i), 'in which event the procedure set out in Pt III shall apply', could not be read as impliedly excluding the procedure set out in Pt III before certification. Accordingly, r 28 applied before certification. In exercising its duty under r 4(4)(i) and its powers under r 28, the tribunal was entitled and bound to consider the implications of a complaint for the protection of the public and the maintenance of the reputation of the profession generally. Just as that might lead the tribunal to adjourn a hearing, it might lead it to defer a decision on a *prima facie* case pending consideration of the matter by the OSS. Although the certification under r 4(4)(i) was by a solicitor member of the tribunal, whereas the power conferred by r 28 was exercisable by the tribunal, there was no reason why the solicitor member responsible for deciding whether a *prima facie* case had been established should not, with another solicitor and a lay member, constitute the tribunal in order to consider and if necessary exercise the power conferred by r 28. Further, the subject matter of r 28 was not so inconsistent with its exercise before certification as to exclude its application to that stage of the proceedings. On the contrary, the power conferred by that rule might be beneficial at an early stage if a lay person presented a complaint with insufficient information for the solicitor member to be satisfied that a *prima facie* case had been established, but which also raised concerns that it might not be unfounded. However, the power to refer an application to the OSS was qualified: it had to be for the purpose of it enabling the OSS to decide whether to lodge a further application against the respondent or to undertake on behalf of the original applicant the prosecution of his application. No other purpose for a reference was given. The words 'in case it should see fit to lodge a further application or to undertake on behalf of the original application the prosecution of his application' limited the purpose of an adjournment of an application. Nor did the rules contain any provision for evidence obtained by the OSS to be brought before the tribunal otherwise than as a result of the OSS taking over or making a further application against a solicitor respondent. In the instant case, there was no justification for the decision of the tribunal to 'decline' to reach a conclusion as to whether or not a *prima facie* case had been established. If it was because the tribunal had delegated that decision to the OSS, it was clearly wrong to do so. The tribunal had no power to delegate to any other body the performance of its statutory duties. If the evidence before it established a *prima*

c Rule 7, so far as material, provides: '(1) Service of an Application and statement or affidavit pursuant to the provisions of Rules 4 and 6 shall be ...'

d Rule 31 is set out at [9], below

e Rule 29 provides: 'No Application shall be withdrawn without the consent of the Tribunal.'

f Rule 30, so far as material, provides: '(i) In proceedings before the Tribunal which involve the decision of another court or tribunal, the following rules of evidence shall apply ...'

facie case, the tribunal should not without good reason defer certification in order to refer the case to the OSS under r 28. It would be a rare case in which it was not possible to determine whether a prima facie case existed but it was appropriate to refer to the OSS. Accordingly, the application would be allowed (see [23], [24], [27]–[29], [31], [33], [34], [38], [40], [41] and [47], below).

Notes

For certification of a prima facie case and the power of referral, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 454, 457.

For the Solicitors (Disciplinary Proceedings) Rules 1994, SI 1994/288 rr 4, 7, 28, 29, 30, 31, see 19 *Halsbury's Statutory Instruments* (1999 issue) 19, 21, 24, 25.

Cases referred to in judgment

Armah v Government of Ghana [1966] 3 All ER 177, [1968] AC 192, [1966] 3 WLR 828, HL.

China v Harrow UDC [1953] 2 All ER 1296, [1954] 1 QB 178, [1953] 3 WLR 885.

Harkness v Bell's Asbestos and Engineering Ltd [1966] 3 All ER 843, [1967] 2 QB 729, [1967] 2 WLR 29, CA.

Hillingdon London BC v ARC Ltd [1997] 3 All ER 506, [1998] 1 WLR 174; *aff'd* [1999] Ch 139, [1998] 3 WLR 754, CA.

R (on the application of Richards) v General Medical Council (18 December 2000, unreported), QBD.

R v General Medical Council, ex p Toth [2000] 1 WLR 2209.

R v Highbury Corner Magistrates' Court, ex p Ewing [1991] 3 All ER 192, [1991] 1 WLR 388, CA.

Rozhon v Secretary of State for Wales (1993) TLR 235, CA.

Cases also cited or referred to in skeleton arguments

A-G v Great Eastern Rly Co (1880) 5 App Cas 473, HL.

Bromley London BC v Greater London Council [1982] 1 All ER 129, [1983] 1 AC 768, HL.

Hazell v Hammersmith and Fulham London BC [1991] 1 All ER 545, [1992] 2 AC 1, HL.

R (on the application of Tshikangu) v Newham London BC [2001] EWHC Admin 92.

R v Secretary of State for the Home Dept, ex p Salem [1999] 2 All ER 42, [1999] AC 450, HL.

R v Test Valley BC, ex p Goodman [1992] COD 101.

Trent River Authority v National Coal Board, Newark Area Internal Drainage Board v National Coal Board [1970] 1 All ER 558, [1971] AC 145, HL.

Application for judicial review

Arpad Toth applied for judicial review of the decision of the respondent, the Solicitors Disciplinary Tribunal, communicated by letter dated 13 March 2000, whereby it (i) declined to reach a conclusion as to whether or not a prima facie case had been established on a complaint made by him to the tribunal on 22 February 2000 under r 4(1)(a)(iii) of the Solicitors (Disciplinary Proceedings) Rules 1994, SI 1994/288, and (ii) referred his complaint to the Office for the Supervision of Solicitors. The facts are set out in the judgment.

Philip Coppel (instructed by Russell-Cooke, Potter & Chapman) for Mr Toth.

Patricia Robertson (instructed by Wright Son & Pepper) for the tribunal.

a 28 March 2001. The following judgment was delivered.

STANLEY BURNTON J.

Introduction

b [1] In 1993 Wilfred Toth, the son of the applicant, Mr Arpad Toth, died in tragic circumstances. Mr Toth believed that his son's death was due to the negligence of his general practitioner and the doctor who was deputising for her. In 1995 he brought proceedings under the Fatal Accidents Act 1976 against the doctors. They were represented by a solicitor from the Medical Defence Union. In 1996, Mr Toth in his personal capacity issued proceedings against the same doctors to claim damages for personal injury he alleged he had suffered as a result
c of his son's death. The same solicitor acted for the doctors in those proceedings. In 1997 Mr Toth made a complaint to the General Medical Council concerning his son's treatment. Again, the same solicitor represented the doctors in relation to that complaint. The 1976 Act proceedings were settled in 1998 when Mr Toth accepted the defendants' payment into court. The defendants applied to strike
d out Mr Toth's personal proceedings against the doctors, but their application was ultimately unsuccessful.

[2] Mr Toth considered that in the course of the strike-out application the doctors' solicitor had misled the court and had otherwise acted improperly. On 22 February 2000 he made a complaint to the Solicitors Disciplinary Tribunal (the tribunal) pursuant to r 4 of the Solicitors (Disciplinary Proceedings) Rules 1994,
e SI 1994/288.

[3] The tribunal is established under s 46 of the Solicitors Act 1974. Its jurisdiction includes cases of professional misconduct and failures to comply with rules made by the Law Society under ss 31 (professional practice, conduct and discipline of solicitors and clerks), 32 (accounts rules), 34 (failure to provide
f accountants' reports) and 37 (professional indemnity rules).

[4] Section 46(6) to (10) are as follows:

'(6) Subject to subsections (7) and (8), the Tribunal shall be deemed to be properly constituted if—(a) at least three members are present; and (b) at least one lay member is present; and (c) the number of solicitor members present exceeds the number of lay members present.
g

(7) For the purpose of hearing and determining applications and complaints the Tribunal shall consist of not more than three members.

(8) A decision of the Tribunal on an application or complaint may be announced by a single member.

h (9) Subject to subsections (6) to (8), the Tribunal, with the concurrence of the Master of the Rolls, may make rules—(a) empowering the Tribunal to elect a solicitor member to be its president; and (b) about the procedure and practice to be followed in relation to the making, hearing and determination of applications and complaints.

j (10) Without prejudice to the generality of subsection (9)(b), rules made by virtue of that paragraph may in particular—(a) empower the president of the Tribunal to appoint a chairman for the hearing and determination of any application or complaint; (b) provide that, if the president does not appoint a chairman, a solicitor member shall act as chairman; and (c) provide, in relation to any application or complaint relating to a solicitor, that, where in the opinion of the Tribunal no prima facie case in favour of the applicant or

complainant is shown in the application or complaint, the Tribunal may make an order refusing the application or dismissing the complaint without requiring the solicitor to whom it relates to answer the allegations and without hearing the applicant or complainant.’ a

[5] The jurisdiction and powers of the tribunal are set out in s 47:

‘(1) Any application—(a) to strike the name of a solicitor off the roll; (b) to require a solicitor to answer allegations contained in an affidavit; (c) to require a former solicitor whose name has been removed from or struck off the roll to answer allegations contained in an affidavit relating to a time when he was a solicitor; (d) by a solicitor who has been suspended from practice for an unspecified period, by order of the Tribunal, for the termination of that suspension; (e) by a former solicitor whose name has been struck off the roll to have his name restored to the roll; (f) by a former solicitor in respect of whom a direction has been given under subsection (2)(g) to have his name restored to the roll, shall be made to the Tribunal; but nothing in this subsection shall affect any jurisdiction over solicitors exercisable by the Master of the Rolls, or by any judge of the High Court, by virtue of section 50. b

(2) Subject to subsection (3) and to section 54, on the hearing of any application or complaint made to the Tribunal under this Act, other than an application under section 43, the Tribunal shall have power to make such order as it may think fit, and any such order may in particular include provision for any of the following matters—(a) the striking off the roll of the name of the solicitor to whom the application or complaint relates; (b) the suspension of that solicitor from practice indefinitely or for a specified period; (c) the payment by that solicitor or former solicitor of a penalty not exceeding £5,000, which shall be forfeit to Her Majesty; (d) in the circumstances referred to in subsection (2A), the exclusion of that solicitor from legal aid work (either permanently or for a specified period); (e) the termination of that solicitor’s unspecified period of suspension from practise; (f) the restoration to the roll of the name of a former solicitor whose name has been struck off the roll and to whom the application relates; (g) in the case of a former solicitor whose name has been removed from the roll, a direction prohibiting the restoration of his name to the roll except by order of the Tribunal; (h) in the case of an application under subsection (1)(f), the restoration of the applicant’s name to the roll; (i) the payment by any party of costs or a contribution towards costs of such amounts as the Tribunal may consider reasonable ... c

(3) On proof of the commission of an offence with respect to which express provision is made by any section of this Act, the Tribunal shall, without prejudice to its power of making an order as to costs, impose the punishment, or one of the punishments, specified in that section. d

(3A) Where, on the hearing of any application of complaint under this Act, the Tribunal is satisfied that more than one allegation is proved against the person to whom the application or complaint relates it may impose a separate penalty (by virtue of subsection (2)(c)) with respect to each such allegation.’ e

[6] The 1994 rules, which govern the procedure of the tribunal, are contained in a statutory instrument made pursuant to the power contained in s 46 of the 1974 Act. f

[7] Rule 4(1) is as follows:

'Applications and Forms

(a) An Application to the Tribunal: (i) To strike the name of a solicitor off the Roll of Solicitors, or (ii) To strike the name of a registered foreign lawyer off the Register of Foreign Lawyers maintained by the Society, or (iii) Making allegations against a solicitor, a former solicitor, or a registered foreign lawyer, or (iv) Making an allegation against a Recognised Body shall be in Form 1.

(b) An Application to the Tribunal to make an order under Section 43(2) of the Act with respect to a solicitor's clerk shall be in Form 2.

(c) An Application to the Tribunal seeking restoration to the Roll or for the revocation of an order made pursuant to Section 43(2) of the Act or by a former registered foreign lawyer seeking to be restored to the Register of Foreign Lawyers shall be by affidavit in Form 3.

(d) An Application to the Tribunal by a solicitor who has been suspended from practice or a registered foreign lawyer suspended from the Register of Foreign Lawyers to have that period of suspension terminated shall be by affidavit in Form 4.

(e) An Application that a direction be made by the Tribunal that a direction made by the Society in respect of a solicitor in respect of inadequate professional services be treated for the purposes of enforcement as if it were contained in an order of the High Court shall be in Form 1.'

[8] Mr Toth's complaint fell within r 4(1)(a)(iii) and was duly made by way of an application in Form 1 contained in the First Schedule to the 1994 rules. Rule 4(4) is as follows:

'Preliminary Consideration of Application

(i) An Application under Rule 4(1)(a)(i)(ii)(iii)(iv) and (b) shall be considered by a solicitor member of the Tribunal who shall certify whether a prima facie case is established in which event the procedure set out in Part III shall apply.

(ii) Where in the opinion of the solicitor member no prima facie case is established the Application shall be considered by another solicitor member and a lay member of the Tribunal and where in their opinion no prima facie case is established, the Tribunal may dismiss the Application without requiring the respondent to answer the allegations and without hearing the applicant. If required so to do by either party, the Tribunal shall make a formal order dismissing the Application.

(iii) If in the opinion of the solicitor member of the Tribunal the respondent should be given the opportunity of making representations as to whether or not a prima facie case is established, then the Clerk will serve a copy of the Application upon the respondent inviting him to make such representation in writing within 14 days and the solicitor member will after considering the same certify that a prima facie case is or is not established, or require oral representations to be made by the parties to him sitting in private before so certifying.'

[9] Part III of the 1994 rules is headed 'General', and contains rr 5 to 31. Rules 5, 6, 9, 28 and 31 are as follows:

‘5 Before fixing a day for any hearing the Tribunal may require the applicant to supply such further information and documents and copies thereof relating to the Application as it thinks fit. a

6 Upon the receipt of an Application and after the finding by the Tribunal of a prima facie case where these Rules require the Tribunal shall fix a day for the hearing and the Clerk shall serve notice thereof on the parties at least 42 days before the date of the hearing. The Clerk shall give notice to the respondent in Form 5 and a copy shall be sent to the applicant ... b

9 The Tribunal may of its own motion or upon the application of any party adjourn or postpone the hearing upon such terms as the Tribunal may think fit ...

28(a) The Tribunal may at any stage of the proceedings against a Solicitor, Former Solicitor or Registered Foreign Lawyer in which the application is not made on behalf of the Society refer the case to the Society for consideration by the Adjudication and Appeals Committee of the Solicitors Complaints Bureau (or such other appropriate body or committee as the Society might decide) and may adjourn the application pending the consideration thereof by that Committee in case it should see fit to lodge a further application against the respondent or to undertake on behalf of the original [applicant] the prosecution of his application. (b) The Tribunal shall inform the Society, or the Solicitors Complaints Bureau, or both, (or such other appropriate body or committee as the Society might decide) at any stage of the proceedings ... if it is of the opinion that the Society should consider whether to take any of the steps set out in the Courts & Legal Services Act 1990 (Schedule 15) relating to inadequate professional services ... c d e

31(a) Subject to the provisions of these Rules the Tribunal may regulate its own procedure. (b) The Tribunal may dispense with any requirements of these Rules in respect of notices, affidavits, witnesses, service or time in any case where it appears the Tribunal to be just so to do.’ f

[10] The Office for the Supervision of Solicitors (the OSS) has replaced the Adjudication and Appeals Committee of the Solicitors Complaints Bureau: it is the ‘other appropriate body or committee as the Society [has decided]’ referred to in r 28. g

[11] By letter dated 13 March 2000, the tribunal informed Mr Toth as follows:

‘Two solicitor members and a lay member of the Tribunal met together on 9 March to discuss your application. They have declined to reach a conclusion as to whether or not a prima facie case is established thereby and believe that the matters which you raise should be investigated. The Tribunal has no powers of investigation and the appropriate body to conduct an investigation is the Office for the Supervision of Solicitors ...’ h

[12] Mr Toth contends that this decision of the tribunal is unlawful, on the basis that it is not permitted by the 1994 rules. He contends that the tribunal was bound to proceed immediately upon his making his application to determine whether or not a prima facie case had been established, and if so to proceed to a hearing of his complaint as required by r 6, and he therefore seeks an order quashing the decision of the tribunal and an order requiring it to consider his application. His essential contentions are: (i) Rule 28 applies only after the tribunal has decided that a prima facie case has been established. (ii) Rule 28 only j

a permits a reference to be made to the OSS for the purpose of its considering whether 'it should see fit to lodge a further application against the respondent or to undertake on behalf of the original [applicant] the prosecution of his application'. It does not permit a reference and consequential adjournment in order for the OSS to investigate generally matters raised by an application.

b [13] The tribunal contends that its decision as set out in the letter of 13 March 2000 was within its powers contained in the 1994 rules. It disputes both of Mr Toth's contentions. It has, without prejudice to its contentions, agreed to consider whether Mr Toth has established a *prima facie* case against the solicitor in question, but, given the possibility that the tribunal may again wish to refer the matter to the OSS, it has agreed that the guidance of the court should be sought as to the correct interpretation of the 1994 rules.

c [14] As can be seen, the issues before me are issues as to the correct construction of the 1994 rules. It was not argued on behalf of Mr Toth that, if the 1994 rules, correctly construed, empowered the tribunal to act as it did, its decision was unreasonable or otherwise vitiated. Furthermore, it was not suggested that r 28(a) is *ultra vires*.

d [15] Before turning to these questions of construction, it is appropriate to complete the chronology.

e [16] On 16 March 2000 the tribunal sent Mr Toth's application to the OSS, stating that it had decided that the case should be referred to the OSS 'for investigation'. On 27 March 2000 his solicitors wrote to the tribunal making the points which have been argued before me, and inviting it to determine that there was a *prima facie* case. On 10 April 2000, the OSS requested further information and documents from Mr Toth. On 20 April 2000, the OSS sent an unfortunate letter to Mr Toth in which it stated:

f 'You will know that the Tribunal's first duty is to determine whether or not there is a *prima facie* case for (the Solicitor) to answer. The Solicitors Disciplinary Tribunal has passed the file to this Office for this Office to determine that issue.'

The letter continued:

g 'At this stage, so far as the Solicitors Disciplinary Tribunal is concerned, your application before them is not "live" and the proceedings before the Tribunal has (sic) not formally begun.'

h [17] On 31 May 2000 the OSS wrote to Mr Toth stating that in view of the imminent court hearings in his county court action and in his judicial review proceedings against the GMC's decision to dismiss his complaint about one of the doctors who had treated his son, it had decided that it could not investigate his complaints and that the 'file is now closed'.

j [18] The present proceedings were begun on 1 June 2000. The tribunal none the less continued to consider Mr Toth's complaint, but by letter dated 3 July 2000 it informed him that it would defer making a decision as to whether there was a *prima facie* case until after the results of the court hearings were known. By the time of the hearing before me, the tribunal had still not made a decision as to whether or not there is a *prima facie* case against the solicitor, but had agreed that a solicitor member of the tribunal should consider the matter.

[19] I have to say that I understand Mr Toth's frustration, if not exasperation, with the lack of any decision by the tribunal as to the existence of a *prima facie*

case. At the date of the hearing before me, over a year had passed since he lodged his complaint, and in effect it had not advanced one iota. a

[20] I turn to consider the questions of construction raised in these proceedings.

The application of r 28 before certification of a prima facie case

[21] The starting point for Mr Toth's submissions is that r 4(4)(i) provides that the procedure in Pt III applies in the event that a solicitor member of the tribunal certifies that a prima facie case is established. Therefore, it is argued, Pt III, which includes r 28, does not apply unless and until the solicitor member so certifies. Rule 4(4)(i) is mandatory, and does not permit the tribunal or a solicitor member to defer making a decision or to refuse to make one. Furthermore, the certificate under r 4(4)(i) is that of a solicitor member of the tribunal, whereas the power under r 28 to refer the case to the OSS and to adjourn for that purpose is vested in the tribunal. Echoing the point made in the OSS's own letter of 31 May 2000, it is argued that there are no 'proceedings' for the purpose of r 28(a) until the solicitor member has certified that a prima facie case is established. It is submitted that the power to refer to the OSS is inherently one to be exercised only if there is a prima facie case against a solicitor. Lastly, the narrowness of the power to refer to the OSS under r 28(a) is shown by the words 'in case it should see fit to lodge a further application against the respondent or to undertake on behalf of the original [applicant] the prosecution of his application', which must qualify both the purpose for which the tribunal may refer a case to the OSS as well as the purpose of an adjournment of the application. b
c
d

[22] Mr Coppel, on behalf of Mr Toth, approached the interpretation of the 1994 rules on the basis that Mr Toth had a right to have his complaint determined by the tribunal, as if the 1994 rules were concerned with a lis between the complainant making an application under the 1994 rules and the solicitor against whom a complaint is made. I do not think that this is the correct approach. The purpose of the tribunal is not confined to matters between the complainant and the solicitor. It does not adjudicate upon private law rights. It does not award damages against a solicitor. It is concerned with the fitness of a person to act as a solicitor not for a particular client, but generally. It is concerned with the protection of the public from misconduct and the breach of professional rules on the part of solicitors, and the punishment of those who are guilty of misconduct or breach of those rules. Rule 28 has to be considered in the light of that consideration, and so considered it confers a potentially beneficial power on the tribunal. e
f
g

[23] In my judgment, as a matter of construction the powers conferred by r 28(a) to refer a case to the OSS and to adjourn an application apply both before and after certification under r 4(4)(i). My reasons are set out in the following paragraphs. h

[24] First, the word 'proceedings' in r 28 has a very wide meaning. In my judgment, 'proceedings' in the tribunal begin with the making of an application under r 4. Indeed, it is difficult to find a different word to denote what occurs after the presentation of an application to the tribunal. Section 46(9)(b) of the 1974 Act refers to the procedure and practice to be followed in relation to (among other matters) the making of complaints. I do not read these words as an indication that the making of complaints is not the subject of procedure, and if so the making of a complaint and what follows are 'proceedings'. j

[25] The width of the word 'proceedings' is demonstrated by decisions such as *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843, [1967] 2 QB 729,

a in which the Court of Appeal held that there were proceedings for the purpose of the then RSC Ord 2, r 1 even before a writ was issued. Lord Denning MR said:

‘Any application to the court, however informal, is a “proceeding”. There were “proceedings” in being at the very moment that the plaintiff made his affidavit and his solicitor lodged it with the registrar.’ (See [1966] 3 All ER 843 at 845, [1967] 2 QB 729 at 735.)

b [26] The context of course was different, but the width of the expression is illustrated, as is its application at the earliest possible stage of an action, indeed before the formal commencement of the action. Similarly, in *R v Highbury Corner Magistrates’ Court, ex p Ewing* [1991] 3 All ER 192, [1991] 1 WLR 388 an application for leave to apply for judicial review was held to be ‘civil proceedings’ for the purpose of s 42 of the Supreme Court Act 1981. See too *Rozhon v Secretary of State for Wales* (1993) TLR 235. The width of the expression can also be seen in the context of limitations of actions in cases such as *Hillingdon London BC v ARC Ltd* [1997] 3 All ER 506, [1998] 1 WLR 174 (affirmed on appeal: [1999] Ch 139, [1998] 3 WLR 754) and *China v Harrow UDC* [1953] 2 All ER 1296, [1954] 1 QB 178. In its normal meaning it would include procedure before certification of a prima facie case.

c [27] The heading of Pt III of the 1994 rules is ‘General’. It does not indicate that the 1994 rules in Pt III apply other than generally. It is permissible to have regard to such headings in a statutory instrument (see *Odgers’ Construction of Deeds and Statutes* (5th edn, 1967) pp 311–312; *Bennion Statutory Interpretation* (3rd edn, 1997) pp 194, 549–550, 574–575).

e [28] In the case of applications under r 4(1)(c), (d) and (e) there is no preliminary consideration of the application under r 4(4). Part III must therefore apply to such applications without any express words of application such as are found in r 4(4)(i).

f [29] Furthermore, in the case of those applications which are subject to the certification of a prima facie case procedure (and I use the word ‘procedure’ as seeming to me to be appropriate) some provisions of Pt III apply before certification. This is clearest in the case of r 7, which expressly applies to service under r 4, and therefore to service on a solicitor under r 4(4)(iii) before certification of a prima facie case. In my judgment, r 31(a) and (b) apply both before and after certification, as do rr 29 and 30. In addition, I see no justification for there being any difference between the meaning of ‘proceedings’ in r 30 (which relates to proof of the decision of a court or tribunal in ‘proceedings before the Tribunal’) and in r 28. In both cases, the word covers the procedure (and again I stress the use of that word) of the tribunal from the moment that an application is made to it. I also tend to the view that, despite its opening words, r 5 applies both before and after certification. It is clearly sensible and beneficial for it so to apply.

g [30] On Mr Coppel’s reading of the 1994 rules, the words in r 6 ‘where these Rules require’, which qualify ‘after the finding by the Tribunal of a prima facie case’, are otiose. I do not think that they are: they were necessary to limit the duty on the tribunal under Pt III to fix a date for the hearing, in cases to which r 4(4) applies, to cases in which a prima facie case is established.

j [31] It follows that the words in r 4(4)(i) ‘in which event the procedure set out in Part III shall apply’ cannot be read as impliedly excluding the procedure set out in Pt III before certification. Accordingly, r 28 applies before certification, unless its wording or effect indicate otherwise. As I stated above, the word ‘proceedings’

is quite general, and the phrase 'at any stage of the proceedings' equally general. I also derive some support for the view that r 28 applies both before and after certification from the reference to adjournment of the application rather than, as in r 9, adjournment of the hearing, bearing in mind that under r 6 the day for the hearing is fixed upon certification. Indeed, the second part of r 28 would duplicate r 9 if it did not also apply to the proceedings before a date for a hearing is fixed.

[32] Mr Coppel submitted that the solicitor member of the tribunal charged with considering certification, or the tribunal itself, are under a duty, imposed by r 4(4)(i), to consider an application to determine whether a *prima facie* case is established; and that Mr Toth had a right to have his application so considered. The tribunal is under a duty to secure that a solicitor member does consider an application under r 4(4)(i). However, that duty is subject to the rights and powers of the tribunal under the rules, including r 28. Mr Toth has no private law right to have his application considered. His 'right' is a public law right. As I mentioned above, the function of the tribunal is not to award compensation for breach of any personal duty owed by a solicitor to a member of the public: the principal object of its disciplinary jurisdiction is the protection of the public and the profession from misconduct and breach of professional rules by solicitors and others subject to its jurisdiction and the punishment of misconduct and breach of the rules. In exercising its duty under r 4(4)(i), and in exercising its powers under r 28, the tribunal is entitled and bound to consider the implications of a complaint for the protection of the public and the maintenance of the reputation of the profession generally. Just as that may lead the tribunal to adjourn a hearing, it may (and I comment on this below) lead it to defer a decision on a *prima facie* case pending consideration of the matter by the OSS.

[33] Mr Coppel relied on the fact that the certification under r 4(4)(i) is by a solicitor member of the tribunal whereas the power conferred by r 28 is exercisable by the tribunal. However, there is no reason why the solicitor member responsible for deciding whether a *prima facie* case has been established should not, with another solicitor and a lay member, constitute the tribunal in order to consider and if necessary exercise the power conferred by r 28.

[34] Lastly, subject to what I say below, I do not find the subject matter of r 28 so inconsistent with its exercise before certification as to exclude its application to that stage of the proceedings. On the contrary, I accept Miss Robertson's submission that the power conferred by r 28 may be beneficial at this early stage if a lay person presents a complaint with insufficient information for the solicitor member to be satisfied that a *prima facie* case has been established, but which also raises concerns that it may not be unfounded.

The purposes of a reference and adjournment under r 28

[35] I have to say that I find the drafting of r 28 unsatisfactory. Read literally, the power to refer an application to the OSS is unqualified, whereas the power to adjourn an application appears to be restricted to the possibility of the OSS lodging a further application against a respondent or undertaking on behalf of the original application (presumably this should read 'applicant') the prosecution of his application. Given that a reference of an application to the OSS at any stage is likely to affect the time required before the application is ready to be heard, it is difficult to understand this difference in wording.

[36] I was not given any examples of cases in which the OSS had taken over an application or presented a further application as a result of a referral under r 28,

a and I do not know how referrals have worked in practice. Neither the 1994 rules nor the 1974 Act confer any right on the OSS to take over someone else's application. Presumably, therefore, r 28 envisages that the original applicant will agree to the OSS taking over his complaint and prosecuting it on his behalf. But what if he does not? Furthermore, the 1994 rules do not deal with the protection of confidential information obtained by the OSS from a respondent solicitor or
b his clients which it may wish to use in undertaking the prosecution of someone else's application. Is the original applicant whose application is being prosecuted entitled to see the documents containing that confidential information or not? And what if the original applicant is not prepared to discuss with the OSS its taking over his application without knowing what additional material the OSS has obtained, material which in the nature of things is likely to be confidential?

c [37] Mr Coppel is correct that the OSS is not the investigatory arm of the tribunal. The tribunal is and must be independent of the Law Society, and thus of the OSS (cf art 6 of the European Convention for Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)).

d [38] I have concluded that the power to refer an application to the OSS is qualified: it must be for the purpose of it enabling the OSS to decide whether to lodge a further application against the respondent or to undertake on behalf of the original application the prosecution of his application. I have so concluded for the following reasons. First, no other purpose for a reference is given. Secondly, the words 'in case it should see fit to lodge a further application or to undertake on behalf of the original [applicant] the prosecution of his application'
e limit the purpose of an adjournment of an application. As I indicated above, in practice if a reference is made to the OSS there will almost certainly need to be an adjournment of either the consideration of the question of a prima facie case or the hearing of the application. Thirdly, the 1994 rules contain no provision for evidence obtained by the OSS to be brought before the tribunal otherwise than
f as a result of the OSS taking over or making a further application against a solicitor respondent.

[39] However, in practice this restriction on the power to refer may not be of great significance. If the tribunal refers a case to the OSS, it cannot at that stage know whether the OSS will want to take over the application or to make a further application against the respondent. It may refer a case to the OSS for it to
g investigate and as a result of its investigation decide whether to intervene in one of the ways envisaged by r 28(a). The practical difference between this, which is permissible, and a reference of a case to the OSS for it to investigate without qualification or reference as to the purpose of the investigation, is likely to be small.

h *The exercise by the tribunal of its power under r 28(a)*

[40] As I stated above, Mr Toth has not raised before me the question whether the decision of the tribunal to refer his case to the OSS was one reasonably open to it on the facts, apart from the question of construction of the 1994 rules that he
j raised. I have to say that quite apart from the questions of construction, I am concerned at the procedure followed in this case. The letter of the OSS dated 20 April 2000 contained two important errors. First, the tribunal had no power to pass the file to the OSS for the OSS to determine whether there was a prima facie case for the solicitor respondent to answer. The tribunal has no power to delegate to any other body the performance of the duties laid on it by the 1974 Act. Secondly, it was incorrect to state that the proceedings before the

tribunal had not formally begun: they had begun with the lodging of Mr Toth's application under r 4(1). a

[41] Furthermore, I have seen no justification for the decision of the tribunal to 'decline' to reach a conclusion as to whether or not a prima facie case is established. If it was because it had delegated that decision to the OSS, it was clearly wrong to do so. If the evidence before it establishes a prima facie case, the tribunal should not without good reason defer certification in order to refer the case to the OSS under r 28. The cases must be rare in which it is not possible to determine whether a prima facie case exists but it is appropriate to refer to the OSS. b

[42] There has been considerable delay in the prosecution of Mr Toth's application, and it is apparent that much of that delay was unnecessary.

[43] The tribunal may have in mind the possibility of making a reference to the OSS, the OSS presenting a further application or taking over an existing application, and the solicitor respondent then being given an opportunity, pursuant to r 4(4)(iii) to make representations as to whether or not a prima facie case has been established. However, it is to be borne in mind that the power under r 4(4)(iii) arises only if it is questionable whether a prima facie case has been established. If a prima facie case has clearly been established, no question arises of the exercise of the power under that rule. In such a case, the occasion for the respondent to present his case and to make his representations is at the hearing of the application. c

[44] I should also point out that in general the existence of pending civil proceedings involving a solicitor respondent is not a good reason to postpone the determination of a complaint by the tribunal (see the cases referred to in *Cordery on Solicitors* (10th edn, 2000) Vol 1, Division I, p 856, para 1441). d

[45] Furthermore, the establishment of a prima facie case is not to be regarded as a high hurdle: see *Armah v Government of Ghana* [1966] 3 All ER 177, [1968] AC 192, in which the House of Lords distinguished between the relatively low requirement of a prima facie case and the requirement, in an extradition case, of a 'strong or probable presumption' that the defendant committed the offence charged. In the present case, I am not asked to review any decision that there was or was not a prima facie case, since no such decision has been made, and I do not propose to discuss the meaning of a prima facie case in the abstract. e

[46] The nature of a similar screening procedure under the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules Order 1988, SI 1988/2255 was considered by Lightman J in *R v General Medical Council, ex p Toth* [2000] 1 WLR 2209, and by Sullivan J in his unreported judgment in *R v General Medical Council, ex p Richards*, copies of which were supplied to me. However, the wording of those rules differs in important respects from the 1994 rules I am considering, and the analysis of the screening process in that context is not necessarily applicable in the present context. f

[47] I shall hear counsel as to any relief required and the form of the order to be made as a result of my judgment. g

Application allowed.

Dilys Tausz Barrister. h

a Kuddus v Chief Constable of Leicestershire Constabulary
[2001] UKHL 29

b HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD MACKAY OF CLASHFERN, LORD NICHOLLS OF BIRKENHEAD,
LORD HUTTON AND LORD SCOTT OF FOSCOTE

20–22 NOVEMBER 2000, 7 JUNE 2001

c *Damages – Exemplary damages – Misfeasance in public office – Whether exemplary damages only available in respect of causes of action attracting such damages before 1964 – Whether exemplary damages available for misfeasance in public office.*

d The claimant, K, reported to a police constable that property was missing from his flat. The officer told him that the matter would be investigated, but two months later forged K's signature on a written statement withdrawing the complaint of theft. Accordingly, the investigation ceased. K subsequently brought proceedings against the defendant Chief Constable for misfeasance in public office, claiming, inter alia, exemplary damages. In doing so, he contended that the case fell within the first of the two factual categories—specified by the House of Lords in a 1964 decision—in which it was permissible to award exemplary damages, namely oppressive, arbitrary or unconstitutional actions by servants of the government. The Chief Constable accepted that the constable's conduct constituted misfeasance in a public office. He nevertheless sought to strike out the claim for exemplary damages, contending that, even if a case fell within one of the two factual categories, such damages were unavailable unless the cause of action relied upon had been recognised before 1964 as justifying their award, and that the tort of misfeasance by a public officer was not such a cause of action. The judge accepted that contention and duly struck out the claim for exemplary damages. His decision was affirmed, by a majority, in the Court of Appeal. K appealed to the House of Lords.

e

f

g

Held – The power to award exemplary damages was not limited to cases where it could be shown that the cause of action had been recognised before 1964 as justifying an award of such damages. The courts should not be required to undertake a trawl of the authorities in order to decipher whether awards of damages for misfeasance before 1964 might have included an award for exemplary damages. Moreover, the adoption of such a rigid rule would limit the future development of the law, even within the two restrictive categories, in a way which was contrary to the normal practice of the courts. It was the features of the behaviour, rather than the cause of action, which had to be looked at in deciding whether the facts brought a case into one of those categories. It followed that, in the instant case, the question was whether the exemplary damages claimed were on the basis of facts which, if established, fell within the first category. For the purposes of the strike-out application, it was accepted that they did so fall. The claim for exemplary damages should not, therefore, have been struck out. Accordingly, the appeal would be allowed (see [21], [22], [26], [27], [38]–[40], [44], [45], [48], [68], [81], [82], [89], [122], [129], below).

h

j

Rookes v Barnard [1964] 1 All ER 367 and *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 considered. a

AB v South West Water Services Ltd [1993] 1 All ER 609 overruled.

Notes

For the circumstance in which exemplary damages are available, see 12(1) *Halsbury's Laws* (4th edn reissue) para 1115–1116. b

Cases referred to in opinions

AB v South West Water Services Ltd [1993] 1 All ER 609, [1993] QB 507, [1993] 2 WLR 507, CA.

A-G v Blake (Jonathan Cape Ltd, third party) [2000] 4 All ER 385, [2001] 1 AC 268, [2000] 3 WLR 625, HL. c

Ashby v White (1703) 2 Ld Raym 938, 92 ER 126.

Bell v Midland Rly Co (1861) 10 CBNS 287, 142 ER 462.

Cassell & Co Ltd v Broome [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL.

Clark v Newsam (1847) 1 Exch 131.

Hamilton v Chief Constable of the Royal Ulster Constabulary [1986] 15 NIJB. d

Holden v Chief Constable of Lancashire [1986] 3 All ER 386, [1987] QB 380, [1986] 3 WLR 1107, CA.

Lavery v Ministry of Defence [1984] NI 99.

Mafo v Adams [1969] 3 All ER 1404, [1970] 1 QB 548, [1970] 2 WLR 72, CA.

Rookes v Barnard [1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269, HL.

Thompson v Comr of Police of the Metropolis [1997] 2 All ER 762, [1998] QB 498, [1997] 3 WLR 420, CA. e

Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, Aust HC.

Walsh v Ministry of Defence [1985] 4 NIJB.

Wilkes v Wood (1763) Lofft 1, 98 ER 489. f

Appeal

The plaintiff, Omar Kuddus, appealed with permission from the decision of the Court of Appeal (Beldam LJ and Sir Christopher Staughton, Auld LJ dissenting) on 10 February 2000 dismissing his appeal from the order of Mr Recorder Waite in the Leicester County Court on 26 November 1998 striking out his claim for exemplary damages in proceedings for misfeasance in public office brought by him against the defendant, the Chief Constable of Leicestershire Constabulary. The facts are set out in the opinion of Lord Slynn of Hadley. g

David Harris QC and *Nicholas George* (instructed by *Sharpe Pritchard* as agents for *Smith Partnership*, Leicester) for the plaintiff. h

Guy Mansfield QC, *Simon Freeland* and *Georgina Kent* (instructed by *Winckworth Sherwood* as agents for *Michael Feeney*, Leicester) for the defendant

Their Lordships took time for consideration.

7 June 2001. The following opinions were delivered. i

LORD SLYNN OF HADLEY.

[1] My Lords, it seems to me that in this case the issues of law which have been raised could have been more satisfactorily dealt with after the facts had been found. Your Lordships, however, have to deal with the case on the basis that the

a recorder and the majority of the Court of Appeal (Auld LJ dissenting) in this case struck out a claim for exemplary damages on the basis that it disclosed no cause of action.

[2] The relevant pleaded facts are short. The appellant plaintiff told a police constable that he had come back to his flat where a friend had been staying to find that a lot of property was missing. The officer said that the matter would be investigated but some two months later he forged the plaintiff's signature on a written statement withdrawing the complaint of theft. Accordingly the police investigation ceased.

[3] The defendant Chief Constable admits the forgery and that the officer's conduct amounts to misfeasance in a public office. He successfully contended, however, that exemplary damages are not recoverable for the tort of misfeasance by a public officer so that that part of the claim should be struck out. He accepts that there is a viable claim for aggravated damages for such misfeasance.

[4] The parties agree that an award of exemplary damages may be made in appropriate cases in English law even though, being punitive in nature, such an award is inconsistent with the principle that damages are intended to be compensatory. As the law now stands that agreement in my view is well founded.

[5] In *Rookes v Barnard* [1964] 1 All ER 367 at 408, [1964] AC 1129 at 1223 Lord Devlin, with whom on this point other members of the House agreed, having considered early cases concluded:

‘These authorities clearly justified the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.’

Having reviewed further cases he said:

‘These authorities convince me of two things. First, that your lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford. The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category,—I say this with particular reference to the facts of this case,—to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way;

but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service ... Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.' (See [1964] 1 All ER 367 at 410, [1964] AC 1129 at 1225–1226.)

Lord Devlin also referred ([1964] 1 All ER 367 at 411, [1964] AC 1129 at 1227) to a third category in which exemplary damages are expressly authorised by statute which it is not necessary to consider in the present case.

[6] It is equally accepted by the parties that exemplary damages are not precluded by the fact that aggravated damages may be awarded though it is clear that before the decision of the House in *Rookes v Barnard* the distinction between the two was not fully appreciated. In that case Lord Devlin drew attention to the difference of purpose of compensatory damages and punitive or exemplary damages:

'In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.' (See [1964] 1 All ER 367 at 411, [1964] AC 1129 at 1228.)

[7] Lord Devlin stressed that a judge should not allow a case for exemplary damages to be left to the jury unless he is satisfied that it can be brought within the categories he had specified and that a claimant can only recover exemplary damages if he is 'the victim of the punishable behaviour' ([1964] 1 All ER 367 at 411, [1964] AC 1129 at 1227). The means of the parties are material in the assessment of exemplary damages. 'Everything which aggravates or mitigates the defendant's conduct is relevant' ([1964] 1 All ER 367 at 411, [1964] AC 1129 at 1228).

[8] It seems to me that there is nothing in Lord Devlin's analysis which requires that in addition to a claim falling within one of the two categories it should also constitute a cause of action which had before 1964 been accepted as grounding a claim for exemplary damages.

[9] In *AB v South West Water Services Ltd* [1993] 1 All ER 609, [1993] QB 507, the court was concerned with claims for public nuisance and breach of statutory duty. Exemplary damages were claimed on the basis that servants or agents of the defendants as employees of a statutory body had acted in an arrogant and high-handed way and had deliberately misled their customers. It was contended that exemplary damages did not lie for nuisance and that the allegations in the case did not fall within either of Lord Devlin's 'categories'. But in addition it was said ([1993] 1 All ER 609 at 614, [1993] QB 507 at 517) that the combined effect of *Rookes v Barnard* and *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027 was that the claim must be 'in respect of a cause of action for which prior to 1964 such an award had been made'.

[10] Stuart-Smith LJ ([1993] 1 All ER 609 at 617, [1993] QB 507 at 519) accepted that this last limitation was not to be found in the speech of Lord Devlin in *Rookes v Barnard* but was to be deduced from the majority of speeches in *Cassell & Co Ltd v Broome*. Having said ([1993] 1 All ER 609 at 620–621, [1993] QB 507 at 523) that the question

- a whether exemplary damages for nuisance were available prior to 1964 depended on a proper view of *Bell v Midland Rly Co* (1861) 10 CBNS 287, 142 ER 462, he held that exemplary damages could not be awarded for damage flowing from public nuisance, such a claim not having been recognised for such purpose before 1964. He also rejected the contention that the defendants' servants or agents were exercising executive power derived from government, central or local. The claim
- b did not fall accordingly within either of Lord Devlin's two categories.

[11] Bingham MR accepted that:

- c 'According to the traditional classification of the law of tort, such misuse of power [i.e. that referred to in Lord Devlin's first category] could give rise to any one of a number of causes of action, which Lord Devlin was not at pains to identify.' (See [1993] 1 All ER 609 at 626, [1993] QB 507 at 529.)

[12] Having referred to passages in the speeches in *Cassell & Co Ltd v Broome* dealing with the question of whether the claim had to be founded on a cause of action recognised as grounding a claim for exemplary damages before 1964, Bingham MR said:

- d 'I cannot pretend to find the answer at all clear, but I incline to think that a majority of the House regarded an award of exemplary damages as permissible only where (a) a case fell within one or other of Lord Devlin's categories and (b) was founded on a tort for which exemplary damages had been awarded before *Rookes v Barnard*. This may involve a misreading of
- e their Lordships' speeches in *Cassell & Co Ltd v Broome*, but I think it is the basis upon which the Court of Appeal should, until corrected, proceed.' (See [1993] 1 All ER 609 at 626, [1993] QB 507 at 530.)

That was also the approach of the majority in the Court of Appeal in the present case.

- f [13] I share Bingham MR's view that it is not easy to be sure whether the House in *Cassell & Co Ltd v Broome* ruled that the 'pre-1964 test' had to be satisfied but that is the core of the question on this appeal so that it is necessary to look carefully at what was said.

- g [14] Lord Hailsham of St Marylebone LC, with whom Lord Kilbrandon agreed, thought ([1972] 1 All ER 801 at 827, [1972] AC 1027 at 1076) that Lord Devlin was not intending to add to the list of torts for which exemplary damages was available though he considered, that the law before 1964 was not settled:

- h 'In point of fact, it was nothing of the kind ... Speaking for myself, and whatever view I formed of the categories, I would find it impossible to return to the chaos which is euphemistically referred to by Phillimore LJ ([1971] 2 All ER at 214, [1971] 2 WLR at 887) as "the law as it was before *Rookes v Barnard*".' (See [1972] 1 All ER 801 at 821, 823, [1972] AC 1027 at 1068, 1070.)

- j Moreover it is to be noted that in considering the first of Lord Devlin's categories Lord Hailsham said that he would be surprised if the list included only servants of the government in the strict sense of the word. It could cover the police and local and other officials exercising search or arrest without a warrant—

'and it may be that in the future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority ... I am not prepared to say without further consideration that a private individual misusing legal powers of private prosecution or arrest ... might not at some

future date be assimilated into the first category.’ (See [1972] 1 All ER 801 at 829–830, [1972] AC 1027 at 1077–1078.) (My emphasis.)

[15] He also thought that the second category should be broadly construed and ‘even though in the absence of authority I am of opinion that exemplary damages cannot be awarded in an action for deceit, I cannot claim that that matter has been finally determined’ ([1972] 1 All ER 801 at 830, 831–832, [1972] AC 1027 at 1078, 1080).

[16] It seems to me, therefore, that Lord Hailsham was prepared in some respects to be more flexible than a rigid adherence to the ‘pre-1964’ test suggests.

[17] Lord Reid stressed that Lord Devlin was not laying down ‘rules’ but stating ‘principles’ ([1972] 1 All ER 801 at 835, [1972] AC 1027 at 1085). He added:

‘But we thought and I still think it well within the province of this House to say that that undesirable anomaly [punitive damages] should not be permitted in any class of case where its use was not covered by authority.’ (See [1972] 1 All ER 801 at 837, [1972] AC 1027 at 1086.)

But Lord Devlin—

‘set out two categories of cases which in our opinion comprised all or virtually all the reported cases in which it was clear that the court had approved of an award of a larger sum of damages than could be justified as compensatory ... We were confronted with an undesirable anomaly. We could not abolish it. We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow any extension.’ (See [1972] 1 All ER 801 at 837, [1972] AC 1027 at 1086–1087.)

[18] Lord Reid also thought that the first ‘category’ should be read as extending to all those who by common law or statute are exercising functions of a governmental character. He said, however, that—

‘I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority. On that basis I support this *category*.’ (See [1972] 1 All ER 801 at 839, [1972] AC 1027 at 1088.) (My emphasis.)

[19] Lord Wilberforce ([1972] 1 All ER 801 at 864, [1972] AC 1027 at 1119) did not consider that Lord Devlin had intended to limit punitive damages in defamation actions to cases where a profit motive was shown. As to the first category he said:

‘There is not perhaps much difficulty about category 1; it is well based on the cases and on a principle stated in 1703—“if *public officers* will infringe men’s rights, they ought to pay greater damages than other men to deter and hinder others from the like offences” (*Ashby v White* (1703) 2 Ld Raym 938 at 956 per Holt CJ). Excessive and insolent use of power is certainly something against which citizens require as much protection today; a wide interpretation of “government” which I understand your Lordships to endorse would correspond with Holt CJ’s “public officers” and would partly correspond with modern needs. There would remain, even on the most liberal interpretation, a number of difficulties and inconsistencies as pointed

- a out by Taylor J in [*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118].’
(See [1972] 1 All ER 801 at 865, [1972] AC 1027 at 1120.)

On all other points not expressly dealt with, Lord Wilberforce agreed with Lord Hailsham.

[20] Lord Diplock agreed—

- b ‘that *Rookes v Barnard* was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit. Its express purpose was to restrict, not to expand, the anomaly of exemplary damages.’ (See [1972] 1 All ER 801 at 874, [1972] AC 1027 at 1131.)

- c He said, however:

- d ‘It was necessary as a matter of decision of the cross-appeal for this House to determine whether the facts in *Rookes v Barnard* brought it within a category of cases in which exemplary damages were recoverable at common law. This House determined that they did not and ordered a new trial. There were two different processes of reasoning by which it would have been possible to reach this conclusion of law. One, which was not adopted by this House, was to hold that the particular tort of intimidation was one in which the common law did not permit of exemplary damages. The other, which was adopted by this House, was to state the categories of cases in which alone exemplary damages might be awarded at common law and to determine whether the facts in *Rookes v Barnard* brought it within one of these categories.’ (See [1972] 1 All ER 801 at 868, [1972] AC 1027 at 1123–1124.)

And:

- f ‘Lord Devlin’s analysis of previous decisions disclosed three kinds of cases in which the courts had recognised the right of a jury to award damages by way of punishment of the defendant in excess of what was sufficient to compensate the claimant for all the harm occasioned to him. The categorisation was new. Its purpose has, I think, been misunderstood. No one suggests that judges, when approving awards of exemplary damages in particular cases in the past consciously differentiated between one kind of case in which exemplary damages could be awarded and another. They dealt with them all as falling within a single nebulous class of cases in which the defendant’s conduct was such as to merit punishment. The purpose of Lord Devlin’s division of them into three categories was in order to distinguish between factual situations in which there was some special reason still relevant in modern social conditions for retaining the power to award exemplary damages, and factual situations in which no such special reason still survived. With this end in view Lord Devlin extracted from the single nebulous class which appeared to be all that had been consciously recognised as justifying an award of exemplary damages at common law, two categories of cases in which this House decided that there were special reasons why the power to award exemplary damages should be retained. These two (apart from cases where exemplary damages are authorised by statute) are generally referred to as ‘the categories’. But there is also to be found in the previous cases a third category, consisting of the remainder of the single nebulous class in which this House decided that the anomalous practice of

awarding exemplary damages in civil proceedings ought to be discontinued.’
(See [1972] 1 All ER 801 at 872, [1972] AC 1027 at 1128.)

[21] My Lords, Lord Hailsham and Lord Kilbrandon appeared to attach importance to the existence of the pre-1964 cause of action test. It is arguable that Lord Reid and Lord Wilberforce took the same view. I am not, however, satisfied that it was their intention. Lord Reid lays much emphasis on ‘principles’ and ‘categories’ and ‘class of case’ rather than on specific or precise causes of action. It seems to me, despite his general agreement with Lord Hailsham, that Lord Wilberforce contemplated a wide interpretation of both ‘government’ and the excessive use of executive power. Accordingly, although I well understand the approach of the Court of Appeal in *AB v South West Water Services Ltd*, I do not consider that the House is bound by a clear or unequivocal decision in *Cassell & Co Ltd v Broome* to hold that the power to award exemplary damages is limited to cases where it can be shown that the cause of action had been recognised before 1964 as justifying an award of exemplary damages. It is certainly not bound by anything said by Lord Devlin in what is after all the basic statement of the law.

[22] I do not consider that in principle it should be so limited. In any event, like Auld LJ, I do not think that courts should be required to undertake a trawl of the authorities in order to decipher whether awards of damages for misfeasance pre-1964 might have included an award for exemplary damages. Such a task would be all the more difficult given the fact, as indicated above, that the distinction between exemplary and aggravated damages was not until *Rookes v Barnard* clearly articulated. To adopt such a rigid rule seems to me to limit the future development of the law even within the restrictive categories adopted by Lord Devlin in a way which is contrary to the normal practice of the courts as referred to by Lord Evershed in *Rookes v Barnard* [1964] 1 All ER 367 at 384, [1964] AC 1129 at 1185, and by Lord Diplock in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 871, [1972] AC 1027 at 1127. Such a restrictive approach also justifies the comments in *Winfield and Jolowicz on Tort* (15th edn, 1998) p 746 in relation to the pre-1964 test:

‘In other words, that decision [*Rookes v Barnard*] was not a ‘new start’ for the law under two rationalised categories but a further restriction upon then existing authority. Whatever one’s views on exemplary damages this is an unfortunate state of affairs because it commits the law to an irrational position in which the result depends not on principle but upon the accidents of litigation (or even of law reporting) before 1964, at a time, moreover, when the distinction between exemplary and aggravated damages was by no means so clearly drawn as it is now.’

[23] It is also to be borne in mind that the Law Commission in its report on *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) para 5.49 recommended that the availability of punitive damages be extended for most torts, which would entail the rejection of ‘the rationally indefensible position which the common law reached’ in deciding claims on the basis of the existence or absence of pre-1964 precedents.

[24] I do not think that the government’s view (Hansard (HC Debates), 9 November 1999, col 502) that it was right to defer a decision on further legislation on this issue coupled with the comment ‘It may be that some further judicial development of the law in this area might help clarify the issues’ should inspire your Lordships to the view that the whole matter should be reopened and

a the Law Commission's report revisited. It is no more than a comment that issues might become clearer as decisions on particular facts emerge.

[25] For my part I do not consider that it would be right in this case to consider reopening the whole question as to whether exemplary damages should be available at all. The House clearly refused in *Rookes v Barnard* and *Cassell & Co Ltd v Broome* to abolish the rule that exemplary damages are in some cases available and in *Cassell & Co Ltd v Broome* the House refused to reopen the basic decision in *Rookes v Barnard*.

[26] There are obviously strong views as to whether exemplary damages should or should not ever be awarded. It has not been contended in this case that your Lordships should hold that in principle they can never be awarded. In my view therefore the starting point is that the two decisions of the House already accept that exemplary damages may be awarded in some cases. The task of the House in the present appeal is to say whether it is arguable that they can, and if the facts are established should, be awarded in the present case for the tort of misfeasance in public office. In Lord Devlin's speech in *Rookes v Barnard* it seems to me that it is the features of the behaviour rather than the cause of action which must be looked at in order to decide whether the facts fall into the first category. In *Cassell & Co Ltd v Broome* Lord Diplock was also recognising that the task of the judge was to decide whether the facts brought the case into one of the categories.

[27] So on the present appeal the question is whether the exemplary damages claimed are on the basis of facts which if established fall within the first category. For the purpose of the strike-out application, it is accepted that they do so fall. The claim is not excluded because it is not shown that a case on the basis of misfeasance in a public office had been decided before 1964. I would therefore allow the appeal. The claim for exemplary damages should not have been struck out on the basis argued before the House. The question whether in principle the defendant can be vicariously liable has not been argued and I do not think it right to discuss or to rule on it in this case.

LORD MACKAY OF CLASHFERN.

[28] My Lords, the pleaded facts in this case are that on 14 June 1996 the appellant plaintiff discovered that a theft had taken place at his home in Leicester. On the same day the plaintiff reported the theft to a police constable serving with the Leicestershire Constabulary and for whose actions in the course of his police functions the respondent defendant was responsible.

[29] In reporting the theft the plaintiff made a written statement explaining that when he left the flat at 11am on 14 June 1996 there remained an acquaintance of his who had stayed the night in the flat as the plaintiff's guest. On leaving his flat the plaintiff locked the front door behind him. When the plaintiff returned at 12.45pm he found the front door open and damaged and a large number of items of property missing. The plaintiff suspected that the property had been stolen by his guest and so informed the police constable. He gave the constable details of the property that had been taken from the flat. The plaintiff to the knowledge of the police constable was willing to co-operate with any police investigations and the constable assured the plaintiff that the offence would be investigated. In fact unknown to the plaintiff and without his consent on or about 18 August 1996 the police constable forged the plaintiff's signature on a written statement prepared by the constable which purported to be a withdrawal by the plaintiff of his complaint of theft. As a result of the forged withdrawal statement the police

investigation into the complaint of theft ceased and the plaintiff did not discover the fact of the forged statement until on or about 5 December 1996. a

[30] The facts I have narrated are the basis of the plaintiff's case that the police constable's conduct amounts to the tort or misfeasance in public office. The defendant admits the fact of the forgery and that the constable's conduct as pleaded amounts to the tort of misfeasance in public office. The plaintiff raised an action in Leicester County Court and in the course of proceedings there the defendant applied for an order that 'the plaintiff's claim for exemplary damages as pleaded ... be struck out'. The grounds of this application were that this part of the plaintiff's claim disclosed no cause of action as exemplary damages are not recoverable for the tort of misfeasance. Mr Recorder Waine on 26 November 1998 acceded to the application and struck out the plaintiff's claim for exemplary damages for misfeasance in public office. The claim for aggravated damages was struck out by mistake and the defendant agrees that the action must proceed so far as claiming damages including aggravated damages but excluding exemplary damages. The plaintiff appealed to the Court of Appeal and on 10 February 2000 the Court of Appeal by a majority (Beldam LJ and Sir Christopher Staughton, Auld LJ dissenting) dismissed the appeal and granted the plaintiff leave to appeal to your Lordships' House. b
c
d

[31] Neither party in this appeal was prepared to argue that exemplary damages should no longer form part of the law of England nor on the other hand that the principles enunciated by Lord Devlin in *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129 should be extended. Both parties were content to proceed on the basis that the decisions of this House in *Rookes v Barnard* and *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027 should be followed. e

[32] In *Rookes v Barnard* Lord Devlin, in a part of his speech adopted by the other members of the Appellate Committee, held that for the court to have a discretion to award exemplary damages in tort, either the facts of the case must fall within one or other of two broad factual categories, or the award of exemplary damages in the circumstances of the case must be expressly authorised by statute. The two factual categories are: (i) oppressive, arbitrary or unconstitutional actions by servants of the government; and (ii) conduct (by the defendant) calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff. It is accepted by the defendant that the pleaded and agreed facts fall within Lord Devlin's first category. At first sight it seems remarkable that the defendant can accept this as the position and at the same time accept that the House should follow the decision in *Rookes v Barnard* and yet that this appeal should be dismissed. The justification for this position lies in the decision of the Court of Appeal in *AB v South West Water Services Ltd* [1993] 1 All ER 609, [1993] QB 507 which laid down that before an award of exemplary damages can be made by any court or tribunal the tort must be one in respect of which an award was made prior to 1964, the date of the decision in *Rookes v Barnard*. f
g
h

[33] The genius of the common law is its capacity to develop and it appears strange that the law on this particular topic should be frozen by reference to decisions that had been taken prior to and including *Rookes v Barnard*. This has led Professor W V H Rogers to comment in *Winfield and Jolowicz on Tort* (15th edn, 1998) p 746, that this decision 'commits the law to an irrational position in which the result depends not on principle but upon the accidents of litigation'. j

[34] If one takes the view that exemplary damages are an anomaly in the law which has been introduced by authority which should be allowed to stand but

a that it should not be extended beyond the limits to which it has already been introduced then a freeze of this kind would be a logical consequence of that position although the very existence of the anomaly is itself illogical. Put another way, if one has accepted that damage has been done to the rationality of the law by the introduction of an anomaly which cannot be removed but which should not be enlarged, the consequence that the extent to which the anomaly persists is determined by the extent to which it has prevailed prior to the decision to limit it is a perfectly natural and reasonable result. In my opinion therefore criticism of *AB v South West Water Services Ltd* on the basis that it is illogical is not well founded. However it remains to consider whether the decision is justified by the reasons on which it was based.

c [35] This consideration requires the House to examine the principles on which *Rookes v Barnard* in so far as it dealt with exemplary damages is based. Since neither party in this appeal was prepared to challenge *Rookes v Barnard* nor to examine the basis in principle for allowing exemplary damages at all the House is put in the position of having to approach the important question of whether exemplary damages should be available for the tort of misfeasance in public office without the benefit of a full examination of the principles by reference to which that decision should be taken. However the Law Commission in its report on *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) after a very full and thorough consultation, has reached the view that exemplary damages should continue to be part of the law of England and Wales although on a more extended basis than it is at present. By written answer of 9 November 1999 (Hansard (HC Debates), 9 November 1999, col 502) the government has stated that it does not propose to take forward the draft legislation giving effect to this recommendation of the Law Commission having regard to the balance of opinion disclosed at consultation; the answer further stated: 'It may be that some further judicial development of the law in this area might help clarify the issues.'

d We were informed that originally the defendant in the present appeal had indicated an intention to raise this issue but on mature consideration had decided not to do so and that preliminary preparations by the plaintiff to meet such an argument had accordingly been departed from for this reason. Both parties to this appeal start from the premise of acceptance of Lord Devlin's speech in *Rookes v Barnard* as setting out the law on this subject which the House should follow in deciding this particular case.

e [36] Much water has flowed under the bridge since *Rookes v Barnard* was decided. Many statutory duties have been created and the Human Rights Act 1998 has been enacted which give rise to claims of damages the principles of which may well affect the propriety of and the necessity for a power to award exemplary damages to continue to be recognised in the law of England. However in the absence of fuller argument on this point and the fact that the Law Commission after a full consultation has recommended that the power to award exemplary damages should not be removed from the law of England I am content to decide this appeal in the light of the arguments that have been presented. *Rookes v Barnard* is an authority decided in this House. While under the Practice Statement of 1966 (*Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234) the House could now for good reason decline to follow it, since neither party was prepared to advance reasons for declining to follow it, in my opinion, the duty of the House is to follow it in deciding the present appeal.

j [37] It is perhaps worthwhile adding that in his *Principles of the Law of Damages* (1962), referred to by Lord Devlin in his speech in *Rookes v Barnard* [1964] 1 All ER 367

at 407, [1964] AC 1129 at 1221, Professor Street, after summarising the arguments against and for exemplary damages concludes, at p 36:

'It is believed that in the present state of knowledge, one cannot say whether exemplary damages are desirable. That study of the law in action which would show how efficiently they contribute to the attainment of the several purposes examined above remains to be done. And the practical usefulness of exemplary damages is the basic question, and one to which no amount of theorising can provide an answer.'

So far as I understand the Law Commission's report it proceeded on views derived from a very full and careful consultation but it may be that the study which Professor Street desiderated remains to be done.

[38] In the forefront of the defendant's argument is the proposition that the power to award exemplary damages in tort depends upon the tort upon which the action is based and that, while a number of torts carry with them the power in the court to award exemplary damages in cases falling within these torts, for example false imprisonment, assault and battery, trespass to land or goods, there are others, for example, negligence, public nuisance, and deceit, which do not. On a reading of Lord Devlin's speech in *Rookes v Barnard* which was concerned not to set out a code but to state the principles upon which in the light of the previous authorities the power to award exemplary damages should be based I find no trace of the idea that the precise form of the cause of action should determine the matter, although that position had been clearly put in argument. Rather what Lord Devlin was indicating were situations in fact which would justify the court having power to award exemplary damages rather than determining this matter by reference to the cause of action. There is no mention whatever in Lord Devlin's speech of a cause of action test and surely when he was setting out principles if that was part of the essential qualification for the existence of the power he would have mentioned it. Indeed one of the difficulties of applying the pre-1964 decisions is to provide rational grounds for distinguishing between torts in which the power was and was not available.

[39] When Lord Devlin came to apply his general principles to the facts of *Rookes v Barnard* itself he made no mention whatever of the tort of intimidation as qualifying or disqualifying for the exercise of the power for exemplary damages. Counsel for the defendant argued persuasively that Mr Gardiner QC, (counsel for the defendants) in *Rookes v Barnard*, had in effect conceded that intimidation was a qualifying tort but even if one accepts this argument if the nature of the tort is a crucial factor in determining whether or not exemplary damages could be awarded I would certainly have expected Lord Devlin to have mentioned it as part of his application of the principle even if up till then it could have been implicitly regarded as an essential prerequisite. As Lord Diplock said in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 868, [1972] AC 1027 at 1123-1124:

'It was necessary as a matter of decision of the cross-appeal for this House to determine whether the facts in *Rookes v Barnard* brought it within a category of cases in which exemplary damages were recoverable at common law. This House determined that they did not and ordered a new trial. There were two different processes of reasoning by which it would have been possible to reach this conclusion of law. One, which was not adopted by this House, was to hold that the particular tort of intimidation was one in which the common law did not permit of exemplary damages. The other, which

a was adopted by this House, was to state the categories of cases in which alone exemplary damages might be awarded at common law and to determine whether the facts in *Rookes v Barnard* brought it within one of these categories.'

b [40] In my opinion this is the essential character of Lord Devlin's approach in *Rookes v Barnard*. If the cause of action is a vital prerequisite then Lord Devlin's approach would surely have been in two stages: first to determine even if doing so by reference to the concession of counsel whether intimidation was a tort which carried with it the power to award exemplary damages and then to consider whether within that framework the facts of the instant case justified the exercise of the power. If that were the correct structure of the law as Lord Devlin c envisaged it I cannot think that he would not have adopted that analysis.

d [41] A great deal of time and effort was devoted in the argument to the analysis of the speeches in *Cassell & Co Ltd v Broome*. It is an interesting feature of these that Lord Reid indicated a difference of opinion from Lord Devlin's speech in *Rookes v Barnard* although he had in that case itself concurred with it. Lord Devlin took the view that the existence of the power to award exemplary damages is a factor in promoting respect for and the effectiveness of the law, a point of view strongly echoed by Lord Wilberforce in *Cassell & Co Ltd v Broome* (which Professor Street's study (*Principles of the Law of Damages*, p 36) would elucidate).

e [42] Although Lord Reid in *Cassell & Co Ltd v Broome* indicated that in his opinion this was not a sufficiently important part of Lord Devlin's reasoning in *Rookes v Barnard* to require him to dissociate himself from it I consider that it could have a considerable effect on the degree to which one would wish to confine an anomaly within the law. A pointless anomaly even if accepted ought to be more closely confined than an anomaly which could have beneficial effects. We cannot know the extent to which the other members of the House who f participated in *Rookes v Barnard* shared Lord Devlin's view on this point rather than that of Lord Reid but I do not think we can proceed on the assumption that they were with Lord Reid on this rather than with Lord Devlin. In any event I regard Lord Devlin's speech as indicating the sort of confinement of the anomaly which he considered right, namely the need for the power to be exercised only in the categories of factual situation which he had expressed. On this point all their g Lordships who sat in *Rookes v Barnard* were agreed.

h [43] The difficulty of adequate reason for distinguishing between torts in respect of which the power to award exemplary damages should exist and those in which it should not is exemplified by Lord Hailsham of St Marylebone LC's treatment in *Cassell & Co Ltd v Broome* of the tort of deceit. The reliance on history and the relationship of the tort of deceit to a breach of contract while leading Lord Hailsham to his then opinion does not seem powerfully persuasive and Lord Hailsham appears to have recognised that in the somewhat tentative nature of his conclusion.

j [44] I have not found the dicta in *Cassell & Co Ltd v Broome* particularly easy to construe but I believe that in so far as they appear to suggest that Lord Devlin did not mean to extend the law to particular torts which had not already been covered by pre-1964 authority that can be accepted as their effect on the basis that Lord Devlin's approach was not concerned with particular torts but rather with factual situations which might exist across a range of torts. In my opinion there is no basis in *Rookes v Barnard* for the view that the power to award exemplary damages exists only in torts which had been decided to have that character prior

to 1964. A fair reading of the dicta in *Cassell & Co Ltd v Broome* do not effectively insert such a basis into the law and accordingly I am of the opinion that *AB v South West Water Services Ltd* was wrongly decided. a

[45] It follows from what I have said that I consider that the question whether the tort of misfeasance in public office carries the power to award exemplary damages should be answered by saying that the mere fact that the tort sued upon is that of misfeasance in public office does not determine the issue. The issue is determined by whether the factual situation is covered by either of Lord Devlin's formulations. In the present case it is accepted that the factual situation does come within Lord Devlin's first category and although on the facts so far as pleaded I regard this as extremely doubtful, for the purposes of this appeal I would be prepared to accept it and accordingly I am of the opinion that the appeal should be allowed and that the claim for exemplary damages should proceed without in any way restricting the judge in his consideration of this issue. b c

[46] I add some further considerations in respect of legislation such as the discrimination legislation and the data protection legislation. Exemplary damages would be available only if the legislation expressly authorises exemplary damages in relation to any particular breach. So far as the 1998 Act is concerned it was submitted on behalf of the defendant that this legislation reduces any need that may have been thought to exist previously for a deterrent factor in damages but for my part until these matters have been more developed I would reach no conclusion upon the point. In so far as a conclusion can be reached upon it at the present time I feel the work of the Law Commission (report on *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997)) is the best indication that the impact on the desirability of retaining the power to award exemplary damages in appropriate cases may not be great. d e

[47] Finally I have found the consideration of the measure of exemplary damages in vicarious liability cases somewhat perplexing. The present is a case of exemplary damages against the defendant. It seems to me that while the defendant's means may be important in considering an award of exemplary damages against the defendant personally where the case is one of vicarious liability I find it somewhat difficult to accept that the relevant means are those of the defendant rather than those of the wrongdoer but since the point has not been argued I express no concluded view upon it. The Law Commission note in their report, at para 4.102, that there is no reported English case which goes beyond mere assumption, and specifically considers the question whether, and if so how, the doctrine should apply. However the decision in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 803 (holding (ii)(c)), [1972] AC 1027 at 1029, holding (4) that the lowest sum for which any defendant could be liable where more than one defendant was sued is the proper figure requires to be taken into consideration. f g h

[48] I would allow the appeal on the basis that the claim should not have been struck out, but leaving open the issues with regard to exemplary damages which have not been argued in this appeal for determination as the case proceeds.

LORD NICHOLLS OF BIRKENHEAD. j

[49] My Lords, on this appeal your Lordships' House is being asked to decide whether exemplary damages may be awarded against a defendant who commits the tort of misfeasance in public office. The leading case on exemplary damages was decided by your Lordships' House in 1964 in *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129. At that time the law was in a state of considerable disarray. Lord Devlin's treatment of this difficult subject received the approval of all

- a members of the House. But in one respect, crucial for the purposes of this appeal, Lord Devlin's observations are not altogether clear.

Rookes v Barnard

- b [50] Exemplary damages are a controversial topic, and have been so for many years. Over-simplified, the matter may be summarised thus. Awards of damages are primarily intended to compensate for loss, whether pecuniary or non-pecuniary. Non-pecuniary loss includes mental distress arising from the circumstances in which the tort was committed, such as justified feelings of outrage at the defendant's conduct. Damages awarded for this type of loss are sometimes called aggravated damages, as the defendant's conduct aggravates the injury done. Sometimes damages may also be measured by reference, not to the claimant's loss, but to the profit obtained by the defendant from his wrongdoing: see the discussion in *A-G v Blake* (*Jonathan Cape Ltd, third party*) [2000] 4 All ER 385 at 391–394, [2001] 1 AC 268 at 278–280.

- c [51] Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a claimant fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter.

- d [52] Punishment is a function par excellence of the criminal law, rather than the civil law. But in *Rookes v Barnard* the House recognised that there are circumstances where, generally speaking, the conduct is not criminal and an award of exemplary damages would serve a useful purpose in vindicating the strength of the law. This purpose would afford 'a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal' (see [1964] 1 All ER 367 at 410, [1964] AC 1129 at 1226 per Lord Devlin). Lord Devlin identified two sets of circumstances ('categories of case') where this was so: oppressive, arbitrary or unconstitutional acts of government servants; and wrongful conduct calculated to yield a benefit in excess of the compensation likely to be payable to the claimant. A further, self-evident category, on which nothing turns, comprises cases where exemplary damages are expressly authorised by statute.

- e [53] Lord Devlin's categorisation is open to two different interpretations. One interpretation is that the sets of circumstances identified by him were thenceforth to constitute the sole criteria for determining whether a court might in its discretion make an award of exemplary damages in respect of tortious conduct. In future, whatever the nature of the claim, whatever the particular tort involved, if the facts fell within one of his two categories the court had power to award exemplary damages.

- f [54] The other interpretation attributes a more limited effect to Lord Devlin's categorisation. According to this second interpretation, Lord Devlin did not seek to rationalise the whole law of exemplary damages. His aim was less ambitious. He sought to do no more than identify the factual circumstances in which alone exemplary damages might be awarded. He set out two categories of factual prerequisites one or other of which must always exist before the court has jurisdiction to award exemplary damages. When imposing these limits on the availability of exemplary damages Lord Devlin did not intend thereby to widen the availability of exemplary damages. He did not intend that exemplary damages should be available in future as a remedy for torts which, under the established law, did not attract this remedy. There are several such torts. Deceit and

negligence are two instances. Lord Devlin intended to leave this area of the existing law untouched. a

[55] Thus, on this second interpretation, two prerequisites have to be satisfied before exemplary damages may be awarded. First, the facts must fall within one of Lord Devlin's two categories. This is the so-called 'categories' condition. Secondly, and standing quite apart from Lord Devlin's categories condition, the cause of action relied upon must not be one in which, under the established law, exemplary damages are unavailable. The latter condition, the so-called 'cause of action' condition, has attracted much criticism. Rightly so, because it represents in practice an arbitrary and irrational restriction on the availability of exemplary damages. b

[56] Perhaps not surprisingly, in *Mafo v Adams* [1969] 3 All ER 1404 at 1410–1411, [1970] 1 QB 548 at 558–559, a case concerning the tort of deceit, Widgery LJ preferred the first of the two interpretations of Lord Devlin's speech. The circumstances in which exemplary damages might be obtained had been drastically reduced by *Rookes v Barnard*, but the effect of Lord Devlin's formulation was to remove the existing limits on the range of wrongs for which exemplary damages might be granted. c

Cassell & Co Ltd v Broome

[57] In *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027 your Lordships' House decided otherwise. The House rejected this interpretation of Lord Devlin's speech. Differing views were expressed on the desirability of exemplary damages. But those of their Lordships who addressed this point spoke with one voice in declaring the current state of the law. When doing so, they openly recognised its lack of principle. Lord Hailsham of St Marylebone LC ([1972] 1 All ER 801 at 828, [1972] AC 1027 at 1076) expressly disagreed with Widgery LJ's observations in *Mafo v Adams*. He stated that by listing the categories Lord Devlin was not intending to add to the number of torts for which exemplary damages can be awarded. Lord Diplock was similarly unambiguous and forthright: d

'*Rookes v Barnard* was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit. Its express purpose was to restrict, not to expand, the anomaly of exemplary damages.' (See [1972] 1 All ER 801 at 874, [1972] AC 1027 at 1131.) e

The principle that, following *Rookes v Barnard*, exemplary damages may be awarded for some torts but not for others was also explicit in Lord Wilberforce's speech when he referred ([1972] 1 All ER 801 at 860, [1972] AC 1027 at 1114) to the 'range of torts for which punitive damages may be given (trespass to person or property, false imprisonment and defamation, being the commonest)'. f

[58] Lord Reid's observations, not specifically addressed to this point, are less explicit. Lord Reid had been a party to the decision in *Rookes v Barnard*, but in *Cassell & Co Ltd v Broome* he disagreed with Lord Devlin's view that in certain classes of case exemplary damages serve a useful purpose in vindicating the strength of the law. Lord Reid's approach was wholly restrictive, confining exemplary damages to 'classes of cases' where its use was covered by authority. In *Rookes v Barnard* the House had been confronted with 'an undesirable anomaly'. Lord Reid continued: g

- a 'We could not abolish it. We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow any extension.' (See [1972] 1 All ER 801 at 837, [1972] AC 1027 at 1087.)
- b I can detect nothing in these observations to suggest that Lord Reid understood, or accepted, that in future exemplary damages would be available in torts such as deceit where under the established law exemplary damages were currently not available.
- c [59] The view of the law expressed by Lords Hailsham, Wilberforce and Diplock has held sway ever since. It was faithfully applied by the Court of Appeal in *AB v South West Water Services Ltd* [1993] 1 All ER 609, [1993] QB 507 when deciding that exemplary damages are not available in claims, arising out of contamination of drinking water supplies, for public nuisance and negligence.
- d *Whither now?*
- e [60] *Cassell & Co Ltd v Broome* was decided in 1972. Since then the legal landscape has much changed. Needless to say, it is well within the province of this House to decide that the law relating to exemplary damages should now be understood in accordance with the first interpretation of Lord Devlin's speech in *Rookes v Barnard*: the interpretation preferred by Widgery LJ in *Mafo v Adams* but rejected by the House in *Cassell & Co Ltd v Broome*. That is one course open to the House. But, as also goes without saying, the House will not follow this course unless satisfied that, in the conditions of today, that is the direction the law should take. The House will wish to be satisfied on this score, because such a decision would represent a significant change in the law. It would mean departing from the law as enunciated in *Cassell & Co Ltd v Broome*. It would mean overturning the law as it has been understood and acted upon for some years. Such a change in the law would affect other torts as well as the newly resurgent tort of misfeasance in public office. It would mean that in future, if the necessary factual circumstances are present, exemplary damages will be available across the board in every tort, including those torts where the absence of exemplary damages has long been established. This would revolutionise the law's approach to exemplary damages. It would mean that, far from being an undesirable anomaly whose use is to be restricted, exemplary damages are now regarded as a convenient tool which the law should seize and be able to use more widely.
- f [61] Is this the direction in which the law should be moving? This question raises three separate issues. The first is whether the present state of the law on exemplary damages is satisfactory. In my view it is not. This view is shared by all your Lordships. The second issue is whether, nonetheless, this is a matter best left to Parliament. Again, I understand that all your Lordships are minded not to leave the law as it presently stands, including as it does a requirement that a claim must satisfy the cause of action condition before exemplary damages may be awarded. In its report, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) the Law Commission looked to Parliament for the necessary reforms. The present state of the law 'cries aloud for parliamentary intervention': see para 5.3. But parliamentary intervention seems unlikely, at least for the foreseeable future. On 9 November 1999 (Hansard (HC Debates), 9 November 1999, col 502), in a written answer to a question in the House of Commons, the

government stated that, in the absence of a clear consensus on the way ahead, it had decided not to take forward the Law Commission's proposals for legislation on exemplary damages. a

The options

[62] So the third issue which arises is what should now be the law relating to exemplary damages. The starting point must be to consider whether exemplary damages, regarded as an anomaly in 1964, ought still to have a place in the law at all. b

[63] The arguments for and against exemplary damages need no rehearsing. They are familiar enough, and they are set out clearly in the Law Commission's report. In the end, and in respectful agreement with the views expressed by Lord Wilberforce in *Cassell & Co Ltd v Broome*, the feature which I find most striking is the extent to which the principle of exemplary damages continues to have vitality. The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the claimant's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna. c d e

[64] This experience has not been confined to this country. Exemplary damages continue to discharge a role, perceived to be useful and valuable, in other common law jurisdictions. Indeed, the restrictions on exemplary damages imposed by *Rookes v Barnard* and *Cassell & Co Ltd v Broome* did not strike a receptive chord, for instance, in Canada, Australia or New Zealand. Outside the United Kingdom *Rookes v Barnard* received a generally negative reception. f

[65] If exemplary damages are to continue as a remedial tool, as recommended by the Law Commission after extensive consultation, the difficult question which arises concerns the circumstances in which this tool should be available for use. Stated in its broadest form, the relevant principle is tolerably clear: the availability of exemplary damages should be co-extensive with its rationale. As already indicated, the underlying rationale lies in the sense of outrage which a defendant's conduct sometimes evokes, a sense which is not always assuaged fully by a compensatory award of damages, even when the damages are increased to reflect emotional distress. g

[66] In *Rookes v Barnard*, Lord Devlin drew a distinction between oppressive acts by government officials and similar acts by companies or individuals. He considered that exemplary damages should not be available in the case of non-governmental oppression or bullying. Whatever may have been the position 40 years ago, I am respectfully inclined to doubt the soundness of this distinction today. National and international companies can exercise enormous power. So do some individuals. I am not sure it would be right to draw a hard-and-fast line which would always exclude such companies and persons from the reach of exemplary damages. Indeed, the validity of the dividing line drawn by Lord Devlin when formulating his first category is somewhat undermined by his second category, where the defendants are not confined to, and normally would not be, government officials or the like. h j

a [67] Nor, I may add, am I wholly persuaded by Lord Devlin's formulation of his second category (wrongful conduct expected to yield a benefit in excess of any compensatory award likely to be made). The law of unjust enrichment has developed apace in recent years. In so far as there may be a need to go further, the key here would seem to be the same as that already discussed: outrageous conduct on the part of the defendant. There is no obvious reason why, if
b exemplary damages are to be available, the profit motive should suffice but a malicious motive should not.

[68] As I have said, difficult questions arise here. In view of the limited scope of the submissions made by the parties on this appeal, this is not the occasion for attempting to state comprehensive conclusions on these matters. For the purposes of the present appeal it is sufficient, first, to express the view that the
c House should now depart from its decision in *Cassell & Co Ltd v Broome*, in so far as that decision confirmed the continuing existence of what has subsequently been described as the 'cause of action' condition and, secondly, to note that the essence of the conduct constituting the court's discretionary jurisdiction to award exemplary damages is conduct which was an outrageous disregard of the
d claimant's rights. Whether the conduct of PC Cavendish satisfies that test in this case is a matter to be resolved at trial. I would allow this appeal.

Vicarious liability

[69] The only defendant in this action is the Chief Constable of Leicestershire Constabulary. The claim against him is made solely on the basis of vicarious
e responsibility for the conduct of PC Cavendish as a serving police officer. On this appeal the defendant has not sought to say that, as a matter of law, his vicarious liability stops short of any claim there may be for exemplary damages. This was not one of the issues raised on the appeal. In the circumstances I express no view on this topic.

f LORD HUTTON.

[70] My Lords, the issue which arises on this appeal is whether exemplary damages can be awarded where a claimant establishes that the defendant has committed the tort of misfeasance in public office. The facts which it alleged constitute the tort in the present case are set out in the speech of my noble and
g learned friend Lord Mackay of Clashfern.

[71] There has been considerable debate on the question whether exemplary damages should continue to be a part of the law of England. The opinion has been expressed that exemplary or punitive damages should have no place in the awarding of damages which are intended to compensate the claimant for the loss or injury which he has suffered by reason of a tort. The matter has been
h considered by the Law Commission in its report on *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997), and its recommendation was that exemplary damages should continue to be part of the law of England although on a more extensive basis than at present. However the government
j has stated that it does not propose to bring forward legislation to give effect to this recommendation and the government has further observed that further judicial development of the law in this area may help to clarify the issues.

[72] The parties have chosen not to present arguments on the issue whether exemplary damages should continue to be awarded but have been content to approach the appeal on the basis that the law as stated by the House in *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129 and *Cassell & Co Ltd v Broome* [1972]

1 All ER 801, [1972] AC 1027 should govern the present case. Therefore the preliminary question arises whether your Lordships should express an opinion on the important issue which arises on this appeal, when the House has not had the advantage of hearing argument on the fundamental question whether exemplary damages should continue to be awarded at all and on the principles which can be advanced to justify the award of exemplary damages or to oppose such an award.

[73] My Lords, whilst the speeches in *Rookes v Barnard* and *Cassell & Co Ltd v Broome* recognised that the award of exemplary damages is anomalous, the speeches nevertheless accepted that exemplary damages constitute part of the law of England. Thus in *Rookes v Barnard* [1964] 1 All ER 367 at 410, [1964] AC 1129 at 1225–1226, after considering the authorities, Lord Devlin stated:

‘These authorities convince me of two things. First, that your lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle.’

And in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 837, [1972] AC 1027 at 1087 Lord Reid, referring to Lord Devlin’s speech in *Rookes v Barnard*, said:

‘Critics appear to have thought that he was inventing something new. That was not my understanding. We were confronted with an undesirable anomaly. We could not abolish it. We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow any extension.’

[74] Moreover, in *Rookes v Barnard* Lord Devlin gave guidance, with which the other members of the House concurred, as to the categories of cases in which exemplary damages should be awarded. In these circumstances, whilst I recognise that it would have been more helpful if the House had heard argument on the fundamental question whether exemplary damages should continue to be awarded, I consider that it is right that the House should express an opinion on the issue raised before it and on which the Recorder and the Court of Appeal have given judgments, the opinion to be given on the basis that the parties accept that the law on exemplary damages is that stated in *Rookes v Barnard* and *Cassell & Co Ltd v Broome*. But I consider that if on a future occasion a party sought to argue that the law should be changed and that exemplary damages should no longer be awarded, it would be open to the House under the Practice Statement of 1966 (*Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234) to hear such an argument and to rule upon it.

[75] As the point has not been argued I express no concluded opinion on the question whether exemplary damages should continue to be awarded in England, but I think that a number of cases decided by the courts in Northern Ireland during the past 30 years of terrorist violence give support to the opinion of Lord Devlin in *Rookes v Barnard* that in certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law. Members of the security forces seeking to combat terrorism face constant danger and have to carry out their duties in very stressful conditions. In such circumstances an individual soldier or police officer or prison officer may, on occasion, act in gross breach of discipline and commit an unlawful act which is oppressive or arbitrary

a and in such cases exemplary damages have been awarded. I refer to two of these cases.

[76] In *Lavery v Ministry of Defence* [1984] NI 99, on a morning after a night of rioting in some areas of Belfast, an army patrol stopped a young man of 16 who was walking along a street. A soldier of the patrol asked him his name and address and where he was coming from and going to. He gave this information and the soldier told him to sit down on the ground. He asked 'what for?' and the soldier's response was to strike him in the groin with his knee and then to strike him on the head with the butt of his rifle, which knocked the young man to the ground and cut his head so that it bled freely. The soldier then handcuffed his ankles. The young man sued the Ministry of Defence in the County Court for damages for assault and battery committed by the soldier. The Ministry of Defence admitted liability and at the hearing no mitigating circumstances were suggested and there was no suggestion that the plaintiff had been guilty of any provocative conduct. The County Court judge awarded damages of £1,000 which included a sum for aggravated damages but not for exemplary damages. On appeal to the High Court, Kelly LJ sitting in the Queen's Bench Division increased the damages to £2,500 which included exemplary damages. In awarding exemplary damages, after citing passages from the speech of Lord Devlin in *Rookes v Barnard*, Kelly LJ said (at 106–107):

'I ask the question what total sum is sufficient not only to compensate the claimant for the assault suffered in all the circumstances, but to teach the defendant that this sort of conduct does not pay and hopefully deter its repetition. I think the conduct of the soldier concerned, some of which was acquiesced in by the other members of the patrol, was a deliberate and unjustifiable abuse of the lawful power to stop and question a citizen. This power is a necessary one, entrusted to the security forces to aid their difficult task of maintaining law and order in the streets of this city and elsewhere throughout the Province. It is a power which at times must be exercised frequently to maintain an efficient standard of peace-keeping. Inevitably it involves confrontation between soldier and citizen and police officer and citizen and a sensitive confrontation at that with the power to stop search and question delicately poised against the rights of the citizen. The lawful exercise of these powers demands moderation and tact on the part of the security forces at all times and when they seek to exercise them in confrontation with unco-operative citizens in hostile and dangerous areas, it demands forbearance and discipline, as well. Nevertheless the security forces must be reminded that these powers which necessarily and lawfully reduce the freedom and privacy of the subject must not be abused. The present case was a blatant and quite unjustified abuse of lawful powers. It should not happen again, the defendants should be told. I do not think that the award of £1,000 by the learned county court judge is adequate to include the elements of punishment or deterrence. My conclusion is that a proper award to include exemplary damages, should be £2,500.'

[77] In *Pettigrew v Northern Ireland Office* [1990] NI 179 there had been a mass escape of convicted terrorist prisoners from H Block 7 in the Maze Prison. In the course of the escape one prison officer died, one prison officer in H Block 7 was shot in the head and seriously wounded and other prison officers were injured. When the prisoners escaped from H Block 7 they left a number of prison officers tied up. It was clear that some of the prisoners who remained in H Block 7 had

helped in varying degrees those who succeeded in escaping. After the escape the remaining prisoners in H Block 7 were moved to H Block 8. a

[78] The plaintiff, who was one of the remaining prisoners moved to H Block 8, brought an action against the Northern Ireland Office for damages for assault and battery by prison officers, alleging that in the course of the move he had been kicked and punched by prison officers and that prison officers who were dog-handlers had not restrained their dogs from nipping and biting him. In the High Court it was held that it was probable that prison officers, angered by the death of a colleague and the wounding of other colleagues in the course of the escape, had given vent to their anger by kicking or punching the plaintiff and that dog handlers had failed adequately to restrain their dogs. The plaintiff was awarded exemplary damages and I refer, if I may, to what I said (at 181–182) in giving judgment: b c

‘In this case I consider that the conduct of the dog handlers who deliberately did not restrain their dogs from nipping or biting the plaintiff and the conduct of the prison officers who kicked or punched the claimant was oppressive conduct by servants of the Government. Notwithstanding that the prison officers had real and understandable grounds for anger, it was their duty to restrain that anger, and in my opinion their conduct calls for an award of exemplary damages to mark the disapproval of the court, to teach that such conduct does not pay, and to act as a deterrent against this type of conduct against prisoners being repeated in the future. Mr Campbell submitted that as the purpose of awarding exemplary damages is to punish a defendant whose conduct was oppressive and in the opinion of the court deserves punishment, exemplary damages should not be awarded against the Northern Ireland Office because it had done nothing deserving of punishment. There could be no suggestion that the Northern Ireland Office connived at or condoned the conduct of the prison officers responsible for the attacks on the plaintiff, and when allegations were made of attacks upon the prisoners the Northern Ireland Office caused an investigation to be carried out. I accept Mr Campbell’s submission that there are no grounds upon which exemplary damages could be awarded against the Northern Ireland Office in respect of its own conduct as a Government department. But there are a number of decisions in this jurisdiction which make it clear that exemplary damages can be awarded against a defendant where that defendant is vicariously liable for the conduct of its or his servants or agents and the conduct of those servants or agents calls for exemplary damages. These cases are *Lavery v Ministry of Defence* [1984] NI 99, *Walsh v Ministry of Defence* [1985] 4 NIJB and *Hamilton v Chief Constable of the Royal Ulster Constabulary* [1986] 15 NIJB. The same view of the law is implicit in the judgments of the Court of Appeal in England in *Holden v Chief Constable of Lancashire* ([1986] 3 All ER 386, [1987] QB 380).’ d e f g h

[79] In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times. In my respectful opinion the view is not fanciful, as my noble and learned friend Lord Scott of Foscote suggests, that such awards have a deterrent effect and such an effect is recognised by Professor Atiyah in the passage from his work on *Vicarious Liability in the Law of Torts* (1967) j

- a cited by Lord Scott of Foscote in his speech. Moreover in some circumstances where one of a group of soldiers or police officers commits some outrageous act in the course of a confused and violent confrontation it may be very difficult to identify the individual wrongdoer so that criminal proceedings may be brought against him to punish and deter such conduct, whereas an award of exemplary damages to mark the court's condemnation of the conduct can be made against
- b the Minister of Defence or the Chief Constable under the principle of vicarious liability even if the individual at fault cannot be identified.

- [80] In *Rookes v Barnard* in the well known passage of his speech Lord Devlin stated ([1964] 1 All ER 367 at 410, [1964] AC 1129 at 1226) that (in addition to cases in which exemplary damages are expressly authorised by statute) there are two categories of cases where exemplary damages can be awarded. The first category
- c is where there is oppressive, arbitrary or unconstitutional action by the servants of the government. The second is where the defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. The question debated by counsel on this appeal is whether a plaintiff, to be entitled to recover exemplary damages, must
- d establish not only that his case falls within one or other of Lord Devlin's categories, but also that his claim is in respect of a tort for which exemplary damages had been awarded before 1964 when *Rookes v Barnard* was decided.

- [81] It is clear from Lord Devlin's speech that he was intending to restrict the range of cases in which exemplary damages could be awarded, but I can see nothing in the speech which suggests that if a case fell within one of the two
- e categories, Lord Devlin intended that an award of exemplary damages should not be made unless the tort for which the plaintiff sued was one for which such damages had been awarded in the past. In my opinion, in referring to certain categories of cases, and particularly in referring to the first category, Lord Devlin was referring to the manner in which the defendant committed the tort, to his
- f behaviour and conduct in carrying out the tort, and not to the particular cause of action upon which the plaintiff relied.

- [82] Mr Mansfield QC for the defendant relied on the point that it appears from the report of the argument of counsel ([1964] AC 1129 at 1164) that in *Rookes v Barnard* Mr Gerald Gardiner QC for the defendants conceded that intimidation by threat of breach of contract may be a tort for which exemplary damages can be
- g awarded. But in my opinion Lord Devlin did not base his judgment on a concession made by counsel but was concerned to state, as a matter of principle, the approach which the courts should take in future to the award of exemplary damages. Therefore, if the present case fell to be determined by the application of Lord Devlin's judgment, I consider (assuming that the conduct of the police
- h constable constituted conduct of the nature described in Lord Devlin's first category) that the plaintiff should succeed in this appeal.

- [83] Mr Mansfield submitted, however, that the requirement that the plaintiff must establish that exemplary damages had been awarded for the tort prior to 1964 (the cause of action test), whilst not laid down expressly in Lord Devlin's
- j judgment, was implicit in it and was made express by the dicta in the speeches of the members of the House in *Cassell & Co Ltd v Broome*. As Bingham MR recognised in *AB v South West Water Services Ltd* [1993] 1 All ER 609 at 627, [1993] QB 507 at 530, this submission gives rise to a difficult point, as is apparent from the difference of opinion in the carefully reasoned judgments of the Court of Appeal in this case and in *AB v South West Water Services Ltd*. I regard the point as a difficult one because, like my noble and learned friend, Lord Mackay of Clashfern,

I find it difficult to obtain clear guidance from the dicta in *Cassell & Co Ltd v Broome*. a

[84] The passage in *Cassell & Co Ltd v Broome* which gives most support to Mr Mansfield's submission is the passage in the speech of Lord Hailsham of St Marylebone LC ([1972] 1 All ER 801 at 828, [1972] AC 1027 at 1076):

'DID ROOKES V BARNARD EXTEND EXEMPLARY DAMAGES TO FRESH TORTS? b

Having rejected the theory that Lord Devlin's speech can be pushed aside as having been delivered per incuriam, I hope I may now equally dispose of another misconception. I do not think that he was under the impression either that he had completely rationalised the law of exemplary damages, nor by listing the 'categories' was he intending, I would think, to add to the number of torts for which exemplary damages can be awarded. Thus I c disagree with the dictum of Widgery LJ in *Mafo v Adams* ([1969] 3 All ER at 1410, [1970] 1 QB at 558) (which, for this purpose, can be treated as an action for deceit) when he said: "As I understand LORD DEVLIN's speech, the circumstances in which exemplary damages may be obtained have been drastically reduced, but the range of offences in respect of which they may d be granted has been increased, and I see no reason since *Rookes v. Barnard* why, when considering a claim for exemplary damages, one should regard the nature of the tort as excluding the claim." This would be a perfectly logical inference if Lord Devlin imagined that he was substituting a completely rational code by enumerating the categories and stating the e considerations. It is true, of course, that actions for deceit could well come within the purview of the second category. But I can see no reason for thinking that Lord Devlin intended to extend the category to deceit, and counsel on both sides before us were constrained to say that, although it may be paradoxical, they were unable to find a single case where either exemplary or aggravated damages had been awarded for deceit, despite the fact that f contumelious, outrageous, oppressive, or dishonest conduct on the part of the defendant is almost inherently associated with it. The explanation may lie in the close connection that the action has always had with breach of contract (see the discussion in Mayne and MacGregor (*On Damages*), chapter 41, especially at para 968).' g

But the weight of this passage is somewhat lessened by the subsequent recognition by Lord Hailsham that the question whether exemplary damages can be awarded in an action for deceit has not been finally determined. g

[85] However, as Auld LJ observed in the Court of Appeal, Lord Reid, Lord Wilberforce and Lord Diplock placed emphasis on Lord Devlin's reference to categories or classes of cases and did not refer to causes of action. Lord Reid said, referring to *Rookes v Barnard*: h

'We thought we had to recognise that it had become an established custom in certain classes of case to permit awards of damages which could not be justified as compensatory, and that that must remain the law. But we thought and I still think it well within the province of this House to say that that undesirable anomaly should not be permitted in any class of case where its use was not covered by authority. In order to determine the classes of case in which this anomaly had become established it was of little use to look merely at the words which had been used by the judges because, as I have said, words like 'punitive' and 'exemplary' were often used with regard to j

- a damages which were truly compensatory. We had to take a broad view of the whole circumstances.’ (See [1972] 1 All ER 801 at 837, [1972] AC 1027 at 1086.)

See also the passage ([1972] 1 All ER 801 at 837, [1972] AC 1027 at 1087) already cited at [73] above.

- b [86] Lord Wilberforce also referred to a category of cases and to the excessive and insolent use of power, and not to causes of action. He said:

- c ‘There is not perhaps much difficulty about category 1; it is well based on the cases and on a principle stated in 1703—“if public officers will infringe men’s rights, they ought to pay greater damages than other men to deter and hinder others from the like offences” (*Ashby v White* ((1703) 2 Ld Raym 938 at 956) per Holt CJ). Excessive and insolent use of power is certainly something against which citizens require as much protection today; a wide interpretation of “government” which I understand your Lordships to endorse would correspond with Holt CJ’s “public officers” and would partly correspond with modern needs.’ (See [1972] 1 All ER 801 at 865, [1972] AC 1027 at 1120.)

- d Lord Diplock also referred to categories of cases and to factual situations:

- e ‘The purpose of Lord Devlin’s division of them into three categories was in order to distinguish between factual situations in which there was some special reason still relevant in modern social conditions for retaining the power to award exemplary damages, and factual situations in which no such special reason still survived.’ (See [1972] 1 All ER 801 at 872, [1972] AC 1027 at 1128.)

See also [1972] 1 All ER 801 at 868, [1972] AC 1027 at 1124.

- f [87] Earlier in his speech Lord Diplock said:

- g ‘It was necessary as a matter of decision of the cross-appeal for this House to determine whether the facts in *Rookes v Barnard* brought it within a category of cases in which exemplary damages were recoverable at common law. This House determined that they did not and ordered a new trial. There were two different processes of reasoning by which it would have been possible to reach this conclusion of law. One, which was not adopted by this House, was to hold that the particular tort of intimidation was one in which the common law did not permit of exemplary damages. The other, which was adopted by this House, was to state the categories of cases in which alone exemplary damages might be awarded at common law and to determine whether the facts in *Rookes v Barnard* brought it within one of these categories.’ (See [1972] 1 All ER 801 at 868, [1972] AC 1027 at 1123–1124.)

- h [88] In my opinion in this passage Lord Diplock stated, in effect, the two tests, the cause of action test and the categories of cases test, and recognised that in *Rookes v Barnard* the House did not accept the cause of action test. I recognise, as j Mr Mansfield submitted, that the defendant can seek to rely on a later passage in Lord Diplock’s speech:

‘Finally on this aspect of the case I would express my agreement with the view that *Rookes v Barnard* was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit. Its express purpose

was to restrict, not to expand, the anomaly of exemplary damages.’ (See [1972] 1 All ER 801 at 874, [1972] AC 1027 at 1130–1131.)

[89] But in my respectful opinion in this later passage, Lord Diplock was not endorsing the cause of action test and was not intending to depart from the view he had expressed in the earlier passage, and I incline to the view that Lord Diplock was of the opinion that negligence and deceit did not fall within Lord Devlin’s first and second categories. Accordingly, I would hold that a claimant is entitled to recover exemplary damages if the circumstances in which the tort of misfeasance in public office is committed bring it within Lord Devlin’s first category and I consider that in *AB v South West Water Services Ltd* the Court of Appeal was in error in holding that the cause of action test must be applied.

[90] The defendant admits that the conduct of the police constable as pleaded amounts to the tort of misfeasance in public office. The essence of the tort is abuse of power. In *Rookes v Barnard* [1964] 1 All ER 367 at 411, [1964] AC 1129 at 1228 Lord Devlin stated:

‘In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.’

[91] I think that the use of the adjective ‘outrageous’ shows that the conduct which falls within Lord Devlin’s first category as being oppressive or arbitrary or unconstitutional is conduct of such a nature that it calls for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law, and I further think that not every abuse of power which constitutes the tort of misfeasance will come within the first category. If the point had arisen for decision I am very doubtful if I would have held that the conduct of the police constable in the present case calls for exemplary damages.

[92] Submissions were advanced to the House on the point whether exemplary damages could be awarded where a plaintiff is entitled to recover compensation or damages under the discrimination legislation or the Human Rights Act 1998, but I would wish to reserve my opinion on this point until the matter arises directly for decision.

[93] I have referred in this speech to two Northern Ireland cases where I consider that the award of exemplary damages served a valuable purpose in vindicating the strength of the law, and in these cases the awards were made against the Ministry of Defence and the Northern Ireland Office on the basis of vicarious liability. In his speech Lord Scott of Foscote has developed a powerful argument against the awarding of exemplary damages on the basis of vicarious liability. This issue was not raised in this appeal and was not addressed by counsel, and therefore I wish to reserve my opinion on this important and interesting question discussed by my noble and learned friend

[94] I would allow this appeal for the reasons which I have given.

LORD SCOTT OF FOSCOTE.

[95] My Lords, the function of an award of damages in our civil justice system is to compensate the claimant for a wrong done to him. The wrong may consist of a breach of contract, or a tort, or an interference with some right of the

a claimant under public law. But whatever the wrong may consist of the award of damages should be compensatory in its intent. Measured by this fundamental principle of damages, an award of exemplary damages, the intention of which is not to compensate the victim of a wrong but to punish its perpetrator, is an anomaly.

b [96] The anomalous character of exemplary damages was recognised in *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129. Lord Devlin ([1964] 1 All ER 367 at 407, [1964] AC 1129 at 1221) invited your Lordships' House to consider 'whether it is open to the House to remove an anomaly from the law of England'. But having referred to various authorities he said:

c 'These authorities clearly justified the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.' (See [1964] 1 All ER 367 at 408, [1964] AC 1129 at 1223.)

d [97] And after reviewing further authorities, he said:

e 'These authorities convince me of two things. First, that your lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made.' (See [1964] 1 All ER 367 at 410, [1964] AC 1129 at 1225–1226.)

f [98] The first of Lord Devlin's two categories was 'oppressive, arbitrary or unconstitutional action by the servants of the government'. His second category covered cases 'in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant'. The three considerations always to be borne in mind were, first ([1964] 1 All ER 367 at 411, [1964] AC 1129 at 1227), that 'the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour'; second, that 'the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case [*Wilkes v Wood* (1763) Lofft 1, 98 ER 489], can also be used against liberty'; and, third ([1964] 1 All ER 367 at 411, [1964] AC 1129 at 1228) that 'the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages'.

g [99] It is relevant in considering the attention paid by Lord Devlin to the authorities that *Rookes v Barnard* pre-dated the Practice Statement of 1966 (*Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234), under which your Lordships' House became free in certain circumstances to depart from previous decisions of the House. It is relevant, also, to notice that each of the three considerations that Lord Devlin warned should be kept in mind draws attention to the anomalous character of exemplary damages.

j [100] The anomalous character of exemplary damages was stressed by Lord Reid in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027. He had been a

member of the committee that had heard *Rookes v Barnard* and he had concurred in Lord Devlin's speech. In *Cassell & Co Ltd v Broome*, he explained:

'We thought we had to recognise that it had become an established custom in certain classes of case to permit awards of damages which could not be justified as compensatory, and that that must remain the law. But we thought and I still think it well within the province of this House to say that that undesirable anomaly should not be permitted in any class of case where its use was not covered by authority.' (See [1972] 1 All ER 801 at 837, [1972] AC 1027 at 1086.)

[101] Lord Morris of Borth-y-Gest remarked on some of the illogicalities of an award of exemplary damages:

'Logical analysis forces the conclusion therefore that in the result there would in a civil action have been punishment for conduct not particularised in any criminal code and that such punishment had taken the form of a fine not receivable by the state but as a sort of bonus by a private individual who would apart from it be solaced for the wrong done to him. There may be much to be said for making it permissible in a criminal court to order in certain cases that a convicted person should pay compensation. There is much to be said against a system under which a fine becomes payable in a civil court without any of the safeguards which protect those charged with crimes.' (See [1972] 1 All ER 801 at 848, [1972] AC 1027 at 1100.)

[102] Viscount Dilhorne commented ([1972] 1 All ER 801 at 855, [1972] AC 1027 at 1108): 'Power to award exemplary damages may be an anomaly, but I doubt whether it is beneficial to the law to seek to reduce the area of that anomaly at the price of creating other anomalies and illogicalities.'

[103] Lord Wilberforce pointed out ([1972] 1 All ER 801 at 860, [1972] AC 1027 at 1114–1115) that English law contained a 'heavy, indeed exorbitant, punitive element in its costs system'. He regarded the costs system as the strongest argument against the principle of punitive damages and said ([1972] 1 All ER 801 at 861, [1972] AC 1027 at 1114–1115): 'One or other must clearly be reformed, and it is Parliament alone that can do it.' In the event, neither has been reformed.

[104] And, finally, Lord Diplock, also recognising the anomalous character of exemplary damages, said this of Lord Devlin's first category:

'My Lords, had I been party to the decision in *Rookes v Barnard* I doubt if I should have considered it still necessary to retain the first category. The common law weapons to curb abuse of power by the executive had not been forged by the mid-eighteenth century. In view of the developments, particularly in the last 20 years, in adapting the old remedies by prerogative writ and declaratory action to check unlawful abuse of power by the executive, the award of exemplary damages in civil actions for tort against individual government servants seems a blunt instrument to use for this purpose today.' (See [1972] 1 All ER 801 at 873, [1972] AC 1027 at 1129–1130.)

[105] These several statements underlining the anomalous nature of awards of exemplary damages constitute the backcloth to the appeal that is now before your Lordships' House. The issues presented to your Lordships are expressed in the statement of facts and issues signed by counsel for the plaintiff and defendant respectively. The issues can be summed up in this question: 'Is an award of exemplary damages a possible remedy for the tort of misfeasance in public office?'

- a In inviting your Lordships to consider and answer this question, counsel, on both sides, instructed us that we were to assume that the speech of Lord Devlin in *Rookes v Barnard* and the speeches in *Cassell & Co Ltd v Broome* correctly stated the law. We were to decide whether the judgment of the Court of Appeal in *AB v South West Water Services Ltd* [1993] 1 All ER 609, [1993] QB 507, which was followed by the Court of Appeal in the present case, correctly applied the law as established by the two cases in your Lordships' House to which I have referred.
- b Counsel had not come prepared to assist your Lordships in a re-examination of the propriety of exemplary damages in the civil law or in a consideration of their propriety in misfeasance in public office cases in particular. Mr Harris QC, counsel for the plaintiff, told us that if we proposed to consider those broader issues he would apply for an adjournment in order to enlist the valuable services of Professor Andrew Burrows as a member of his team.
- c

[106] My Lords, this is not, in my view, an appropriate manner in which to bring before your Lordships an important issue of principle. I share the dismay expressed by my noble and learned friend, Lord Nicholls of Birkenhead, about the lack of assistance that your Lordships have had in considering the general issues about exemplary damages that this appeal has raised, many of which were mentioned in the course of the hearing but, no doubt for the reason I have given, not examined in any depth.

- [107] I agree with Lord Nicholls that the question whether exemplary damages are available in misfeasance in public office cases cannot be answered without first asking whether exemplary damages *should* be available in misfeasance cases. And that question cannot be answered without considering the role and propriety of exemplary damages in the civil law. The law regarding exemplary damages did not become fossilised and set in stone when Lord Devlin pronounced in 1964 (*Rookes v Barnard*) or when the seven members of the House pronounced in 1972 (*Cassell & Co Ltd v Broome*). Since then the common law has flowed on. One of the great developments of the common law since the time of *Rookes v Barnard* has been in the area of public law and judicial review to which Lord Diplock referred. Oppressive, arbitrary and unconstitutional acts by members of the executive can be remedied through civil proceedings brought in the High Court. The remedies the court can provide include awards of damages, declarations of right and, in most cases, injunctions. The developments since Lord Diplock's remarks in *Cassell & Co Ltd v Broome* have transformed the ability of the ordinary citizen to obtain redress. The continuing need in the year 2001 for exemplary damages as a civil remedy in order to control, deter and punish acts falling within Lord Devlin's first category is not in the least obvious.
- e
- f
- g

- [108] My noble and learned friend, Lord Hutton, has referred, as examples, to two cases in Northern Ireland where in his view the award of exemplary damages served a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law. In one case (*Lavery v Ministry of Defence* [1984] NI 99) a soldier was the wrongdoer. The Ministry of Defence was the defendant. In the other case (*Pettigrew v Northern Ireland Office* [1990] NI 179), prison officers were the wrongdoers. The Northern Ireland Office was the defendant. In each case the conduct of the wrongdoer, or wrongdoers, was outrageous and fell squarely within Lord Devlin's first category. But I do not follow why an appropriate award of aggravated damages would not have served to vindicate the law just as effectively as the fairly moderate awards of exemplary damages that were made. The condemnation by the trial judge of the conduct in question would have been expressed no differently. As to deterrence, in a case
- h
- j

where the defendant is not the wrongdoer, and the damages are in any event going to be met out of public funds, how can it be supposed that the award of exemplary damages adds anything at all to the deterrent effect of the trial judge's findings of fact in favour of the injured person and his condemnation of the conduct in question? The proposition that exemplary damage awards against such defendants as the Ministry of Defence or the Northern Ireland Office, or, for that matter, the defendant, can have a deterrent effect is, in my respectful opinion, fanciful. It is possible that exemplary damages awards against the actual wrongdoers which they would have to meet out of their own pockets would have a deterrent effect upon them and their colleagues. But that is not what happened in either of the two cases. As to the propriety in principle of exemplary damages awards in vicarious liability cases, I will return to the point later.

[109] Lord Devlin's second category, cases in which the defendant's wrongful conduct has made a profit for himself which exceeds the compensation payable to the victim of the conduct, has been largely overtaken by developments in the common law. Restitutionary damages are available now in many tort actions as well as those for breach of contract. The profit made by a wrongdoer can be extracted from him without the need to rely on the anomaly of exemplary damages: see the discussion of the topic in *A-G v Blake (Jonathan Cape Ltd, third party)* [2000] 4 All ER 385 at 391–394, [2001] 1 AC 268 at 278–280 by Lord Nicholls of Birkenhead.

[110] Whatever may have been the position in 1964, when *Rookes v Barnard* was decided, or in 1972, when *Cassell & Co Ltd v Broome* was decided, there is, in my opinion, no longer any need for punitive damages in the civil law, or, at least, no need sufficient to offset the disadvantages to which Lord Morris of Borth-y-Gest in *Cassell & Co Ltd v Broome* cogently referred. These disadvantages are the more prominent now that, via the Human Rights Act 1998, art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) has become part of our domestic law.

[111] Thus far I have been considering some of the general issues that are prompted by the present appeal. For the reasons I have outlined, I would be receptive to a submission that exemplary damages awards should no longer be available in civil proceedings. However, Mr Mansfield QC, counsel for the defendant, has not made that submission and, having had the advantage of reading the texts of my noble and learned friends' speeches on this appeal, it is apparent that mine is a minority view. It is, therefore, necessary for me to consider the narrower question, namely, whether in order to qualify for an award of exemplary damages the claim must not only fall within one or other of the two categories identified by Lord Devlin in *Rookes v Barnard* but also be a claim based on a cause of action that, pre-*Rookes v Barnard*, had been recognised in the case law as grounding a claim for exemplary damages.

[112] Express support for the need to satisfy the cause of action criterion is not to be found in the speech of Lord Devlin itself. He formulated the two types of conduct that might attract an award of exemplary damages in a tort action. He recognised ([1964] 1 All ER 367 at 411, [1964] AC 1129 at 1227) that exemplary damages awards for breaches of statutory duty might be expressly authorised by statute but plainly regarded the two types of conduct as comprehensively covering all tortious conduct that might justify an exemplary damages award.

[113] The requirement for the additional cause of action criterion comes not from Lord Devlin in *Rookes v Barnard* but from *Cassell & Co Ltd v Broome* and, in

a particular, the speeches of Lord Hailsham of St Marylebone LC, Lord Reid and Lord Diplock.

[114] Lord Hailsham said ([1972] 1 All ER 801 at 828, [1972] AC 1027 at 1076) that he did not think that Lord Devlin 'by listing the "categories" was ... intending ... to add to the number of torts for which exemplary damages can be awarded'. In *Mafo v Adams* [1969] 3 All ER 1404 at 1410–1411, [1970] 1 QB 548 at 558 Widgery LJ

b had said:

'As I understand Lord Devlin's speech ... the range of offences in respect of which [exemplary damages] may be granted has been increased, and I see no reason ... why, when considering a claim for exemplary damages, one should regard the nature of the tort as excluding the claim.'

c Lord Hailsham expressed his dissent from Widgery LJ's view. Lord Diplock said ([1972] 1 All ER 801 at 874, [1972] AC 1027 at 1131) that '*Rookes v Barnard* was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit.' Lord Reid made the comment ([1972] 1 All ER 801 at 837, [1972] AC 1027 at 1086) that I have cited at [100] above.

d [115] And, in addition, Lord Wilberforce referred ([1972] 1 All ER 801 at 860, [1972] AC 1027 at 1114) to 'the range of torts for which punitive damages may be given (trespass to person or property, false imprisonment and defamation being the commonest', thus at least suggesting a cause of action test.

e [116] It seems to me, therefore, that the Court of Appeal, both in *AB v South West Water Services Ltd* and in the judgment under appeal in the present case, were on firm ground in concluding that the authoritative case law required that a claim for exemplary damages should not only fall within one or other of the two Devlin categories (*Rookes v Barnard* [1964] 1 All ER 367 at 410–411, [1964] AC 1129 at 1226–1227) but should also satisfy the cause of action test. The passages from the speeches of Lord Hailsham, Lord Wilberforce and Lord Diplock cited above were cited in the *AB* case as authority for giving the answer 'No' to the question 'Did *Rookes v Barnard* extend exemplary damages to fresh torts?'

f [117] My Lords, I am in respectful agreement with much of the criticisms of the cause of action test that are to be found both in academic writings and in the speeches of my noble and learned friends on this appeal. I agree that the cause of action test 'commits the law to an irrational position in which the result depends not on principle but upon the accidents of litigation' (*Winfield and Jolowicz on Tort* (15th edn, 1998) p 746, cited by my noble and learned friend Lord Mackay of Clashfern ([33], above); and I agree that the cause of action test appears to encourage a tedious trawl through ancient authority in an attempt to unearth an award of damages that can be categorised as exemplary in a case based upon a particular cause of action.

g [118] The present case is an example. Misfeasance in public office is a cause of action discovered, or rediscovered, relatively recently. But it is only since *Rookes v Barnard* that exemplary damages have been clearly distinguished from aggravated damages. The task of discovering whether, pre-*Rookes v Barnard*, exemplary damages had been awarded in a misfeasance in public office case has shown itself to be, and was always likely to be, lengthy and inconclusive. The cause of action criterion for an award of exemplary damages as an addition to the requirement that the conduct of the defendant fall within one or other of Lord Devlin's two categories does no credit to the law.

[119] On the other hand the exemplary damages principle is itself an anomaly in the civil law and, as Lord Mackay has pointed out, it should not come as a matter of too much surprise that anomalies are to be found in the criteria that determine the availability of an anomalous remedy. a

[120] Your Lordships are, it seems to me, caught on the horns of a dilemma. On the one hand, the cause of action test is not based on principle and has serious practical difficulties. On the other hand, the removal of the cause of action test would expand the cases in which exemplary damages could be claimed. Claims could be made in cases of negligence and cases of deceit provided only that the conduct complained of fell within one or other of the two Devlin categories (*Rookes v Barnard* [1964] 1 All ER 367 at 410–411, [1964] AC 1129 at 1226–1227). Claims could probably also be made, subject to the same proviso, in actions based upon breach of statutory duty whether or not the statute had expressly authorised such claims. b
c

[121] My Lords, I view the prospect of any increase in the cases in which exemplary damages can be claimed with regret. I have explained already why I regard the remedy as no longer serving any useful function in our jurisprudence. Victims of tortious conduct should receive due compensation for their injuries, not windfalls at public expense. d

[122] Faced with the unattractive alternatives of leaving the cause of action test in place or removing it, I would, for my part, favour a pragmatic solution under which, on the one hand, the cause of action test were removed but, on the other, exemplary damages were declared to be unavailable in cases of negligence, nuisance and strict liability, and also liability for breach of statutory duty except where the statute in question had expressly authorised the remedy. In this way the main objections to the cause of action test would be met and tedious research into pre-1964 case law would be avoided but existing authority as to cases where exemplary damages cannot be claimed would be left broadly unaltered. It will be noticed that I have not included deceit among the nominate torts where, on authority, exemplary damages cannot be claimed. This is because if, which I regret, exemplary damages are to be retained and reformed, rather than abolished, deceit practised by a government or local authority official, or by a police officer, on a citizen ought, it seems to me, to be allowed in a suitable case to attract them. e
f

[123] There is, however, a further issue in this case that, in my opinion, requires some comment. The issue is whether exemplary damages can be claimed against an employer for a tort committed by an employee where the employer's liability is only vicarious. The facts of the present case raise this issue. g

[124] The plaintiff's case is that he made a complaint to the police of the theft from his home of certain property. He named a lodger at his home as the suspect. A police officer, PC Cavendish, assured the plaintiff that the complaint would be investigated but subsequently forged the plaintiff's signature on a statement purporting to be a withdrawal by the plaintiff of the complaint. So the theft was never investigated and the plaintiff lost the chance of his property being recovered. Later the plaintiff was informed by the Crown Prosecution Service that there was insufficient evidence to justify a prosecution of the lodger. The defendant to the plaintiff's misfeasance in public office claim is the Chief Constable of Leicestershire Constabulary. PC Cavendish, the alleged wrongdoer, has not been sued. The plaintiff makes no allegation against the defendant personally. The defendant's alleged liability is simply vicarious. The particulars of conduct relied on as justifying an award of exemplary damages are particulars which relate h
j

a to the alleged conduct of PC Cavendish. The defendant is not mentioned anywhere in the body of the pleading.

[125] My Lords, the viability of the plaintiff's exemplary damages claim against the defendant depends not only on the question whether exemplary damages can ever be recovered in a misfeasance claim, but also on the question whether exemplary damages can be recovered in a claim where the defendant's alleged liability is simply vicarious. The point was raised with counsel in the course of the hearing before your Lordships but neither counsel made any submission on it. Nonetheless it is a point that seems to me of considerable importance and one that may be determinative of the present case.

b [126] There has been, so far as I have been able to discover, no discussion in English case law, and, with one notable exception, very little discussion in English law textbooks, of the availability of exemplary damages awards in vicarious liability cases.

c [127] In *MacGregor on Damages* (16th edn, 1997) pp 311–312 (para 469), the text deals with exemplary damages awards where there are joint wrongdoers:

d 'Where joint wrongdoers are sued together, the conduct of one defendant does not allow exemplary damages to be awarded in the single judgment which must be entered against all if the conduct of the other defendant or defendants does not merit punishment. This was the view of Pollock B in *Clark v Newsam* (1847) 1 Exch 131, 141, and is now finally established by the House of Lords in (*Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027).'

e [128] If that is the rule where joint wrongdoers are sued, it must also be so where only one of two or more joint wrongdoers is sued, or where the employer is sued together with the wrongdoers, or where the employer alone is sued. Since all the wrongdoers are jointly liable for the wrong and, if their employer is vicariously liable, he is jointly liable with them, an exemplary damages award against any of them ought, in principle, to be a justifiable award against each of them. If the conduct of any of them, including the employer, does not merit punishment, an exemplary damages award ought, in principle, not to be made. The law might, of course, develop so that an exemplary damages award against a particular wrongdoer became separated from the general compensatory damages for which all the wrongdoers and their vicariously liable employer were jointly liable.

f [129] The notable exception to which I referred is to be found in Professor Atiyah's *Vicarious Liability in the Law of Torts* (1967), published not long after *Rookes v Barnard* had been decided, which contains a chapter (ch 39) dealing with exemplary damages. The chapter has a section headed 'Vicarious Liability'. This section commences with the following paragraph:

g 'The most difficult problems arise in this connection in cases of pure vicarious liability. There appears to be no English authority in which there has been any discussion of the question whether exemplary damages can be awarded against an employer who is vicariously liable for the tort of a servant committed in circumstances in which exemplary damages can be awarded against the servant. At first sight there seems to be much against allowing vicarious liability for exemplary damages, for if these are avowedly designed as punishment it might seem wrong in principle to punish someone other than the actual wrongdoer. On the other hand it can also be urged that

vicarious liability in the criminal law is not wholly unknown, and that the deterrent aspect is also an important consideration. In certain types of action, in particular false imprisonment, purely compensatory damages might not be an adequate deterrent against repetition, and it may well be that the deterrence would be more effective if aimed against the employer rather than the servant. The question could become of practical importance with the recent introduction of vicarious liability for police officers. If a policeman were to make an arrest in wholly unjustifiable circumstances it would seem right that the vicarious liability of the Chief Constable should extend to exemplary damages, for otherwise there might be no sufficient incentive to the police authorities to take stern measures with a view to preventing repetition of the offence.'

I would not myself accept that a deterrent purpose was a sufficient justification for exemplary damages in vicarious liability cases, but, whatever may be the value of such a purpose in the false imprisonment or unlawful arrest cases referred to in the text, such a purpose has no relevance in the present case. No one would think of arguing that there is a need for chief constables to be deterred from allowing their officers to conduct themselves as PC Cavendish is alleged by the plaintiff to have conducted himself.

[130] The 'Vicarious Liability' section goes on to refer to the manner in which exemplary damages in vicarious liability cases is dealt with in the American Restatement:

'The problem has received some discussion in America although the courts are divided in the result. The Restatement, however, comes out in favour of a compromise. While denying vicarious liability for exemplary damages in principle, it admits such liability in four cases, that is, if, but only if: (a) the principal authorised the damage and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of his capacity, or (d) the principal or a managerial agent of the principal ratified or approved the act.'

None of these four paragraphs would cover the exemplary damages claim in the present case, nor, for that matter, in either of the two Northern Ireland cases referred to by my noble and learned friend, Lord Hutton.

[131] The objection to exemplary damages awards in vicarious liability cases seems to me to be fundamental. The only acceptable justification of exemplary damages awards in cases falling within Lord Devlin's first category (*Rookes v Barnard* [1964] 1 All ER 367 at 410, [1964] AC 1129 at 1226), 'oppressive, arbitrary or unconstitutional action by the servants of the government', including police officers, is that the conduct complained of has been so outrageous as to warrant a punitive response. As Lord Devlin said ([1964] 1 All ER 367 at 411, [1964] AC 1129 at 1227): '... the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour.' The other side of the coin is, in my opinion, equally valid: the defendant should not be liable to pay exemplary damages unless he has committed punishable behaviour. This principle leaves no room for an award of exemplary damages against an individual whose alleged liability is vicarious only and who has not done anything that constitutes punishable behaviour.

a [132] In 1997 the Law Commission laid before Parliament a paper on *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997). The paper was, by order of the House of Commons, printed on 15 December 1997.

b [133] The section of the paper dealing with exemplary damages refers to some of the complications that arise in vicarious liability cases. The paper notes, in para 4.69, that 'when calculating the appropriate exemplary sum, it has been laid down that the court or jury should take into account the defendant's capacity to pay' and went on in the following paragraphs to consider how this could work in a vicarious liability case:

c '4.69 When calculating the appropriate exemplary sum, it has been laid down that the court or jury should take into account the defendant's capacity to pay. It would seem that either party may give evidence of the defendant's resources, but that in practice evidence of the defendant's means is rarely, if ever, adduced.

d 4.70 Until the recent case of [*Thompson v Comr of Police of the Metropolis* [1997] 2 All ER 762] it was unclear how this consideration should be applied in a vicarious liability case, where a plaintiff seeks to make an employer liable for the wrongful conduct of his employee. One possibility was that any sum which an employer is liable to pay as exemplary damages could be subject to deduction on account of the employee's lack of means. Another, contrasting, possibility was that the means of the wrongdoing employee are irrelevant to the size of the sum which the employer is vicariously liable to pay.

e 4.71 In [*Thompson's case*] the Court of Appeal finally endorsed the second approach. It was said [at 776] that where the action is brought against the chief police officer, and damages are paid on the basis of vicarious liability for the acts of his officers, "it [is] wholly inappropriate to take into account the means of the individual officers except where the action is brought against the individual tortfeasor." There seems to be no good reason why this approach should not apply generally to vicarious liability to exemplary damages.'

g [134] *Thompson v Comr of Police of the Metropolis*, referred to in the Law Commission Paper, is now reported in [1998] QB 498. The case was one in which the plaintiff, having been lawfully arrested, was subsequently assaulted and manhandled by police officers and wrongly detained in a cell for about four hours. She claimed against the Commissioner damages for false imprisonment and malicious prosecution. She claimed both aggravated damages and exemplary damages. The only defendant was the Commissioner. No argument was presented to the court that exemplary damages should not be awarded in a vicarious liability case. So h the court was entitled to proceed on the footing that exemplary damages as well as aggravated damages could be awarded. The points taken before the court related simply to quantum. Counsel for the Commissioner argued ([1998] QB 498 at 501) that "The jury should be directed (1) that the [exemplary damages] award should be the minimum sum necessary to meet the underlying purpose of j punishing the defendant.' But why should the Commissioner have been punished at all? He had done nothing that merited punishment.

[135] Lord Woolf MR said:

'The fact that the defendant is a chief officer of police also means that here exemplary damages should have a lesser role to play. Even if the use of civil proceedings to punish a defendant can in some circumstances be justified it

is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrongdoer, but his 'employer'. While it is possible that a chief constable could bear a responsibility for what has happened, due to his failure to exercise proper control, the instances when this is alleged to have occurred should not be frequent.' (See [1997] 2 All ER 762 at 772, [1998] QB 498 at 512.)

[136] I respectfully agree with the first two sentences in the above cited passage. As to the third sentence, there is nothing in the report of the case in the Court of Appeal which indicates that any factual findings of breach of duty on the part of the defendant personally were made, whether in respect of failure to exercise proper control or otherwise. But it is possible that there were such findings. In the absence of any finding of some personal breach of duty by the defendant, there would, in my opinion, have been no basis upon which punishment, in the form of exemplary damages, could properly have been visited upon him. The conduct meriting punishment was not his conduct but that of his officers. It appears to me that, silently and without any proper or principled justification for it, a system of vicarious punishment of public employers for the misfeasances of their employees has crept into our civil law.

[137] In my opinion vicarious punishment, via an award of exemplary damages, is contrary to principle and should be rejected. The plaintiff's pleaded case against the Chief Constable of Leicestershire Constabulary is a vicarious liability case and no more. It does not, in my opinion, enable an award of exemplary damages to be made against the defendant.

[138] However, the point regarding vicarious liability and exemplary damages was not the basis on which the strike-out application was made, was not dealt with in the courts below and was not addressed by counsel before your Lordships. The views I have expressed should, therefore, be regarded as provisional and the point left for decision at a later stage in the proceedings.

[139] In the result I would, for the reasons given in [122] above, with reluctance, allow this appeal. My reluctance is the consequence of my opinion that, on the vicarious liability point, this exemplary damages claim is bound to fail.

Appeal allowed.

Kate O'Hanlon Barrister.

a

Wilson v First County Trust Ltd

[2001] EWCA Civ 633

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, CHADWICK AND RIX LJ

b

19, 20 MARCH, 2 MAY 2001

Consumer credit – Agreement – Form and content of agreement – Restrictions on enforcement – Statutory provision rendering improperly-executed regulated agreement unenforceable if debtor not signing document containing all prescribed terms of agreement – Whether provision compatible with right to fair trial and right to property under human rights convention – Consumer Credit Act 1974, ss 61(1)(a), 65(1), 113, 127(3) – Human Rights Act 1998, ss 3(1), 4, 6, 10, Sch 1, Pt I, art 6(1), Pt II, art 1 – Consumer Credit (Agreements) Regulations 1983, Sch 6, para 2.

c

d

e

f

g

h

In January 1999 the claimant, W, signed a loan agreement with the defendant pawnbroker, and pledged her car as security. The agreement was a regulated agreement for the purposes of the Consumer Credit Act 1974. Section 61(1)^a of the 1974 Act set out three conditions which had to be satisfied if a regulated agreement was to be treated as properly executed. Condition (a) required both the debtor and the creditor to sign, in the prescribed manner, a document in the prescribed form containing all the prescribed terms and conforming to regulations made under s 60(1). By virtue of para 2^b of Sch 6 to the Consumer Credit (Agreements) Regulations 1983, the prescribed terms included 'a term stating the amount of the credit'. Under s 65(1)^c of the Act, an improperly-executed regulated agreement was enforceable against the creditor only on order of the court. Section 127(3)^d provided that the court could not make such an order if s 61(1)(a) had not been complied with unless a document (whether or not in the prescribed form and complying with regulations under s 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner). The court thus had no power to make a s 65(1) order in cases where the debtor had not signed a document containing all the prescribed terms, even though the omission of a prescribed term had caused no prejudice to anyone. In such cases, security taken for the loan would also, prima facie, be rendered unenforceable by s 113^e of the Act. In W's case, her agreement with the pawnbroker stated the amount of the loan to be £2,500. That included a sum of £250 which was stated to be a document fee. In subsequent county court proceedings between the parties, the principal issue was whether the inclusion of that sum in the amount stated to be the amount of the loan meant that 'the amount of the credit' had been misstated. The judge held that the agreement conformed with the conditions. On W's appeal, the Court of Appeal reversed the

j

a Section 61, so far as material, provides: '(1) A regulated agreement is not properly executed unless—(a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner ...'

b Paragraph 2, so far as material, is set out at [3], below

c Section 65, so far as material, provides: '(1) An improperly-executed regulated agreement is enforceable against the debtor or hirer on an order of the court only.'

d Section 127(3) is set out at [5], below

e Section 113, so far as material, is set out at [6], below

judge's decision, holding that the document fee could not of itself be treated as credit, that the 'amount of the credit' was therefore £5,000, not £5,250, and that accordingly the agreement was not a properly-executed regulated agreement. The court further held that the case fell within s 127(3), that the agreement was therefore unenforceable against W and that, at least *prima facie*, the pawnbroker could not rely on the security. In those circumstances, the court indicated that it was considering making a declaration under s 4^f of the Human Rights Act 1998 that s 127(3) was incompatible with two rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) (the convention), namely the right to a fair hearing under art 6(1)^g and the prohibition against depriving a person of his possessions under art 1^h of the First Protocol to the convention. The appeal was therefore adjourned for further hearing after notice had been given to the Crown. On the adjourned hearing, the court was required to determine (i) whether the relevant provisions of the 1998 Act had any application in view of the fact that the agreement pre-dated their implementation on 2 October 2000; if so, (ii) whether the provisions in s 127(3) of the 1974 Act, read with those in Sch 6 to the 1983 regulations, would be incompatible with a convention right guaranteed to the pawnbroker; if so, (iii) whether it was possible (as required by s 3(1)ⁱ of the 1998 Act) for the court to read and give effect to the provisions in s 127(3) of the 1974 Act in a way which was compatible with that convention right; and, if that were not possible, (iv) whether, as a matter of discretion, a declaration of incompatibility should be granted. In considering those issues, the court had regard to various provisions of the 1998 Act in addition to s 3(1), namely s 6(1)^j, which made it unlawful for a 'public authority' (a term which included a court) to act in a way which was incompatible with convention rights; s 6(2)(b), which excluded the application of s 6(1) where, in the case of one or more provisions of, or made under, primary legislation which could not be read or given effect in a way which was compatible with convention rights, the court was acting so as to give effect to or enforce those provisions; and s 10^k, which enabled the government to take remedial action in the event of a declaration of incompatibility.

-
- ^f Section 4, so far as material, provides: '(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right. (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.'
- ^g Article 6, so far as material, is set out [8], below
- ^h Article 1, so far as material, is set out at [8], below
- ⁱ Section 3(1) provides: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'
- ^j Section 6, so far as material, provides: '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if ... (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. (3) In this section "public authority" includes—(a) a court or tribunal ...'
- ^k Section 10, so far as material provides: '(1) This section applies if—(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—(i) all persons who may appeal have stated in writing that they do not intend to do so; (ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or (iii) an appeal brought within that time has been determined or abandoned ... (2) If a Minister of the Crown considers that there are compelling reasons for proceedings under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.'

Held—(1) In order to comply with s 6(1) of the 1998 Act, the court had to ask itself, in any case which came before it after 2 October 2000, whether the order which it was about to make was or was not compatible with convention rights. Accordingly, the relevant event, in the instant case, was not the making of the agreement, but rather the making of an order on the appeal from the judge. The relevant question was not whether some convention right of the pawnbroker was infringed when it made a loan to W upon the terms of the agreement. Rather, it was whether in allowing an appeal from the order made by the judge—or, more precisely, in making an order after 2 October 2000 which gave effect to a decision to allow the appeal—the court would be acting in a way which was incompatible with an existing convention right. That question had to be answered in the basis of facts as they were at the time when the order was made in the Court of Appeal. It followed that ss 3, 4 and 6 of the 1998 Act applied (see [16]–[18], below).

(2) Section 127(3) of the 1974 Act was incompatible with the rights guaranteed under art 6(1) of the convention and art 1 of the First Protocol. Those provisions of the convention were engaged by the restriction on the enforcement of the creditor's contractual rights. The critical question, therefore, was whether the exclusion of any judicial remedy in a case such as the instant case was legitimate, having regard to the nature of the rights engaged by that exclusion. The policy aim of s 127(3) was to ensure that particular attention was paid to the inclusion in the document to be signed by the debtor of certain terms which would, or might, be prescribed by the Secretary of State in the future. Although it was impossible to suggest that that was not a legitimate aim, it did not follow that the means by which it was to be achieved were also legitimate. The means would not be legitimate if guaranteed convention rights were infringed to an extent which was disproportionate to the policy aim. That, however, was the effect of the inflexible prohibition, imposed by s 127(3), against the making of an enforcement order in cases where the document signed by the debtor failed to include the prescribed terms. No reason had been identified as to why such a prohibition was necessary in order to achieve the legitimate policy aim. There was no reason why it should not be achieved through judicial control, by empowering the court to do what was just in the circumstances of the particular case. Moreover, it was not possible to read and give effect to the relevant provisions of the 1974 Act in a way which was compatible with the pawnbroker's human rights. It was therefore necessary to consider whether the court should, as a matter of discretion, grant a declaration of incompatibility. It was right to do so for three reasons. First, the point had been fully identified and argued at a further hearing appointed for that purpose. Second, since the court had held that the order which it was required to make on the appeal by a non-convention interpretation of s 127(3) would be incompatible with convention rights, it could not lawfully make that order unless satisfied that the section could not be read or given effect in a way which was compatible with convention rights. It was appropriate that the court's conclusion to that effect should be formally recorded by a declaration which gave legitimacy to the order. Third, a declaration served a legislative purpose under the 1998 Act in that it provided a basis, under s 10(1)(a), for a minister of the Crown to consider whether there were compelling reasons to make amendments to the legislation by remedial order (under Sch 2 to the Act) for the purpose of removing the incompatibility which the court had identified. Accordingly, a declaration of incompatibility would be granted (see [28], [31], [32], [39], [40], [45], [47], [50], [51], below).

Notes

For the right to a fair trial and the right to property, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 137, 165, and for the consequences of the improper execution of regulated agreements, see 9(1) *Halsbury's Laws* (4th edn reissue) para 169.

For the Consumer Credit Act 1974, ss 61, 65, 113, 127, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 62, 65, 100, 127.

For the Human Rights Act 1998, ss 3, 4, 6, 10, Sch 1, Pt I, art 6, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 502, 504, 509, 523, 525.

For the Consumer Credit (Agreements) Regulations 1983, Sch 6, para 2, see 5 *Halsbury's Statutory Instruments* (1999 issue) 262.

Cases referred to in judgment

Allgemeine Gold-und Silberscheideanstalt v UK (1986) 9 EHRR 1, ECt HR.

Dimond v Lovell [2000] 2 All ER 897, [2000] 2 WLR 1121, HL.

James v UK (1986) 8 EHRR 123, ECt HR.

Mellacher v Austria (1989) 12 EHRR 391, ECt HR.

Orakpo v Manson Investments Ltd [1977] 3 All ER 1, [1978] AC 95, [1977] 3 WLR 229, HL.

Osman v UK (1998) 5 BHRC 293, ECt HR.

R v DPP, ex p Kebeline [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.

Sporrong v Sweden (1982) 5 EHRR 35, ECt HR.

Stran Greek Refineries v Greece (1994) 19 EHRR 293, ECt HR.

Appeal

By notice dated 18 October 1999, the claimant, Penelope Wilson, appealed with permission of Judge Hull QC from his decision, sitting in the Kingston upon Thames County Court at Epsom on 24 September 1999, refusing her application for a declaration that the credit agreement which she had entered with the defendant, First County Trust Ltd, on 22 January 1999 was void and unenforceable. On 23 November 2000 the Court of Appeal ([2001] QB 407, [2001] 2 WLR 302) handed down interim judgments and adjourned the appeal for further argument. The Secretary of State for Trade and Industry intervened on the adjourned appeal. The facts are set out in the judgment of the court.

Richard Salter QC and *Martin Young* (instructed by the *Bar Pro Bono Unit*) for Mrs Wilson.

Philip Havers QC and *William Hibbert* (instructed by *Park Nelson*) for First County. *Jonathan Crow* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Monica Carss-Fisk QC (instructed by the *Treasury Solicitor*) as *amicus curiae*.

Cur adv vult

2 May 2001. The following judgment was delivered.

SIR ANDREW MORRITT V-C (giving the judgment of the court).

[1] We handed down interim judgments in this appeal on 23 November 2000. We indicated, in those judgments ([2001] QB 407, [2001] 2 WLR 302), that we were considering whether to make a declaration, under s 4(2) of the Human Rights Act 1998, that a provision of primary legislation—s 127(3) of the Consumer Credit Act 1974—was incompatible with a convention right. In those circumstances we directed that notice should be given to the Crown under s 5 of

a the 1974 Act and we adjourned the appeal for further hearing. This is the judgment of the court following the further hearing of the appeal.

The application of the 1974 Act to the facts in this case

b [2] The appeal is from an order made on 24 September 1999 by Judge Hull QC, sitting in the Kingston upon Thames County Court at Epsom, in proceedings brought by Mrs Penelope Wilson against the First County Trust Ltd, a pawnbroker. The underlying facts are set out in the earlier judgment of the Vice-Chancellor. It is unnecessary to rehearse them at any length. It is sufficient to recall that the principal issue was whether the inclusion of an amount (£250), described as a document fee, in the amount (£5,250) stated on the face of a loan agreement signed by Mrs Wilson on 22 January 1999 to be the amount of the loan had the effect that 'the amount of the credit' was misstated. We held, reversing the judge, c that the document fee—being an item which entered into the total charge for credit—could not, itself, be treated as credit. Accordingly, on a true analysis of the position, 'the amount of credit' was £5,000, not £5,250.

d [3] It was common ground that the agreement of 22 January 1999 was a regulated agreement for the purposes of the 1974 Act. Section 61(1) of the 1974 Act sets out three conditions which must be satisfied if a regulated agreement is to be treated as properly executed. Condition (a) requires that a document in the prescribed form containing all the prescribed terms and conforming to regulations under s 60(1) is signed in the prescribed manner both by the debtor and by or on behalf of the creditor. In the present context 'the prescribed terms' for the purposes of s 61(1)(a) of the 1974 Act include 'a term stating the amount of the credit'—see para 2 in Sch 6 to the Consumer Credit (Agreement) Regulations 1983, SI 1983/1553. It followed from the fact that the amount of the credit was misstated that the agreement of 22 January 1999 was not a properly executed regulated agreement.

f [4] Section 65(1) of the 1974 Act provides that an improperly executed regulated agreement is enforceable against the debtor on an order of the court only. Section 127 of the 1974 Act sets out the powers of the court upon an application for an enforcement order under (inter alia) s 65(1). Section 127(1) provides that the court shall dismiss the application if, but only if, it considers it just to do so having regard to (i) prejudice caused to any person by the contravention g in question and the degree of culpability for it, and (ii) the powers conferred on the court by s 127(2) and ss 135 and 136 of the 1974 Act. Section 127(2) empowers the court (if it appears just to do so) to reduce or discharge any sum payable by the debtor, so as to compensate him for prejudice suffered as a result of the contravention in question. Sections 135 and 136 confer further powers on the h court in relation to the terms upon which enforcement orders may be made.

[5] Section 127(1) of the 1974 Act is subject to the restrictions imposed by ss 127(3) and (4). Those subsections set out circumstances in which the court shall not make an enforcement order under s 65(1) of the 1974 Act. In particular, s 127(3) is in these terms:

j 'The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner).'

It follows that in a case where there is no document signed by the debtor—or no document signed by the debtor which contains all the prescribed terms of the agreement—the court has no power to make an enforcement order. In such a case, the effect of ss 65(1) and 127(3) of the 1974 Act is that the agreement is not enforceable against the debtor. a

[6] Further, at least *prima facie*, security taken for the loan will also be unenforceable in such a case. Section 113(1) of the 1974 Act provides (so far as material) that— b

‘Where a security is provided in relation to an actual or prospective regulated agreement, the security shall not be enforced so as to benefit the creditor ... directly or indirectly, to an extent greater (whether as respects the amount of any payment or the time or manner of its being made) than would be the case if the security were not provided and any obligations of the debtor ... under ... the agreement were carried out to the extent (if any) to which they would be enforced under this Act.’ c

In a case where the agreement itself is not enforceable against the debtor—by reason of the provisions in ss 65(1) and 127(3)—the creditor could obtain no benefit if ‘the security were not provided’. So, in such a case, notwithstanding that ‘security is provided’, the security cannot be enforced so as to benefit the creditor. The point is reinforced by s 113(2): d

‘In accordance with subsection (1), where a regulated agreement is enforceable on an order of the court ... only, any security provided in relation to the agreement is enforceable (so far as provided in relation to the agreement) where such an order has been made in relation to the agreement, but not otherwise.’ e

In a case where no enforcement order can be made in relation to the regulated agreement, it must follow that security provided in relation to the agreement is not enforceable either. f

[7] We held that the present case fell within s 127(3) of the 1974 Act—because (in the absence of a term correctly stating the amount of the credit) the document signed by the debtor on 22 January 1999 did not include all the prescribed terms of the agreement. It followed (i) that the agreement was not enforceable against Mrs Wilson and (ii) at least *prima facie*, that First County Trust could not rely on the security which she had provided by way of pledge over her BMW car. g

The convention rights

[8] Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) as it has effect for the time being in relation to the United Kingdom provides, so far as material, that: h

‘In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...’ j

Article 1 of the First Protocol to the convention, agreed at Paris on 20 March 1952, provides that:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

a interest and subject to the conditions provided for by law ... The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...'

b [9] We pointed out, in the judgments which we handed down on 23 November 2000, that the effect of ss 65(1) and 127(3) of the 1974 Act—in a case to which the latter section applies—is to deprive the court of any power to enforce a regulated agreement from which a prescribed term has been omitted; notwithstanding that no prejudice has been caused to anyone by that omission. We queried whether that was a proportionate response, having regard to the creditor's convention rights. The point was identified by the Vice-Chancellor ([2001] QB 407 at 418, c [2001] 2 WLR 302 at 313 (para 27)):

d 'It appears to me that it may be arguable that section 127(3) infringes article 6(1) of, and/or article 1 of the First Protocol to, the Convention for the Protection of Human Rights and Fundamental Freedoms set out in Schedule 1 to the Human Rights Act 1998. In the case of article 6(1) it is arguable that the absolute bar to enforcement in the case of an agreement which does not contain the prescribed terms is a disproportionate restriction on the right of the lender, which exists in all other cases, to have the enforceability of his loan determined by the court: *Osman v United Kingdom* ((1998) 5 BHRC 293). The position is similar in the case of article 1 of the First Protocol. The money advanced by FCT to Mrs Wilson was its possession. It lent that money to Mrs Wilson on terms, as it thought, that it should be repaid in six months time. It has been deprived of that possession as provided for by law in the form of section 127(3). But does that law strike a fair balance between the demands of the general community and the fundamental right of the individual? See *Stran Greek Refineries v Greece* ((1994) 19 EHRR 293 at 328 f (para 69)).'

The Human Rights Act 1998

g [10] Section 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a convention right. In that context 'public authority' includes a court or tribunal—see s 6(3)(a) of the 1998 Act. But s 6(2)(b) excludes the application of s 6(1) where, in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the convention rights, the court is acting so as to give effect to or enforce those provisions. That provision must be read in conjunction h with s 3(1) of the 1998 Act, which requires that, so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the convention rights. The position, therefore, is that, where a court is faced with a provision in primary legislation which appears to require it to make an order which would be incompatible with a convention right, the court must j consider whether it is possible to read and give effect to that provision in a way which does not lead to that result. If it is possible to do so, then the court must take that course. The court will make an order which is not incompatible with the convention right. But if it is not possible to read and give effect to the primary legislation in a way which is compatible with the convention right, then the court must make the order which the primary legislation requires. It will not, then, be acting unlawfully—see s 6(2)(b) of the 1998 Act.

[11] It follows that, in any case where the court makes an order which is incompatible with a convention right, it must, necessarily, first address the question whether it is required to do so by some provision in primary legislation. If satisfied that it is required to do so—that is to say, if satisfied that (notwithstanding the obligation imposed on the court by s 3(1) of the 1998 Act) the provision in primary legislation cannot be read and given effect in a way which is compatible with the convention right—the court (if a court within s 4(5) of the 1998 Act) may make a declaration of that incompatibility—see s 4(2) of the 1998 Act. It does so, in part at least, in order to explain why it is not, itself, acting unlawfully—see ss 6(1) and 6(2)(b) of the 1998 Act. But, in so doing, it also enables remedial action to be taken by government, under s 10 of the 1998 Act. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, nor is it binding on the parties to the proceedings in which it is made—see s 4(6) of the 1998 Act.

[12] Section 5(1) of the 1998 Act requires that where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to be given notice; and, in such a case, a Minister of the Crown (or a person nominated by him) is entitled to be joined as a party to the proceedings. In the present case, in response to the notice which we directed to be given under s 5 of the 1998 Act, the Secretary of State for Trade and Industry has been joined as a party to the appeal. Counsel instructed on his behalf has appeared at the further hearing to resist the making of a declaration of incompatibility.

The issues for decision on the further hearing of the appeal

[13] The original respondent to the appeal, First County Trust, had not been represented by solicitors or counsel at the earlier hearing of the appeal and (in any event) would seem to have no interest in the question whether or not a declaration of incompatibility should be made. In those circumstances we thought it appropriate to invite the Attorney General to appoint an amicus curiae to assist the court. We have had that assistance, for which we are grateful. We have been assisted, also, by counsel now instructed on behalf of First County Trust and by counsel who have accepted instructions pro bono publico on behalf of the appellant, Mrs Wilson.

[14] In the light of the submissions which have been made to us, we identified the following issues for decision: (i) whether the relevant provisions of the 1998 Act have any application in circumstances where the agreement of 22 January 1999 pre-dated 2 October 2000, the date upon which those provisions came into force; if so, (ii) whether the provisions in s 127(3) of the 1974 Act—read with those in Sch 6 to the 1983 regulations—would (but for the application of s 3(1) of the 1998 Act) be incompatible with a convention right guaranteed to First County Trust; if so, (iii) whether it is possible (as required by s 3(1) of the 1998 Act) to read and give effect to the provisions in s 127(3) of the 1974 Act in a way which is compatible with that convention right; and, if that is not possible, (iv) whether, as a matter of discretion, a declaration of incompatibility should be made. We address those issues in the following paragraphs of this judgment.

Whether the relevant provisions of the 1998 Act have any application in this case

[15] It was submitted on behalf of the Secretary of State that the court has no power, under s 4(2) of the 1998 Act, to make a declaration of incompatibility in a case, such as the present, where what is said to be the relevant event—the making of the regulated agreement on 22 January 1999—took place before that section

- a was brought into force (on 2 October 2000) by an order made under s 22(3) of that 1998 Act. The Secretary of State does not shrink from the necessary conclusion that, if that submission were well founded, it would follow that, in a case where the relevant event took place before 2 October 2000, a court is not required by s 3(1) of the 1998 Act to read and give effect to legislation (so far as it is possible to do so) in a way which is compatible with convention rights; nor would a court b be acting unlawfully under s 6(1) of the 1998 Act if (having failed to give effect to s 3(1) of the 1998 Act) it were to make an order which is incompatible with a convention right. We have explained, already, that ss 3, 4 and 6 of the 1998 Act must be read together.

[16] In our view the submission that ss 3, 4 and 6 have no application in the present case is misconceived.

- c [17] The 1998 Act was enacted, as appears from its long title, 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. The convention rights to which the 1998 Act gives 'further effect' are not, themselves, new rights introduced by the 1998 Act; they are existing rights set out in the convention and its Protocols, to which the United d Kingdom is party—see s 1(1) of the 1998 Act. The object of the 1998 Act is to incorporate those rights into domestic law and to give an effective domestic remedy. Section 6 must be read with that object in mind. Section 6(1)—in conjunction with s 6(3)(a)—requires a court to refrain from acting in a way which is incompatible with a convention right. If the court is to comply with that e requirement it must ask itself—in any case which comes before it after 2 October 2000—whether the order which it is about to make is or is not compatible with convention rights. The relevant event, in the present case, is not the making of the agreement on 22 January 1999; the relevant event is the making of an order on this appeal.

- f [18] To put the point in another way, the relevant question, in the present case, is not whether some convention right of First County Trust was infringed when it made a loan to Mrs Wilson upon the terms of the agreement dated 22 January 1999; nor whether, before 2 October 2000, there was any domestic remedy in respect of any such infringement. The relevant question is whether g in allowing an appeal from the order made by Judge Hull QC—or, more precisely, in making an order after 2 October 2000 which gives effect to a decision to allow the appeal—this court would be acting in a way which is incompatible with an existing convention right. That is a question which has to be answered on the basis of the facts as they are at the time when the order is made in this court.

- h [19] The contrary argument is founded on the provisions of s 22(4) of the 1998 Act, which both extends and limits the retrospective effect of s 7(1). Section 7(1) of the 1998 Act is in these terms:

- j 'A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.'

For the purposes of s 7(1)(b) 'legal proceedings' includes (a) proceedings brought by or at the instigation of a public authority, and (b) an appeal against the decision of a court or tribunal—see s 7(6) of the 1998 Act. That is the context in which s 22(4) of the 1998 Act must be read. The section is in these terms:

‘Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.’

It is said that the first limb of that section—which identifies limited circumstances in which s 7(1)(b) applies to an act (alleged to be unlawful under s 6(1)) which has taken place before 2 October 2000 (when s 7, also, came into force pursuant to s 22(3) of the 1998 Act)—is the exception which proves the general rule. The general rule, it is said, is that a court is not concerned with alleged infringing acts which took place before 2 October 2000.

[20] We are satisfied that that argument is based on a misunderstanding of the purpose and effect of s 22(4) of the 1998 Act. The effect of s 22(4) is not in doubt. It provides (by the second limb of the section) that, in general, s 7(1) does not apply to an act taking place before 2 October 2000. So, for example, a person who claims that a public authority has acted in a way which is incompatible with a convention right (contrary to s 6(1) of the 1998 Act) cannot bring proceedings against the authority under the 1998 Act (pursuant to s 7(1)(a)) if the unlawful act took place before 2 October 2000. Nor, it seems, can a person who claims that a court or tribunal has acted in a way which is incompatible with a convention right (contrary to s 6(1) of the 1998 Act) rely on that as a ground of appeal against the decision of that court or tribunal in a case where the decision complained of was made before 2 October 2000—see s 7(1)(b) and s 7(6)(b) of the 1998 Act. If the act which is said to be unlawful under s 6(1) has taken place before 2 October 2000, it is only where the person who claims to be the victim of that act is party to proceedings brought by or at the instigation of a public authority that he can rely on that section.

[21] Once the effect of s 22(4) of the 1998 Act is analysed, it is not difficult to see the purpose for which that section was enacted. Parliament took the view—no doubt as a matter of policy—that public authorities should not be exposed to proceedings in respect of acts (alleged to be incompatible with convention rights) which had taken place before ss 6 and 7 had come into force. Nor should the decisions of courts and tribunals made before those sections had come into force be impugned on the ground that the court or tribunal was said to have acted in a way which was incompatible with convention rights. But, where the public authority was itself the claimant in, or the instigator of, proceedings, there was no policy reason why another party to those proceedings should not rely on an allegation that the authority had acted in a way which s 6 made unlawful, whenever the alleged unlawful act had taken place. The first limb of s 22(4) is required because, without it, an act of a public authority which was incompatible with a convention right but which had taken place before s 6 had come into force would not be unlawful; with the consequence that the unlawfulness of the act could not be relied upon as an answer to proceedings brought by the public authority. The second limb of s 22(4) is required because, without it, public authorities would be exposed to claims in respect of acts (said to be unlawful under s 6(1)) which had taken place before s 7 had come into force.

[22] So understood, s 22(4) of the 1998 Act provides no support for the submission that s 6(1)—or ss 3 and 4—of the 1998 Act have no application in the present case. Section 22(4) is directed to the particular problems raised by the decision to give a domestic remedy, under s 7(1) of the 1998 Act, against public authorities who act, or have acted, in a way made unlawful by s 6(1). It has no relevance to the

a quite separate question whether a court, which is now required by s 6(1) to act in a way which is compatible with convention rights, must have regard to the facts as they are at the time when it makes its order. As we have said, that question requires an affirmative answer.

b *Whether the provisions in s 127(3) of the 1974 Act would (but for the application of s 3(1) of the 1998 Act) be incompatible with a convention right*

[23] We turn, therefore, to consider the second issue for decision on this further hearing: whether the provisions in s 127(3) of the 1974 Act—read with those in Sch 6 to the 1983 regulations—would (but for the application of s 3(1) of the 1998 Act) be incompatible with the rights guaranteed to the pawnbroker by art 6(1) of the convention and art 1 of the First Protocol.

c [24] It is essential to a proper consideration of this issue to appreciate that there is nothing in the 1974 Act which prevents an improperly executed regulated agreement from giving rise to contractual rights. Nor is there anything in the 1974 Act which prevents the right to possess goods pledged as security for the borrower's contractual obligations under such a contract passing on delivery of the goods by the pawnor to the pawnee. The effect of the 1974 Act, in the present context, is limited to restricting the ability of the pawnbroker to enforce its contractual rights, or to enforce its security as the person in possession of the goods pledged.

e [25] The point is made by ss 65(1) and 113(2) of the 1974 Act. Section 65(1) provides for an improperly executed agreement to be enforced on an order of the court. Where the court makes an enforcement order, it enforces the contractual rights under the agreement; subject to the reduction or discharge of any sum payable thereunder (see s 127(2)), the omission of any term omitted in the document signed by the debtor (see s 127(5)), or such variation or modification as it may make under s 136 in consequence of a term imposed under s 135 of the 1974 Act. Where, following an enforcement order, security is enforceable under s 113(2) of the 1974 Act, it is the security that has been provided in relation to the agreement that is enforced. Sections 65(1) and 113(2) of the 1974 Act do not make the rights conferred on the creditor by the agreement or by the delivery of the pawn unenforceable. Rather, those sections recognise that those rights exist and are enforceable; but enforcement against the debtor or pawnor is made subject to judicial control.

g [26] The recognition that there is nothing in the 1974 Act which prevents an improperly executed regulated agreement from giving rise to contractual rights, nor which prevents the right to possess goods pawned as security passing on delivery of the goods, provides the answer, as it seems to us, to the principal argument advanced on behalf of the Secretary of State in support of his submission that there is nothing in s 127(3) of the 1974 Act which is incompatible with convention rights. It was said, in effect, in relation to art 1 of the First Protocol, that, where there was no document signed by the debtor—or where the document signed by the debtor did not contain all the prescribed terms of the agreement—neither the agreement, nor the delivery of the pawn, conferred any enforceable rights on the creditor. So, in the present case, the creditor had no relevant 'possessions' to the peaceful enjoyment of which it was entitled, or of which it was deprived by s 127(3) of the 1974 Act. In effect, the creditor—by failing to ensure that he obtained a document signed by the debtor which contained all the prescribed terms—must (in the light of the provisions in ss 65(1) and 127(3) of the 1974 Act) be taken to have made a voluntary disposition, or gift,

of the loan moneys to the debtor. The creditor had chosen to part with the moneys in circumstances in which it was never entitled to have them repaid; so there is nothing to engage the rights guaranteed by art 1 of the First Protocol. Nor, on that analysis, does the creditor have any civil rights in respect of which it is entitled to a fair and public hearing by an independent and impartial tribunal. Article 6 of the convention is not in point. a

[27] There is, if we may say so, such an obvious unreality in treating the pawnbroker as if it were a voluntary disponor that we do not find it a matter of any surprise that the argument advanced on behalf of the Secretary of State cannot be supported. It cannot be supported because, as we have said, a proper analysis of the 1974 Act does not lead to the conclusion that a creditor under a regulated agreement who fails to obtain a document signed by the debtor which contains all the prescribed terms is without rights. The true analysis is that the agreement, and the delivery of the pawn, do confer rights on the creditor; but those rights are subject to restrictions on enforcement. b

[28] It is the restrictions on enforcement which engage art 6(1) of the convention. The guarantee, in relation to the determination of a party's civil rights, of a fair and public hearing by an independent and impartial tribunal is of no substance if the outcome is determined by a statutory inhibition which not only prevents the court from doing what is just in the circumstances, but does so (a) in the context of a legislative scheme which gives the court a discretion to do what is just in other, very similar, circumstances and (b) for reasons which (if they exist at all) are wholly opaque. If there is some legitimate aim in pursuit of which the guarantee enshrined in art 6(1) needs to be wholly or partially curtailed, then it is necessary to ask whether the statutory inhibition is proportionate to that aim. Is there a proper balance between ends and means? c

[29] The contrast between ss 127(1) and 127(3) of the 1974 Act is striking. Section 127(1) provides that, on an application under s 65(1) of the 1974 Act for an enforcement order in relation to an improperly executed agreement, the court shall dismiss the application if, *but only if*, it considers it just to do so. In considering whether it is just to refuse an enforcement order, the court must have regard to questions of prejudice and culpability; and to its own powers to reduce or discharge any sum payable by the debtor or to impose terms and conditions in the order. Section 127(3) provides that the court shall not make an enforcement order on an application under s 65(1) of the 1974 Act where the reason why the agreement is not properly executed (for the purposes of s 61(1)) is that there is no document signed by the debtor which contains all the prescribed terms. In such a case the court can have no regard to prejudice or culpability. It is immaterial that the creditor was in no way to blame for the omission; it is immaterial that the omission has caused no prejudice to the debtor; it is immaterial that any prejudice which the omission has caused to the debtor could be the subject of some compensating provision in an enforcement order. d

[30] Further, it is not the omission of every term of the agreement which leads to the consequence that the court cannot make an enforcement order. There will be a failure to comply with s 61(1)(a) of the 1974 Act if the document which is signed is not in the prescribed form or does not conform to regulations made under s 60(1) of the 1974 Act. Regulations made under s 60(1) may—and, in the case of the 1983 regulations, do—require a great deal of information (in addition to terms prescribed for the purposes of s 61(1)(a)) to be included. For example, the annual percentage rate of charge for credit (APR) must be included in a regulated consumer credit agreement—see reg 2(1) of, and Sch 1 to, the 1983 regulations—but e

a a statement of the APR is not one of the prescribed terms set out in Sch 6 to those regulations. A court is not prevented from making an enforcement order if the failure to comply with s 61(1)(a) of the 1974 Act is the omission of a term which is not a prescribed term—see s 127(3). In such a case the court may, if it thinks fit, make an enforcement order which directs that the agreement is to have effect as if it did not include the term which has been omitted from the document signed

b by the debtor—see s 127(5) of the 1974 Act.

[31] The question, therefore, is whether the exclusion of any judicial remedy—indeed, the exclusion of any meaningful consideration by the court of the creditor's rights under the agreement—in a case where the document signed by the debtor does not include all the prescribed terms of the agreement is legitimate, having regard to the fundamental nature of the right guaranteed by

c art 6(1) of the convention. The principle was expressed in the majority judgment in the European Court of Human Rights in *Osman v UK* (1998) 5 BHRC 293 at 329 (para 147):

d 'However, this right [the right of access to a court under article 6(1) of the convention] is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the state. In this respect, the contracting states enjoy a certain margin of appreciation, although the final decision as to the observance of the convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the

e individual in such a way or to such an extent that the very essence of the right is impaired. *Furthermore, a limitation will not be compatible with art 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ...*' (My emphasis.)

f As Lord Hope of Craighead pointed out in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 843, [2000] 2 AC 326 at 380, the doctrine of 'the margin of appreciation', while a familiar part of the jurisprudence of the Strasbourg Court, has no place, as such, in a consideration by a national court of a convention issue arising within its own domestic jurisdiction. But he went on to say:

g '... in the hands of the national courts also the convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made

h by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the convention. This point is well made in *Human Rights Law and Practice* (1999) p 74, para 3.21, of which Lord Lester of Herne Hill QC and Mr David Pannick QC are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the "discretionary area of judgment". It will be easier for such an area of judgment to be recognised where the convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be

j

easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.’ (See [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 380–381.) a

[32] For the reasons to which we have already referred, the exclusion of any judicial remedy in a case such as the present engages not only art 6(1) of the convention but also art 1 of the First Protocol. Put shortly, the effect of ss 65(1) and 127(3) of the 1974 Act is to deprive the pawnbroker of its ability to enjoy benefit from the contractual rights arising from the agreement or from the rights arising from the delivery of the pawn. Article 1 of the First Protocol requires, in terms, a balance to be struck between the rights of the individual to enjoy possessions and the public or general interest. And there are a number of decisions of the European Court of Human Rights which emphasise the need to strike that balance. It is enough, we think, to refer to observations of the European Court in *Sporrong v Sweden* (1982) 5 EHRR 35 at 52 and 53 (paras 69 and 70); *James v UK* (1986) 8 EHRR 123 at 144–145 (para 50); and *Allgemeine Gold- und Silberscheideanstalt v UK* (1986) 9 EHRR 1 at 13 and 14 (paras 52–55). The last of those references contains the following passage: b c d

‘The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of the circumstances which should be taken into account.’ e

As we have already observed, it is a feature of s 127(3) of the 1974 Act that, where it has the effect of excluding any judicial consideration of the case, it does so without regard to prejudice or culpability. It excludes all consideration of the circumstances of the particular case in favour of a mechanistic approach: does the document contain all the prescribed terms? f

[33] Counsel for the Secretary of State urged, rightly, that the 1974 Act is concerned with issues of social policy rather than matters of high constitutional importance. The issues fall within an area in which the courts should be ready to defer, on democratic grounds, to ‘the considered opinion of the elected body or person’. We recognise the force of those arguments. But, unless deference is to be equated with unquestioning acceptance, the argument that an issue of social policy falls within a discretionary area of judgment which the courts must respect recognises, as it seems to us, the need for the court to identify the particular issue of social policy which the legislature or the executive thought it necessary to address, and the thinking which led to that issue being dealt with in the way that it was. It is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based on policy; it is quite another thing to be required to accept, without question, an opinion for which no reason of policy is advanced. g h

[34] It was submitted on behalf of the Secretary of State that an attempt to investigate, through examination of preparatory materials and the content of debates in Parliament, what reason of policy led enacted legislation to take the precise form that it does is, itself, illegitimate. It is enough, he submits, that the legislation has been enacted. Because it has been enacted, it must be taken to represent the considered opinion of the elected body. It is not for the courts to question the basis upon which that opinion was reached; nor even, it seems, j

a to seek to understand the basis upon which that opinion was reached. For the reasons which we have already expressed, we reject that submission. We note that the European Court of Human Rights has thought it helpful to look at preparatory material in order to identify the policy aims and justification of social legislation—see *James v UK* (1986) 8 EHRR 123 at 143 (paras 47–48) and 146 (para 52); and *Mellacher v Austria* (1989) 12 EHRR 391 at 409 (para 47).

b [35] The 1974 Act had a lengthy gestation. It followed the *Crowther Committee's Report on Consumer Credit* (Cmnd 4596) in March 1971. We were taken through that report in some detail. We were shown the White Paper *Reform of the Law on Consumer Credit* (Cmnd 5427) presented to Parliament in September 1973. We were referred to the Parliamentary debates on the bill. The purpose of that exercise was not to aid construction. There is no difficulty in construing s 127(3) of the 1974 Act. The question on which we sought assistance was not 'what is the meaning of the words which Parliament has enacted?'; rather, the question was 'what was the reason which led Parliament to enact a provision in those words?'. Why was it thought necessary to deny to the courts the power to do what was just in those cases in which there was no document signed by the debtor which
c contained terms which would or might, at some future date, be prescribed by the Secretary of State?

d [36] The material to which we have been taken provides no answer to that question. Indeed, such references as there are to the point tend to confuse rather than to illuminate. In a debate on 29 January 1974, in standing committee of the House of Commons, the Minister of State (the Rt Hon Michael Heseltine MP),
e when introducing, as an amendment to what was then cl 118 of the bill, the provision which was to become enacted as s 127(3) of the 1974 Act, explained its purpose in these terms:

f '... the Government do not think that Clause 118 clearly sets out their policy with regard to those matters which the court may or may not overlook. Generally speaking, the Government want the court to overlook everything except a complete omission of the signature, absolute failure to supply a second copy of an agreement in a cancellable transaction, and the complete absence of a notice of cancellation rights in any copy of the agreement. The redraft of sub-sections (1) and (2) makes that clear ...'

g Later, following a change of government, the purpose of the clause (which had become cl 129 of the bill) was explained by the Minister of State (Lord Shepherd) in a debate in the House of Lords on 6 May 1974:

h 'Clause 129 permits the court, in certain circumstances, to allow the enforcement of an agreement against a debtor or hirer, even though the agreement was not properly executed. But the debtor or hirer may have been prejudiced in some way by reason of this fact. For example, the agreement may not have set out the terms properly, so that a debtor may have entered into it without fully realising how much he was going to pay.
j He may have thought that the total amount he was to pay would be £500, whereas in fact it would be £600. It may be that an error in the agreement was due to some unintentional slip by a shop assistant, so that it would be unfair on the creditor to deprive him of all his rights under the agreement. On the other hand, it might be unfair to the debtor in such a case to make him pay the whole sum. In such a case we feel that the court should be able to act justly between the parties, and order the debtor to pay the creditor a

substantial part of the £600, but not the whole of it. If the debtor had been misled into thinking that £500 was all he would have to pay, we think the court should be able to order him to pay £500 only.’ a

It is impossible to find in those passages any indication of the thinking which led the government to propose—or which led Parliament to enact—provisions which draw such a sharp contrast between the power of the court to enforce an agreement contained in a document which omits a term which is not a prescribed term and the position where the document omits a term which is a prescribed term. b

[37] In the present case, therefore, we are left without the assistance which examination of reports, preparatory material and debates in Parliament might have been expected to provide on the question ‘why was it thought necessary to deny to the courts the power to do what was just in those cases in which there was no document signed by the debtor which contained terms which would or might, at some future date, be prescribed by the Secretary of State?’ Nor has the Secretary of State been able to explain to us, now, why it is thought necessary to deny to the courts the power to do what is just in those cases. We have been shown no material which helps us to understand why the executive thought it necessary to propose, or why Parliament thought it necessary to enact, s 127(3) of the 1974 Act in the form which it takes. Nor is there anything which indicates why the Secretary of State thought it appropriate to prescribe the terms which he did in the 1983 regulations. c
d

[38] In the absence of extraneous assistance as to the policy aims of the legislation, or as to the justification for the exclusion of any judicial remedy in cases where there is no signed document which contains all the prescribed terms, we must decide the issue on the basis of the legislation as enacted. The policy aims for which ss 60, 61 and 65 of the 1974 Act were enacted are clear enough. Regulated agreements ought to be made with an appropriate degree of formality; that requires that the terms of the agreement should be set out in a document which is signed by the debtor; the document should contain information relevant to the transaction; and, where those requirements are not met, the agreement is not to be enforced against the debtor except through the court. It cannot be suggested that those are not legitimate objectives of social policy. Nor can it be suggested that judicial control, under s 127 and the other sections in Pt IX of the 1974 Act, is not a legitimate means of pursuing those objectives. Indeed, it might be said that judicial control—under which, in the event that the requirements imposed by s 61 are not met, the court has power to do what is just—is an obviously legitimate and sensible way of implementing the policy aims. e
f
g

[39] But s 127(3) of the 1974 Act goes beyond that. The policy aim, reflected in that section, is to ensure that particular attention is paid to the inclusion in the document to be signed by the debtor of certain terms which will, or may, be prescribed by the Secretary of State in the future. Again, it cannot be suggested that that is not a legitimate policy objective. But it does not follow that the means by which that policy aim is to be achieved, under the provisions of s 127(3) of the 1974 Act are also legitimate. The means will not be legitimate if guaranteed convention rights are infringed to an extent which is disproportionate to the policy aim. That, in our view, is the effect of the inflexible prohibition—imposed by s 127(3) of the 1974 Act—against the making of an enforcement order in a case where the document signed by the debtor does not include the prescribed terms. There is no reason that we can identify—and, as we have said, no reason has been advanced—why an inflexible prohibition is necessary in order to achieve the h
j

a legitimate policy aim. There is no reason why that aim should not be achieved through judicial control; by empowering the court to do what is just in the circumstances of the particular case.

[40] For those reasons we are satisfied that (subject to the application of s 3(1) of the 1998 Act) the provisions in s 127(3) of the 1974 Act are incompatible with the rights guaranteed by art 6(1) of the convention and art 1 of the First Protocol.

b *Whether it is possible to read and give effect to the relevant provisions of the 1974 Act in a way which is compatible with that convention right*

c [41] We can deal with this issue shortly. Section 3(1) of the 1998 Act requires that, in 'So far as it is possible to do so', primary legislation and subordinate legislation must be read and given effect in a way which is compatible with convention rights. It follows, as we understand that requirement, that, where the court finds that what we may describe as a 'non-convention' interpretation of the words used in legislation would lead to the conclusion that the legislative provision was incompatible with a convention right, it must consider whether there is some other legitimate interpretation of those words which avoids that conclusion. If there is, then the interpretation which avoids that conclusion must be adopted.

d [42] In that context, by 'some other legitimate interpretation' we mean some interpretation of the words used which is legally possible. The court is required to go as far as, but not beyond, what is legally possible. The court is not required, or entitled, to give to words a meaning which they cannot bear; although it is required to give to words a meaning which they can bear, if that will avoid incompatibility, notwithstanding that that is not the meaning which they would be given in a 'non-convention' interpretation.

e [43] Section 127(3) of the 1974 Act falls into three parts: (i) 'The court shall not make an enforcement order under section 65(1)'; (ii) 'if section 61(1)(a) (signing of agreements) was not complied with'; and (iii) 'unless a document ... itself containing all the prescribed terms of the agreement was signed by the debtor'. Section 61(1)(a) requires 'a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) ... signed in the prescribed manner both by the debtor ... and by or on behalf of the creditor'. It is clear that, notwithstanding what we have identified as the second part of s 127(3), the prohibition in the first part of the section does not prevent the making of an enforcement order in all cases where s 61(1)(a) has not been complied with. But the irreducible minimum requirement is that spelt out in the third part of the section. No enforcement order can be made unless there is a document signed by the debtor which contains all the prescribed terms of the agreement. We can see no way in which it is possible to read and give effect to s 127(3) of the 1974 Act which avoids that irreducible minimum requirement; and none has been suggested to us in argument. Nor can we see any way in which it is possible to read and give effect to the 1983 regulations which avoids the conclusion that the terms set out in Sch 6 to those regulations are 'prescribed terms' for the purposes of ss 61(1)(a) and 127(3) of the 1974 Act.

j [44] In the judgments handed down on 23 November 2000 [2001] QB 407 at 423, [2001] 2 WLR 302 at 317–318 (para 47)) there is raised for consideration the possibility that it might be held (with the encouragement and exhortation which the opening words of s 3(1) of the 1998 Act provide) that dismissal of an application for an enforcement order in the present case was a dismissal 'on technical grounds only'—so that s 106 of the 1974 Act was not engaged; and, if so,

that the interaction of ss 113(1), 113(3) and 106 does enable a distinction to be drawn between 'enforcement' of the security—which is prohibited by s 113(1), and also, in a case in which no enforcement order can be made, by s 113(2)—and the right of the creditor to retain possession of the property 'lodged for the purposes of the security'. Upon further consideration of the point we are satisfied that—whether or not it would be open to the court to hold (having regard to s 3(1) of the 1998 Act) that dismissal of an application for an enforcement order under s 127(3) of the 1974 Act was a dismissal 'on technical grounds only' (upon which we do not need to express a view)—it could not be held that a creditor had the right to retain possession of property lodged for the purposes of the security in a case where enforcement of the security was prohibited.

[45] We conclude that it is not possible to read and give effect to the relevant provisions of the 1974 Act in a way which is compatible with the pawnbroker's convention rights.

Whether, as a matter of discretion, a declaration of incompatibility should be made

[46] The court has power, if satisfied that a provision of primary legislation is incompatible with a convention right, to make a declaration of that incompatibility—see s 4(2) of the 1998 Act. In the case of subordinate legislation—of which the 1983 regulations are an example—the power is circumscribed. The court should not make a declaration of incompatibility in respect of a provision of subordinate legislation unless satisfied both that the provision is incompatible with a convention right and that (disregarding any possibility of revocation) the primary legislation under which the subordinate legislation has been made prevents the removal of the incompatibility—see s 4(4) of the 1998 Act. In the present case, the incompatibility lies in the primary legislation. It is not the fact that there are prescribed terms which infringes convention rights. Nor is it the content of the prescribed terms which leads to infringement. Rather, it is the fact that, where terms have been prescribed for the purposes of s 127(3) of the 1974 Act, the provisions of s 127(3) of that Act have the effect of excluding the creditor from any judicial remedy in aid of his rights.

[47] The question, therefore, is whether, as a matter of discretion, a declaration of incompatibility should be made in the present case. In our view it is right to do so for three reasons. First, the point has been identified and fully argued at a further hearing appointed for that purpose. Second, in the circumstances that we have held that the order which a non-convention interpretation of s 127(3) of the 1974 Act requires the court to make on this appeal would be incompatible with convention rights, we could not lawfully make that order unless satisfied that the section cannot be read or given effect in a way which is compatible with convention rights; and it is appropriate that that should be formally recorded by a declaration which gives legitimacy to the order. Third, a declaration serves a legislative purpose under the 1998 Act; in that it provides a basis, under s 10(1)(a) of that Act, for a Minister of the Crown to consider whether there are compelling reasons to make amendments to the legislation by remedial order (under Sch 2 to the 1998 Act) for the purpose of removing the incompatibility which the court has identified.

[48] It was submitted on behalf of the Secretary of State that it was unnecessary and inappropriate for the court to make a formal declaration of incompatibility in the circumstances that our conclusion, recorded in this judgment, removed the bar, identified by Lord Hoffmann in *Dimond v Lovell* [2000] 2 All ER 897, [2000] 2 WLR 1121, to the pursuit of remedies based on unjust

a enrichment. Lord Hoffmann said ([2000] 2 All ER 897 at 906, [2000] 2 WLR 1121 at 1131):

b ‘The real difficulty, as it seems to me, is that to treat Mrs Dimond as having been unjustly enriched would be inconsistent with the purpose of s 65(1). Parliament intended that if a consumer credit agreement was improperly executed, then subject to the enforcement powers of the court, the debtor should not have to pay. This meant that Parliament contemplated that he might be enriched and I do not see how it is open to the court to say that this consequence is unjust and should be reversed by a remedy at common law: cf *Orakpo v Manson Investments Ltd* [1977] 3 All ER 1, [1978] AC 95.’

c The submission, as we understand it, is that, notwithstanding that Parliament may have intended that the debtor should not have to pay in certain circumstances, a finding that that intention is incompatible with convention rights would enable the creditor to say that that consequence is unjust.

d [49] There is no counterclaim for unjust enrichment in the present proceedings. We express no view on the question whether the prospects of successfully pursuing such a claim—which may be taken to have been minimal in the light of Lord Hoffmann’s observations in *Dimond’s* case—have been affected, in any way, by anything which we have decided on the present case. It is unnecessary for us to do so. We are satisfied that, whether or not there is any substance in the submission that those prospects have been revived by this judgment, the point is irrelevant to the question whether a declaration of incompatibility should be made in this case.

e
Conclusion

f [50] We invite further submissions from the Secretary of State on the form of the declaration of incompatibility to be made. It may be of assistance, however, if we indicate our present view. We think that it would be appropriate to declare that, having regard to the terms prescribed by reg 6(1) of, and Sch 6 to, the 1983 regulations, the provisions of s 127(3) of the 1974 Act, in so far as they prevent the court from making an enforcement order under s 65(1) of that Act unless a document containing all the prescribed terms of the agreement has been signed by the debtor or hirer, are incompatible with the rights guaranteed to the creditor or hirer by art 6(1) of the convention and art 1 of the First Protocol.

g [51] We allow the appeal against the order made on 24 September 1999 for the reasons given in our interim judgments of 23 November 2000.

Appeal allowed. Declaration accordingly. Permission to appeal refused.

Kate O’Hanlon Barrister.

Rall v Hume

[2001] EWCA Civ 146

COURT OF APPEAL, CIVIL DIVISION

POTTER AND SEDLEY LJ

17 JANUARY, 8 FEBRUARY 2001

Practice – Cross-examination – Personal injury action – Video evidence – Claimant seeking damages for personal injury – Defendant possessing videotape evidence apparently undermining claimant's case on impact of injury – Defendant disclosing videos to claimant – Action being struck out because of oversight by both parties – Defendant not attending application for reinstatement – District Judge reinstating action and setting trial date – Defendant subsequently applying to rely on video evidence in claimant's cross-examination – Court dismissing application on grounds that use of video evidence would lead to loss of trial date – Principles governing use of video evidence for purposes of cross-examination in personal injury cases – CPR 1.1, 1.3, 1.4, 32.1.

The claimant, R, brought an action for personal injury against the defendant, H. Liability was admitted, but damages remained in issue. Medical reports prepared on R's behalf stated, inter alia, that the injury had made it difficult for her to drive and pick up small children, and that she only drove locally. At a directions hearing in May 2000, the district judge gave a direction for further directions/disposal on 9 October 2000. By the time of the May hearing, H's solicitors were in possession of a covertly-taken video film showing R going about her daily tasks with her child, including journeys in her car, without any apparent difficulty. The evidence was disclosed to R in June 2000. H's solicitors obtained a second video in September 2000. Once again, it appeared to show R leading a normally active life without difficulty and, on one occasion, making a lengthy car journey. That video was disclosed to R's solicitors on 10 October 2000, the day after the date set for the further directions hearing. Due to an oversight, neither side had attended that hearing, and accordingly the claim had been struck out. R's solicitors successfully applied to have the case reinstated. At the hearing, which was attended only by R's solicitors, the district judge ordered the case to be listed for a case management conference on 13 December 2000, and also listed the case for disposal on 22 January 2001 with an estimate of four hours. On receipt of that order, H's solicitors resolved to make an application at the case management conference to rely on the video evidence. The district judge dismissed that application. On an appeal heard on 3 January 2001, the district judge's decision was affirmed by the judge who concluded that the trial hearing would be lost if the whole of the video, which ran for two hours, was put in evidence, and that accordingly the application had been made too late. H appealed to the Court of Appeal.

Held – Where, in a personal injury action, video evidence was available which, according to the defendant, undermined the claimant's case to an extent that would substantially reduce the award of damages to which the claimant was entitled, it would usually be in the overall interests of justice that the defendant should be permitted to cross-examine the claimant and her medical advisors upon it, provided that that did not amount to trial by ambush. It was, however, necessary in the interests of proper case management and the avoidance of

a wasted court time that the matter be ventilated with the judge managing the case at the first practicable opportunity once a decision had been made by a defendant to rely on the video evidence obtained. Such a duty lay upon the defendant under CPR 1.3^a which required the parties to help the court in furthering the overriding objective under CPR 1.1^b, in furtherance of which, under CPR 1.4^c, the court's duty of active case management included giving directions to ensure that the trial

b proceeded quickly and efficiently. In the instant case, there had been no deliberate delay in disclosure by H so as to achieve surprise. Nor was the delay otherwise culpable bearing in mind the mutual muddle over the 9 October hearing date. Although H's solicitors had been at fault in not attending the application for reinstatement of the claim and apprising the court of H's intention to use the video evidence for the purposes of cross-examination at trial, their error was not a

c sufficient ground for shutting H out from all opportunity to cross-examine R on the contents of the videos. She had already had an opportunity to view and comment upon their content following their disclosure, and there was no reason to suppose that her medical witnesses would not themselves be able to view the videos in the three weeks remaining between the appeal before the judge and the date fixed for

d hearing. Further, there was no reason why the judge, in the exercise of his powers under CPR 32.1^d to control the evidence given at trial, and in particular to limit cross-examination under CPR 32.1(3), should not have made appropriate directions for H to give notice in advance of those parts of the video footage relied on, coupled with a limitation on the time permitted for cross-examination at trial. By such means, even if the four-hour estimate for trial was exceeded, all the

e evidence and cross-examination of R and the medical witnesses could be completed on the day fixed, thus ensuring that her part in the trial would be over and unnecessary experts' costs avoided. In those circumstances, the appeal had been resolved by an order that the trial date should stand, while a direction be given that copies of the videos be viewed by R and her medical experts before trial, with

f permission to H to cross-examine upon the content of the footage totalling not more than 20 minutes running time, such footage to be identified and communicated to R's solicitors three days in advance of the trial (see [17], [19]–[21], [23], [25], below).

Appeal

g Ross Hume, the defendant to proceedings for personal injury brought by the claimant, Sally Rall, appealed with permission of the Court of Appeal from the decision of Judge Thompson at Aldershot County Court on 3 January 2001 dismissing the defendant's appeal from the case management decision of District Judge Fuller on 13 December 2000 dismissing his application to use at trial certain

- h*
-
- a* Rule 1.3 provides: 'The parties are required to help the court to further the overriding objective.'
- b* Rule 1.1, so far as material, provides: '(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with cases justly includes, so far as is practicable ... (d) ensuring that it is dealt with expeditiously and fairly ...'
- j c* Rule 1.4, so far as material, provides: '(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes ... (1) giving directions to ensure that the trial of a case proceeds quickly and efficiently.'
- d* Rule 32.1, so far as material, provides: '(1) The court may control the evidence by giving directions as to—(a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is placed before the court ...
(3) The court may limit cross-examination.'

video evidence in the cross-examination of the claimant. The facts are set out in the judgment of Potter LJ. a

John Bate-Williams (instructed by *Stuchbery Stone*) for the defendant.
Paul Stewart (instructed by *Amery-Parkes*, Basingstoke) for the claimant.

17 January 2001. The appeal was allowed for reasons to be given later. b

8 February 2001. The following judgments were delivered.

POTTER LJ.

Introduction c

[1] This is the appeal of the defendant in a personal injury action from the decision of Judge Thompson in the Aldershot County Court on 3 January 2001 dismissing the defendant's appeal from the case management decision of District Judge Fuller dated 13 December 2000. Thus, it is a second tier appeal. However, we granted the defendant permission to appeal at the outset of the hearing on 17 January 2001 on the grounds that it raises an important point of practice so far as reliance upon video evidence in personal injury actions is concerned. Having heard the appeal, we then indicated our decision and the order which we would make, so that the trial might proceed on 22 January 2001, stating that we would give our reasons later. They appear below. d

The procedural history e

[2] The action concerns an injury caused to the claimant in a road accident in August 1996 in respect of which liability is admitted. The claimant is a young mother. She was aged 31 at the time of the accident, since when she has had two children. On 6 December 1999 she obtained judgment for damages to be assessed. At the same time an order was made that the case be listed before a district judge on 2 May 2000 for disposal/directions. f

[3] As pleaded in the particulars of personal injury in the particulars of claim dated 15 July 1999, as a result of the accident the claimant suffered an injury to her neck, left shoulder and lower back causing immediate pain and stiffness. However, contemporary x-rays were normal. For a time after the accident the pain increased and the claimant suffered a number of unpleasant symptoms which then diminished to an extent but affected her sleep. She required physiotherapy for her physical symptoms and counselling from a psychologist to deal with travel anxiety and depression. She had to give up her active hobbies and had considerable difficulties in the tasks involved in caring for her baby following her pregnancy. It is said that she continues to suffer physical and psychological symptoms and that, having moved to Australia with her husband, it was necessary to return to Britain to live so that she could have the support of her family in various domestic tasks necessary to look after a young family. The original claim for damages was limited to £50,000. However, the claimant's schedule of damages dated 30 July 1999, in addition to special damages of £6,750 claimed future losses in the sum of £68,283 on the basis that the claimant would need permanent additional domestic assistance from her husband for ten hours per week claimed at £4.50 per hour and applying a multiplier of 28. g

[4] So far as general damages are concerned, the claimant's medical condition has gradually improved from that described in an orthopaedic report dated 16 March 1998 h

a and reports of a clinical psychologist dated 11 and 23 February 1998 served with the particulars of claim. Her progress appears from the orthopaedic report of Mr E J Smith dated 12 April 2000 and a psychiatric report from Dr G Bennet dated 17 August 2000 upon which the claimant proposes to rely at trial. In the latter report, it is stated that:

b 'She has been much isolated by the limitations placed on her by not being able to participate in sports and in getting around generally. She has also commented on the considerable extra burden which has fallen on her husband ... many tasks are made more difficult with her neck and back pain, in particular ... picking up small children ... she only drives locally around Chepstow along familiar roads ... She regards her difficulty in driving, and
c the limitations it places on her life, as a "major problem" ...'

[5] On the basis of that evidence the substantial claim for future loss is maintained.

d [6] Reverting to the history, the directions hearing duly took place on 2 May 2000 when directions were given in relation to the timings and agreement of future medical reports and the service of updated statements and schedules of damage, and a direction was made that the matter be relisted before District Judge Fuller for further directions/disposal on 9 October 2000. No trial date was fixed.

e [7] By 2 May 2000 the solicitors for the defendant were in possession of a covertly taken video film containing footage relating to the claimant's movements on 8 February 2000 and 15 February 2000. The video evidence showed her going about her daily tasks with her child, including journeys in her car without any apparent difficulty. The video evidence was not disclosed at that stage as it was clear from the medical reports previously relied on that the claimant was going through a continuing process of improvement and it would not be clear before
f the up-to-date reports were available whether what was shown on the video was at odds with her case as it would be advanced at trial. However, when the updated medical evidence was obtained from Mr Smith on 12 April 2000, the defendant's insurers instructed his solicitors to disclose the video to the claimant's solicitors, which they did on 21 June 2000.

g [8] A second video was obtained by the defendant's solicitor on 11 September 2000 containing footage of the claimant in the course of her shopping and child caring activities on 21 and 24 August 2000. Again it appeared to show her having a normally active life without difficulty and on one occasion making a lengthy (rather than local) car journey. Instructions were obtained that the video should be disclosed and it was disclosed to the claimant's solicitors on 10 October 2000. If (as was by then intended by the defendant) the videos were to be relied upon
h at trial, the second video should plainly have been disclosed prior to the directions hearing set for 9 October so that any directions relating to or consequent upon the proposed use of the videos could be dealt with by the court. However, the need for disclosure before that date was not appreciated at the time; both sides had in fact overlooked the provision in the order of 2 May for the 9 October appointment
j (it appeared on the second page of the order, the text of which apparently ended on the first page). Consequently, neither party appeared before District Judge Fuller on 9 October and the claim was struck out. Both sides were still not aware of the position on 10 October, when the second video film was disclosed.

[9] The claimant's solicitors quickly applied to have the claim reinstated and that the case be relisted for further directions/disposal. That application was supported by a statement of the solicitor with conduct of the claimant's case

which explained and apologised for the error and ended: 'I respectfully request that this case be re-instated and listed for Further Directions/Disposal hearing.' Since the defendant's solicitors did not wish to take advantage of the claimant's solicitors' error, and because no further directions were apparently being sought by the claimant at that stage, they simply wrote a letter to the court consenting to reinstatement. a

[10] The reinstatement hearing before District Judge Caron on 6 November 2000 was attended only by the claimant's solicitor. District Judge Caron ordered that the case be reinstated and that it be listed for a case management conference on 13 December 2000 with a time estimate of one hour. He also took the opportunity, on the basis of the case as described to him, to list the case for disposal, ie trial, on 22 January 2001 with an estimate of four hours. b

[11] On receipt of the order, the defendant's solicitors resolved that they would apply to rely upon the video evidence at the case management conference on 13 December, and did so. c

The district judge's decision

[12] At the case management conference, a transcript of which is before us, District Judge Fuller refused the defendant's application. He stated that the application was made too late. He said that, if the defendant wished to adduce the video evidence, he should have made application to that effect at the first directions hearing on 2 May 2000 in relation to the first video and that, in relation to the second video, further application could have been made at the hearing of the reinstatement application before District Judge Caron, who was likely then to take the opportunity to give directions for trial. The district judge indicated that, in principle, he would have allowed the application for video evidence to be introduced (save for certain footage showing the claimant within her own home and inside a nursery with her child, on the basis that it was an intrusion into her privacy). However, as a result of the delays of the defendant, the position had been reached whereby a date for trial had been fixed with an estimate of four hours. That was already a tight estimate and, if the videos were shown, it was a certainty that the case would not be disposed of within the four-hour period. The claimant was anxious and entitled to have her case disposed of expeditiously and she did not want the delay and anxiety which would be involved if a new date were fixed. Furthermore, it would be unfair and an inconvenience to the claimant for rushed arrangements to have to be made over the Christmas period for the claimant and her experts to view the video and make their comments upon it. Accordingly the balance of justice fell in favour of excluding the video evidence. District Judge Fuller gave leave to appeal. d
e
f
g

The judge's decision

[13] At the appeal before Judge Thompson on 3 January 2001, the decision of the district judge was confirmed. The judge took the view that, if application to adduce the video evidence had been made in time, it would have been appropriate to allow the application (subject to excision from the video of the intrusive footage). However, he said: h
i

'... if the total video which runs to two hours is to be put in evidence, the consequence is that the hearing on 21 January 2001 will be lost, as it is not possible within the time allowed to show two hours of video. Furthermore, the video may need to be shown again in order to cross-examine the claimant

- a on it. In my judgment the application was far too late. If you want to call evidence you must give an indication early on. Once the video had been taken it should have been disclosed promptly and if the intention was to rely upon video evidence an application should also be made promptly to do so. I can see no justification for saying that the district judge was plainly wrong in reaching the decision that he did and I cannot therefore allow the appeal.
- b The district judge was right and I dismiss this appeal.'

[14] The judge made clear earlier in his judgment that, in addition to the principal objection of lateness, he had been told by the claimant's counsel, who had seen the video, that it did not 'add up to much', showing as it did the claimant generally going about her business, but not dealing with the aches and pains which she says she experiences when doing so. Furthermore, he considered that the part of the video taken through the window of the claimant's home was a clear invasion of privacy which should be excluded, and probably the same argument applied to some footage which he was told had been taken through the window of the local nursery.

- d [15] While at first sight this is no more than a second tier appeal against a case management decision and, as such, is an appeal in respect of which the Court of Appeal does not ordinarily grant permission, we did so because it is clear that neither the Civil Procedure Rules (CPR) nor the practice directions contain any rule or particular direction as to the use of video evidence for the purpose intended in this case, ie as material for cross-examination of the claimant in a personal injury action so as to cast doubt upon the claim.
- e

The application of the Civil Procedure Rules

- f [16] For the purposes of disclosure, a video film or recording is a document within the extended meaning contained in CPR 31.4. A defendant who proposes to use such a film to attack a claimant's case is therefore subject to all the rules as to disclosure and inspection of documents contained in CPR 31. Equally, if disclosure is made in accordance with CPR 31, whether as part of standard disclosure under CPR 31.6 or the duty of continuing disclosure under CPR 31.11, the claimant will be deemed to admit the authenticity of the film unless notice is served that the claimant wishes the document to be proved at trial. If the claimant does so, the defendant will be obliged to serve a witness statement by the person who took the film in order to prove its authenticity. If the claimant does not challenge the authenticity of the film, however, it is, in the absence of any ruling by the court to the contrary, available to the defendant for the purposes of cross-examining the claimant and/or the claimant's expert medical witnesses at court.

- g [17] So stated, the position appears to be straightforward. However, the practical constraints upon such a procedure in terms of case management are: (1) that showing of a video, or part of it, in court for the purposes of cross-examination requires arrangements to be made for the availability of video equipment in any court where it is not normally to be found, and (2) that the whole procedure extends trial time. Hence, when fixing a trial date with an estimate of time, it is necessary for the managing judge to make proper allowance for this. It is therefore necessary in the interests of proper case management and the avoidance of wasted court time that the matter be ventilated with the judge managing the case at the first practicable opportunity once a decision has been made by a defendant to rely on video evidence obtained. Such a duty lies upon the defendant under CPR 1.3 which requires the parties to help the court to further the overriding
- j

objective under CPR 1.1(2), in furtherance of which, under CPR 1.4, the court's duty of active case management includes giving directions to ensure that the trial proceeds quickly and efficiently. a

[18] While it was plainly these later considerations which were decisive so far as the district judge and the judge were concerned and led each of them to the conclusion that the defendant's application was made too late, it appears to me matters may well have proceeded, and were in any event decided, on the basis of a misunderstanding. I say this because it is apparent from the terms of their judgments, that the district judge and the judge throughout proceeded upon the assumption that the application was an application by the defendant to adduce the video evidence as part of his own case, in respect of which leave was required under the CPR, and that the entire video would need to be played for the purposes of admission in evidence and (it might well be) again for the purposes of cross-examination, whereas, the authenticity of the video not having been challenged, the issue was whether or not the defendant should be prevented from exercising what *prima facie* was his right to cross-examine the claimant by putting to her for her comment such parts of the video as the defendant thought appropriate for the purposes of undermining her case. Had the matter been dealt with on that basis, it seems to me that a different result might have followed and that justice could have been done by a form of order tailored to the realities of the position (see [23], below). b
c
d

[19] In principle, as it seems to me, the starting point on any application of this kind must be that, where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the claimant and her medical advisors upon it, so long as this does not amount to trial by ambush. This was not an 'ambush' case: there had been no deliberate delay in disclosure by the defendant so as to achieve surprise, nor was the delay otherwise culpable, bearing in mind the mutual muddle over the 9 October hearing date. Nor is this the comparatively rare kind of case in which the film has to be independently adduced because what it shows goes beyond what can be established by cross-examination, and where different directions may be needed. e
f

[20] It is true that the defendant's solicitors were at fault for not attending at the application for reinstatement of the claimant's claim and apprising the court of the intention of the defendant to use the video evidence for purposes of cross-examination at trial. It appears they had overlooked the provisions of CPR Pt 23 PD which provides: g

'2.7 Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it. h

2.8 Applications should wherever possible be made so that they can be considered at any other hearing for which a date has already been fixed or for which a date is about to be fixed. This is particularly so in relation to case management conferences, allocation and listing hearings and pre-trial reviews fixed by the court. j

2.9 The parties must anticipate that at any hearing the court may wish to review the conduct of the case as a whole and give any necessary case management directions. They should be ready to assist the court in doing so and to answer questions the court may ask for this purpose.'

- a [21] However, it does not seem to me that the solicitor's error was a sufficient ground for shutting out the defendant from all opportunity to cross-examine the claimant on the contents of the videos. The claimant had already had an opportunity to view and comment upon the contents of the videos following their disclosure (an opportunity of which she had availed herself, as we were informed on this appeal), and there was no reason to suppose that her medical witnesses would not themselves be able to view the videos in the three weeks remaining between the appeal before the judge and the date fixed for hearing. Further, there was no reason why the judge, in exercise of his powers to control the evidence given at trial (see CPR 32.1) and, in particular, to limit cross-examination under CPR 32.1(3), should not have made appropriate directions for the defendant to give notice in advance of those parts of the video footage relied on, coupled with a limitation on the time permitted for cross-examination at trial. By such means, even if the four-hour estimate for the trial was exceeded, all the evidence and cross-examination of the claimant and the medical witnesses could be completed upon the day fixed, thus ensuring that the claimant's part in the trial (and her consequent anxiety) would be over and unnecessary experts' costs avoided.
- d [22] So far as concerns the first of the two subsidiary reasons given by the judge for his decision, it does not seem to me that significant weight should have been attached to the assertion of the claimant's counsel that the video did not add up to much, in the face of the defendant's submissions to the contrary. From what we have been told on this appeal, it is true that none of the individual activities of the claimant portrayed on the video is one which, according to the medical reports, it would be impossible for her to carry out; it is equally the case that the video cannot in itself attest to the genuineness of such pain or discomfort as the claimant may say that she felt. However, it is the contention of the defendant that the actions portrayed exhibit an overall level and freedom of activity which is inconsistent with the overall picture presented in the reports and the statement of claimant. In my view, in the circumstances described above, justice to the defendant requires that an opportunity to cross-examine on the content of the videos be afforded. Finally, so far as concerns those parts of the video which the claimant's counsel argued amounted to an invasion of her privacy, the parties have agreed before us that it is unnecessary for us to consider further argument in that respect because the defendant is content to abandon reliance upon the footage complained of.
- e
- f
- g

Conclusion

- [23] In those circumstances, I would resolve this appeal by an order (which the court has already made) that the trial date fixed for 22 January 2001 should stand. I would direct that copies of the videos be viewed by the claimant and her medical experts prior to trial, with permission to the defendant to cross-examine upon the content of footage totalling not more than 20 minutes running time, such footage (which should not include any footage of the claimant within her own home or within the nursery visited with her child) to be identified and communicated to the claimant's solicitors by 1 pm on 19 January 2001.
- h
- j

Costs

[24] So far as costs are concerned, it seems to me that the need for this appeal would have been avoided had the defendant's solicitors not delayed in raising the question of reliance upon the videos for the purposes of cross-examination, in time for their consideration at the reinstatement hearing on 6 November 2000.

Their failure to do so involved a breach of their duty under the CPR at least in the respects described at [20], above. Further, the form of order which I have proposed only emerged during argument upon this appeal. It was certainly never articulated as a solution before the judge. Accordingly I would order that the defendant pay the costs of this appeal. a

SEDLEY LJ.

[25] I agree b

Order accordingly.

Gillian Crew Barrister.

a **Raiffeisen Zentralbank Österreich AG v
Five Star General Trading LLC and others**
[2001] EWCA Civ 68

b COURT OF APPEAL, CIVIL DIVISION
ALDOUS, MANCE LJ AND CHARLES J
12, 13 DECEMBER 2000, 26 JANUARY 2001

c *Conflict of laws – Jurisdiction – Challenge to jurisdiction – Insurance policy – Assignment – Assignment of insurance policy with French insurers governed by English law – Claimant seeking proprietary and contractual declarations – Whether French law or English law governing assignee’s claim – Whether assignment had taken place – Contracts (Applicable Law) Act 1990, s 2, Sch 1, art 12.*

d The claimant bank, RZB, lent money to the first defendant (the owners) to assist them in buying a vessel, the M, for the purpose of sailing her to India and selling her for scrap value. The owners mortgaged the vessel to RZB and agreed to assign to RZB the insurance on the M. The insurance policy was expressly governed by English law. The owners also executed a written notice of the assignment, which was sent to an insurance broker for transmission to the French insurers. The French brokers drafted an endorsement, intended to be attached to and form part of the insurance slip, which provided that all insurances in respect of the M were assigned absolutely to RZB. In 1997, the M collided with another vessel, the IV, which was a total loss. The owners of the cargo loaded on the IV arrested the M in Malaysia. She was sold and the proceeds of sale held in the Malaysian court. The cargo owners obtained preventive attachments in France *e* in respect of the proceeds of the insurance by way of security for the claims against the owners. RZB commenced proceedings against the owners, the French insurers and the cargo owners seeking the insurance proceeds, asserting that, by virtue of the assignment, the owners had no right, title or interest in the insurances. RZB applied for summary judgment and sought declarations on the basis that by virtue of the notice of assignment the cargo owners had no real prospect of successfully defending the claim. The cargo owners denied that the notice of assignment was valid and binding on them, contending that the validity of the notice with respect to third parties was governed by French law, and that by art 1690 of the French Civil Code the assignment was not binding on the French insurers because notice had not been served on them by or through a French bailiff. *h* on their argument, it followed that the owners remained the insured under the policy and that the cargo owners were entitled to the proceeds of the insurance by virtue of their attachments. RZB argued that under art 12(2) of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (the convention) (as set out in Sch 1 to the Contracts (Applicable Law) Act 1990) *j* English law applied, as the law governing the underlying obligation, and accordingly no question of the requirements of French law arose. The cargo owners submitted that the convention did not apply since RZB’s claim was not contractual but proprietary, in that it was asserting that the contract was vested in it rather than in the owners, and that it followed that the correct law to apply was the *lex situs* of the debt, namely French law. The judge granted the declarations sought and found that RZB’s claims were both contractual and

proprietary. The judge went on to conclude that the 'real' question was whether RZB could invoke, as against the insurers, the assignment to it of the contract of insurance. Accordingly, he held that art 12(2) of the convention provided that the applicable law was the law governing the right to which the assignment related, namely the law of the underlying obligation, and it followed that English law was to be applied. The cargo owners appealed.

Held – (1) The three-stage process at common law for identifying the appropriate law fell to be undertaken in a broad internationalist spirit in accordance with English conflict of laws principles. The overall aim of the process was to identify the appropriate law to govern the particular issue and ought not to be applied in a mechanistic way. Article 12(2) of the convention manifested the clear intention to embrace the issue and to state the appropriate law by which the dispute had to be determined, namely, the law of the contract giving rise to the obligation. Article 12(1) regulated the position of the assignor and the assignee as between themselves, while under art 12 (2) the contract giving rise to the obligation governed not merely the assignability of the obligation but also the relationship between the assignee and the debtor, the conditions under which the assignment could be invoked as against the debtor, and any question as to whether the debtor's obligations had been discharged. On its face, art 12(2) treated issues such as whether the debtor owed moneys to the assignee and under what conditions, such as the giving of notice, as within its scope. Under the convention, the issue of what steps were necessary for an assignment to take place as between the assignee and the debtor did not involve any property right, but was simply a contractual issue to be determined by the law governing the obligation assigned. It followed that the effect of the assignment in the instant case was to be determined by reference to English law (see [26], [27], [43], [47], [48], [57], [89]–[91], below); *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1996] 1 All ER 585 applied.

(2) In the instant case, the assignment in issue had not taken effect under either s 50^a of the Marine Insurance Act 1906 or s 136^b of the Law of Property Act 1925, because, following the assignment, the insurers had continued to protect the owner's interests in respect of any losses and liabilities which it had incurred as mortgagor and owner or as the operator of the vessel, and accordingly there had been no assignment of the whole benefit of the insurance cover, as required by s 50 of the 1906 Act, or and no absolute assignment of the legal thing in action, as required by s 136 of the 1925 Act. However, as a matter of English law, the benefit of any claims under the policy had taken effect in equity from the date when the insurers were notified of the assignment by the owners in favour of RZB and RZB, as assignee in equity, had been entitled as against the owners and the insurers to the whole benefit of all claims arising from the collision (see [68]–[71], [74], [75], [80], [81], [89]–[91], below).

Decision of Longmore J [2000] 1 All ER (Comm) 897 affirmed in part.

Notes

For the application of the Rome Convention, and for the assignment of a policy of marine insurance, see respectively 8(1) *Halsbury's Laws* (4th edn reissue) para 845 and 25 *Halsbury's Laws* (4th edn reissue) para 214.

^a Section 50 is set out at [58], below

^b Section 136, so far as material, is set out at [59], below

- a** For the Marine Insurance Act 1906, s 50, see 22 *Halsbury's Statutes* (4th edn) (2000 reissue) 42.
 For the Law of Property Act 1925, s 136, see 37 *Halsbury's Statutes* (4th edn) (1998 reissue) 295.
 For the Contracts (Applicable Law) Act 1990, Sch 1, art 12, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 254.
- b** **Cases referred to in judgments**
Brandsma qq v Hansa Chemise AG (16 May 1997) (RvdW 1997, 126C), Neth SC.
Central Insurance Co Ltd v Seacalf Shipping Corp, The Aiolos [1983] 2 Lloyd's Rep 25, CA.
Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Xas Al-Khaimah National Oil Co [1988] 2 All ER 833, [1990] 1 AC 295, [1988] 3 WLR 230, HL.
- c** *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti, Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd, The Padre Island* [1990] 2 All ER 705, [1991] 2 AC 1, [1990] 3 WLR 78, HL.
First National Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg), The Evelpidis Era [1981] 1 Lloyd's Rep 54.
- d** *Lloyd v Fleming, Lloyd v Spence* (1872) LR 7 QB 299.
Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1996] 1 All ER 585, [1996] 1 WLR 387, CA.
Maudslay, Sons & Field, Re, Maudslay v Maudslay, Sons & Field [1900] 1 Ch 602.
Meadows Indemnity Co Ltd v Insurance Corp of Ireland plc [1989] 2 Lloyd's Rep 298, CA.
- e** *Messier-Dowty Ltd v Sabena SA (No 2)* [2000] 1 All ER (Comm) 833, [2000] 1 WLR 2040, CA.
Queensland Mercantile and Agency Co, Re, ex p Australasian Investment Co, ex p Union Bank of Australia [1892] 1 Ch 219, CA; *affg* [1891] 1 Ch 536.
Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438, [1921] All ER Rep 329, HL.
- f** *Sim Swee Joo Shipping Sdn Bhd v Shirlstar Container Transport Ltd* (17 February 1994, unreported), QBD.
Swan v Maritime Insurance Co [1907] 1 KB 116.
Tolhurst v Associated Cement Manufacturers (1900) Ltd [1903] AC 414, [1900–1903] All ER Rep 386, HL.
- g** *Torkington v Magee* [1902] 2 KB 427, [1900–1903] All ER Rep 991, DC; *rvsd* [1903] 1 KB 644, CA.
Ventouris v Mountain (No 2), The Italia Express [1992] 3 All ER 414, [1992] 1 WLR 887, CA.
- h** *Weddell v JA Pearce & Major (a firm)* [1987] 3 All ER 624, [1988] Ch 26, [1987] 3 WLR 592.
William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd [1912] 3 KB 614, [1911–1913] All ER Rep 861.
Williams v Atlantic Assurance Co Ltd [1933] 1 KB 81, [1932] All ER Rep 32, CA.
- j** **Cases also cited or referred to in skeleton arguments**
Airbus Industrie GIE v Patel [1998] 2 All ER 257, [1999] 1 AC 119, HL.
Anglesey (Marquis of), Re, Countess De Galve v Gardner [1903] 2 Ch 727.
Badeley v Consolidated Bank (1886) 34 Ch D 536; *affd in part* (1888) 38 Ch D 238, [1886–90] All ER Rep Ext 1493, CA.
Compania Colombiana De Seguros v Pacific Steam Navigation Co, Empresa De Telefonos De Bogota v Pacific Steam Navigation Co [1964] 1 All ER 216, [1965] 1 QB 101.

Davis v Freethy (1890) 24 QBD 519, CA.

General Horticultural Co, Re, ex p Whitehouse (1886) 32 Ch D 512.

Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, [1914–1915] All ER Rep 24, CA.

Holt v Heatherfield Trust Ltd [1942] 1 All ER 404, [1942] 2 KB 1.

Hughes v Pump House Hotel Co Ltd [1902] 2 KB 190, [1900–1903] All ER Rep 480, CA.

Iraqi Ministry of Defence v Arcepey Shipping Co SA (Gillespie Bros & Co Ltd intervening), The Angel Bell [1980] 1 All ER 480, [1981] QB 65.

Jabbour v Custodian of Absentee's Property of State of Israel [1954] 1 All ER 145, [1954] 1 WLR 139.

Kent & Sussex Sawmills Ltd, Re [1946] 2 All ER 638, [1947] Ch 177.

Kwok v Comr of Estate Duty [1988] 1 WLR 1035, PC.

Norton v Yates [1906] 1 KB 112.

Overseas Union Insurance Ltd v New Hampshire Insurance Co Case C-351/89 [1992] 2 All ER 138, [1991] ECR I-3317, ECJ.

Peters v General Accident Fire & Life Assurance Corp Ltd [1937] 4 All ER 628; *aff'd* [1938] 2 All ER 267, CA.

Siu Yin Kwan v Eastern Insurance Co Ltd [1994] 1 All ER 213, [1994] 2 AC 199, PC.

Sprung v Royal Insurance (UK) Ltd [1999] Lloyd's Rep IR 111, CA.

William Brandt's Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454, [1904–1907] All ER Rep 345, HL.

Appeal

The appellants, An Feng Steel Co Ltd and four other Taiwanese companies, owners of cargo lost aboard the vessel ICL Vikraman, appealed from declarations made by Longmore J on 26 May 2000 ([2000] 1 All ER (Comm) 897) relating to the assignment to the respondent, Raiffeisen Zentralbank Österreich AG (RZB), of a marine insurance policy on the vessel Mount I, alleged to have been responsible for the collision, following the obtaining by the cargo owners of attachments of the insurance and the proceeds of the sale of the Mount I. The facts are set out in the judgment of Mance LJ.

Alexander Layton QC and *Michael Davey* (instructed by *Howard Kennedy*) for the cargo owners.

Jeffrey Gruder QC (instructed by *Stephenson Harwood*) for RZB.

Cur adv vult

26 January 2001. The following judgments were delivered.

MANCE LJ.

Introduction and facts

[1] This appeal from a judgment of Longmore J (see [2000] 1 All ER (Comm) 897) concerns rival attempts to obtain the benefit of the proceeds of claims arising under an English law marine insurance policy placed by Dubai owners of the vessel Mount I with French insurers. The insurance claims arise out of a collision between the Mount I and the ICL Vikraman. The respondent is an Austrian mortgagee bank claiming as assignee of the benefit of the insurance. The appellants are Taiwanese companies, who, as owners of cargo on the ICL Vikraman,

a have obtained provisional attachment orders in France against any insurance proceeds.

[2] The appeal raises at least one moot issue of private international law. The judge was warned that he was being set an examination question on the applicable law. We have to consider the judge's response, conscious that our own may itself be reviewed. Although a central issue involves the scope of the
b Rome Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980 (OJ 1980 L266 p 1)) (given the force of law in the United Kingdom under the Contracts (Applicable Law) Act 1990), there is, as yet, no court to which such an issue may be referred to ensure a uniform international interpretation.

[3] The collision occurred in the Malacca Straits on 26 September 1997. The
c ICL Vikraman vessel sank, with the tragic loss of life of her 29 crew, and also loss of her cargo. The appellants, who are the 11th to 15th defendants in the proceedings, claim as owners of cargo of the ICL Vikraman and on the basis that the Mount I was responsible for the collision. The Mount I was on a voyage from Singapore to India or Bangladesh for scrapping. She had been purchased for this
d purpose by the first defendants, Five Star General Trading LLC (Five Star), a Dubai company. To enable her purchase and scrapping, the respondent, the claimant in the proceedings, Raiffeisen Zentralbank Österreich AG (RZB), through its London branch, had agreed on 16 September 1997 to lend Five Star up to \$US 3,760,219. The facility letter of that date required as a condition of
e drawdown the provision of, inter alia, a mortgage over the vessel, the insurance policies and other documents relative to the insurance effected on her, an assignment of such insurances ('in such form as the bank may require') and notice of such assignment duly signed.

[4] The mortgage executed on the next day under the laws of St Vincent and the Grenadines included further extensive provision regarding insurance. The
f vessel was to be and remain insured against marine risks (for her full market value and in any event not less than 120% of the loan), entered in a protection and indemnity association or club, insured against oil pollution risks and insured against excess and war risks (cl 5.1). RZB was to approve in advance the markets with which such insurances were placed, and Five Star was not to alter their
g terms without RZB's prior written consent and was to supply RZB 'from time to time on request and at least annually [sic]' with such information as RZB might require regarding the insurances (cl 5.3). Five Star was to procure letters of undertaking from the brokers or P&I associations or clubs in such form as RZB might approve (cl 5.6). By cl 5.7 Five Star agreed that, at any time after the
h occurrence or during the continuation of an event which was (or would be with notice, or the passage of time or the satisfaction of any materiality test) an event of default as defined, RZB should be entitled to collect, sue for, recover and give a good discharge for all claims in respect of the insurance, and by cl 5.11 it was agreed:

j 'In the event that any sums shall become due under any protection and indemnity entry or insurance, such sums shall be paid to the Owners to reimburse them for, and in discharge of, the loss, damage or expense in respect of which such sums shall have become due PROVIDED THAT if at the time such sums become due, there shall have occurred and be continuing an Event of Default or any event which, with the giving of notice and/or the passage of time and/or the satisfaction of any materiality test would

constitute an Event of Default, the Mortgagees shall be entitled to receive such sums and to apply them either in reduction of the indebtedness or, at the option of the Mortgagees, to the discharge of the liability in respect of which they were paid.' a

[5] The deed of assignment dated 17 September 1997 dealt with insurance in different terms. Five Star thereby purported to 'assign absolutely and unconditionally and agree to assign to the Bank all their right, title and interest in and to the Insurances' (cl 2.1) and undertook to give notice to the insurers in a form recording that it had— b

'assigned absolutely to [RZB] all insurances effected or to be effected in respect of the above vessel, including the insurances constituted by the policy whereon this notice is endorsed, including all moneys payable and to become payable thereunder or in connection therewith (including returns of premium'— c

(cl 2.3.2 and App A). However, by cl 2.3.4 Five Star also covenanted that it would procure that a loss payable clause in the form of App B (or such other form as RZB might approve) or in the case of P & I entries a note of RZB's interest in such form as RZB should approve should be endorsed upon or attached to the relevant policies and that letters of undertaking in such form as RZB should approve would be issued to RZB by the brokers. The terms of the form of loss payable clause contemplated by App B are set out later in this judgment. The deed was entered into in London and made expressly subject to English law and to the jurisdiction of the English courts as regards 'any disputes which may arise out of or in connection with [it]'. Finally, also on 17 September 1997 Five Star signed a notice of the absolute assignment of the insurances in favour of RZB in the form of App A. d e

[6] As from 17 September 1997, the vessel was insured by Five Star for \$US 4.8m (or 125% of the market value of the vessel as scrap at the time of sailing, whichever was less) against total loss only. The policy terms further conferred protection and indemnity cover in terms of cl 9 of the Institute Time Clauses Hulls Port Risks (20 July 1987) with certain amendments and, most importantly in this case, cover in respect of collision liability in terms of cl 6 of the Institute Voyage Clauses—Hulls—Total Loss (1 October 1983) with amendments to read as follows: f g

'6.1 The Underwriters agree to indemnify the Assured for four-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for: 6.1.1 loss of or damage to any other vessel or property on any other vessel ...' h

[7] The insurers were the second to tenth defendants, companies incorporated and carrying on business in France (the insurers). The second and tenth defendants were joint leaders for the purposes of the insurance. The insurance was placed through CE Heath (Insurance Broking) Ltd (UAE Office) (CE Heath) who in turn used sub-brokers, Philmar Assurances SA (Philmar) of Paris. It was on terms evidenced by these brokers' cover notes dated respectively 15 and 22 September 1997. By such terms the insurance was expressly subject to English law. On 19 September 1997 RZB's solicitors, Stephenson Harwood, wrote to CE Heath asking that RZB's interest be noted on the policy. By fax on 7 October 1997 Philmar sent a memorandum to the two leaders, enclosing a copy j

a of Five Star's notice of assignment to RZB dated 17 September 1997 together with a draft policy memorandum No 2, by which it was—

‘further noted and agreed to register interest of RZB Bank as Mortgagee on vessel “MOUNT I” with effect from 17 September 1997, and corresponding Notice of Assignment is attached.’

b The second defendants agreed to this memorandum by fax on 10 October 1997. Despite the terms of cl 2.3.4 of the deed of assignment, the notice of assignment given to the insurers was, so far as appears, given in unqualified terms. No clause along the lines of App B was attached to it or ever endorsed upon or attached to the policy or any cover note or certificate.

c [8] After the collision of 26 September 1997, the Mount I was arrested in Malaysia by the owners of the ICL Vikraman. She was later sold by order of the Malaysian court. Her sale realised \$US 3,082,805 which is presently held by the Malaysian court. The substantive issue of liability for the collision is being litigated in Malaysia by both vessels' owners and the appellants. We were told by Mr Gruder QC for RZB that, under Malaysian law, third party claimants such as
d the appellants will, if successful in establishing liability on the part of Five Star, take priority over RZB's claim as mortgagees as against the Malaysian fund. However that may be, the appellants evidently do not regard the Malaysian fund as sufficient to satisfy all their claims. They have obtained from the Tribunal de Commerce of Paris five orders dated between 9 October to 6 November 1997.
e These orders authorised *saisies conservatoires* or, as I may call them, preventive attachments in respect of proceeds of the insurance, by way of security for the appellants' claims against Five Star. Thus, the specimen order put before us (relating to the 14th and 15th defendants' claims) authorised such appellants—

f ‘to carry out a seizure of all sums in the hands of [the insurers] held for the account of Five Star General Trading ... in their capacity as owner of the vessel “MOUNT I” for security and conservation of their [ie the arrestors] maritime lien which we value provisionally at the principal sum of \$2,685,005·63 or the equivalent in French Francs.’

g [9] The bailiff's order notifying the insurers of the attachments in favour of the 14th and 15th defendants related specifically to ‘sums owed by you to the debtors: Five Star ... Owner of the vessel “MOUNT I”’. It advised insurers that ‘the present order freezes the sums which you hold for the account of the debtor [ie Five Star]’, and requested the insurers to inform the bailiff of the sums held for the debtor's account. It went on:

h ‘Any third parties whose property has been seized are required to declare to the Applicants the extent of the debtor's claims against them, the extent of any future modes of enforcement which might come to affect these claims and the existing satisfaction of any claims, the existing assignment of any debts or the existence of prior Orders.’

j [10] Since the hull and machinery insurance on the Mount I was total loss only, the insurance's only relevance may well lie in the potential claims under the collision liability cover. Mr Gruder said (without contradiction from Mr Layton QC for the appellants) that it is the appellants' probable aim (a) to receive the Malaysian fund, (b) to treat such receipt as a payment pro tanto of their claims, so triggering the insurers' liability under the collision liability cover to indemnify Five Star in a like amount and then (c) relying on the French attachments, to seek

payment of that amount also, up to the amount of their full loss. This plan, if successful, would ensure that the appellants received payment in respect of their full loss, before RZB as mortgagee received any sum at all. a

The present proceedings

[11] On 25 October 1997 RZB started the present proceedings in the Commercial Court. The claim recites the relevant facts, and claims four declarations, in summary: (1) that notice of the assignment dated 17 September was validly given to the insurers and that the assignment took effect as a legal assignment under s 136 of the Law of Property Act 1925 on 19 September 1997; (2) that as from 17 September 1997 Five Star had no right, title and interest in and to the vessel's insurances, particularly that with the insurers; (3) that as from 17 September 1997, RZB had all right, title and interest in such insurances; and (4) that all moneys payable by the insurers arising out of the casualty are payable to RZB and not to Five Star. The claim was served on Five Star and on the insurers, in each case by consent through their solicitors, on 28 October 1997. b
c

[12] On 12 November 1997 RZB applied for permission to serve a concurrent copy of the claim form and particulars of claim out of the jurisdiction on the appellants in Taiwan. Permission was sought on the primary basis that the appellants were necessary and proper parties to the claims brought against and duly served on Five Star and the insurers, and on the alternative bases that the claims were to enforce Five Star's contract of assignment to RZB, which had been made in England, was by its terms governed by English law and contained a term conferring jurisdiction on the English courts to hear and determine any action in respect of the assignment. Permission was granted by order dated 17 November 1997. Service was effected, and acknowledged on 6 January 2000 with a statement of intention to contest jurisdiction. On 19 January 2000 the appellants through their solicitors gave notice that they no longer intended to contest jurisdiction, but intended to defend; they entered a further acknowledgement of service accordingly. d
e
f

[13] On 1 February 2000 RZB verified its claim through Mr Foord of Stephenson Harwood and applied for summary judgment, on the basis that the appellants had on the evidence no real prospect of successfully defending the claim. By witness statement of their solicitor, Ms O'Keefe, and by defence served 30 March 2000, the appellants took issue with this. The defence denies that the notice of assignment was valid and binding on the appellants. It alleges that the notice's validity 'with respect to third parties is governed by French law, being the law of the country of domicile of the insurers'; that by art 1690 of the French Civil Code an assignment is not binding on third parties unless notice is served on the debtor (ie the insurers) by a bailiff; that this did not occur; that the appellants had 'attached in France the insurances and/or the proceeds thereof, to which [Five Star] are or were entitled'; that— g
h

'the effect of the attachment as a matter of French law is that entitlement to the insurances and/or the proceeds thereof is frozen as at the date of attachment and [RZB] are not entitled thereafter to serve notice of the assignment through a bailiff'— j

and, in the premises that the appellants are not bound by the assignment, and, further, that Five Star remained the insured under the policy. Alternative allegations are made that the assignment was made by way of security and, in the

a light of the loss payable clause, that it did not operate to divest Five Star of its beneficial interest or its entire such interest.

[14] Ms O'Keefe's statement records advice from a M Nicolas of the appellants' French lawyers on French law. According to this advice, unless and until RZB serve notice through a bailiff, the appellants as 'third parties' are entitled to proceed against the insurances and their proceeds as the property of the assignor, Five Star; further, the attachments prevent any payments of the insurance proceeds and preclude service of notice through a bailiff. The appellants have subsequently amplified their case on French law by producing an opinion from Professor Emeritus Philippe Malaurie of the University of Panthéon-Assas (Paris II). He sets out art 1690:

c 'The assignee is only *saisi* in relation to third parties through notification of the assignment to the debtor ("*signification de transport faite au débiteur*"). Nevertheless, the assignee may also be *saisi* by acceptance of the assignment in the form of a legal deed, passed in front of a *Notaire*. ("*l'acceptation du transport faite par le débiteur dans un acte authentique*").'

d [15] Professor Malaurie is more specific than the defence or M Nicolas. According to his opinion, 'third parties' within art 1690 does not refer to 'persons who are completely strangers to the assignment, the *penitus extranei*'. The position of such persons, he indicates, would be governed by art 1165, whereby—

e 'agreements are only valid between contracting parties: they cannot harm third parties and they may profit from them only in the case provided for in Article 1121.'

[16] Rather, 'third parties' in art 1690 includes both (a) the assigned debtor, i.e. here the insurers, and (b) those deriving title from the assignor, e.g:

f '... another assignee or, as in this case, a creditor of the assignor, whether or not he has executed an enforcement measure, such as an attachment, on the claim.'

Professor Malaurie also says that, when a claim has been assigned without fulfilment of the formalities provided by art 1690, the assignor and the assignee become joint and several creditors of the debtor, and both may claim payment; but that, once due notice has been given, the claim no longer belongs to the assignor who can therefore no longer claim. He adds that, although the Cour de Cassation's jurisprudence was that only those attachments ordered prior to due notice of the assignment took priority, by a law on civil execution proceedings dated 9 July 1991 (in force since 1 January 1993), priority in such a case was also conferred on any subsequently ordered attachments. These statements of French domestic law are not admitted. But, for the purposes of the present appeal we must, like the judge below, take them as accurate. It is clear, however, that they relate to situations all aspects of which are subject to French law.

j *The order under appeal*

[17] The application for summary judgment came before Longmore J on 11 May 2000. On 26 May 2000 he handed down judgment in favour of RZB. By his order of the same date he declared, in relation to the first declaration claimed, that notice of the assignment contained in the deed dated 17 September 1997 had been validly and effectively given to the insurers. In relation to the remaining three heads, he granted declarations as sought.

[18] Longmore J started by seeking to characterise the issues. His initial analysis suggested that the issues arising from claims (1) and (4) were contractual, while those arising from claims (2) and (3) were proprietary. But he concluded that the 'real' question was whether RZB 'can invoke, as against the insurers, the assignment to them of the contract of insurance' (see [2000] 1 All ER (Comm) 897 at 903). On that basis, in his view, art 12(2) of the Rome Convention, as scheduled to the 1990 Act, provided the key to identification of the applicable law. English law, governing the contract of insurance, was thus the law by which to determine whether RZB had a good claim against the insurers.

The issue(s)

[19] I turn to the opposing analyses of the issue. In RZB's submission, the issue is whether the insurance contract, and/or the right to claim unliquidated damages from insurers for failure to pay under it, was effectively and validly assigned by Five Star to RZB. This, in its submission, is a contractual issue. The judge was therefore right in his general approach. The appellants, in contrast, maintain that the relevant issue concerns the validity against 'third parties' of an assignment of an intangible right of claim against insurers. In support of their analysis, the appellants submit that the dispute is essentially between RZB as purported assignee and the appellants, who attached the insurance claim and have no other nexus, let alone contractual, with anyone. So viewed, the dispute in their submission raises an essentially proprietary issue, to be resolved by the *lex situs* of the attached debt, that is by French law. Under French law, they submit, their attachment prevails over RZB's assignment in the absence of any bailiff's notification or debtor's acceptance by *acte authentique*.

[20] These opposing analyses both assume that the factual complex raises only one issue and, in their differing identification of that issue, emphasise different aspects of the facts. In my judgment a more nuanced analysis is required. This can be demonstrated by a chronological approach. Prior to 9 October 1997 there was no attachment or competing claim to any insurance moneys at all. On 7 October 1997 notice of assignment was given by fax by the sub-brokers to the insurers. From 7 to 9 October 1997, the only persons with any conceivable right to claim or receive sums payable under the insurance were Five Star and/or RZB. The first issue for consideration raised by the parties' opposing cases is whether, in the light of the assignment and notice and apart from any attachment, the right or title to such claim and sums as against the insurers was and is in RZB or Five Star (or both). This is an issue concerning the effect on insurers' liability under the contract of insurance of Five Star's voluntary assignment to RZB (coupled with RZB's notice of such assignment to insurers).

[21] If, consequent on such assignment and notice, RZB acquired no right or title to any insurance claim arising, the matter ends there. But, even if RZB had such right and title from 7 to 9 October 1997, it is possible to conceive of a second issue, arising from 9 October 1997. That is whether the appellants' attachments of any insurance claim in France override such right and title, or, putting the point the other way around, whether the appellants as attachors are bound to recognise the transfer of Five Star's right or title to RZB. This second issue (if it arises at all—see below) concerns the effect (involuntary as regards all three contracting parties) of the preventive attachments obtained by third parties (the appellants) in the French courts.

[22] If each of these issues now arises before us, it is our task to identify and apply the appropriate law to decide each in turn. But in Mr Gruder's submission,

a we are only concerned, at least at this stage, with the first issue. He points out that the attachments were obtained on the basis that any insurance claims on the insurers belonged to Five Star. On this basis, he submits, all that RZB would need to demonstrate is that, applying the appropriate law, the insurers had by 9 October 1997 become liable to pay any insurance claims to RZB, and not Five Star. No one has produced evidence to show that, if this issue were to be decided

b in RZB's favour, the French attachments could still apply, or that any second issue would remain. Professor Malaurie's opinion addresses French domestic law in purely domestic factual situations, and is predicated upon the first issue being decided by reference to French law. If all parties were French residents and the insurance claims arose under a French law policy, art 1690 would mean that (without a bailiff's notification or debtor's acceptance by *acte authentique*) RZB

c would not acquire the sole right and title in respect of the insurance claim, even as against the insurers, and would not (therefore) be able to assert any right or priority in relation to attachment creditors of Five Star like the appellants. Article 1690 is thus a provision limiting both the passing from Five Star to RZB of the right and title to sue the insurers and so the effect on (other) third parties. But, if

d the issue of entitlement to the insurance moneys, as between the insurers, Five Star and RZB, falls to be referred to English law, and if, applying that law, RZB acquired the sole right and title to the insurance claim and proceeds as against Five Star and the insurers on 7 October 1997, then there is nothing in Professor Malaurie's opinion to suggest that, under French law, the attachments could override this position. On the other hand, it is right to add that there is also

e nothing positive to assist us as to what attitude French law would take in this situation. Nor, before us, did Mr Layton's submissions address any further issue discretely. Mr Layton's consistent submission was that the validity of the assignment was for all purposes referable to French law, against both the insurers prior to 9 October 1997 and the appellants thereafter.

f [23] I note the terms of the judgment dated 18 October 2000 by the Juge de l'Execution of the Tribunal de Grande Instance de Paris, granting to the insurers a stay of proceedings brought by the appellants and other cargo interests, pending resolution of the present proceedings. She drew attention to the nature of RZB's claim in England and the fact that English jurisdiction had not been contested, and expressed the view that the 'cause' and 'objet' of the present proceedings and

g those brought before the French court were identical. This is at least consistent with the possibility that the resolution of the first issue may be regarded in France as determinative of the whole matter.

[24] Mr Gruder did not, however, submit that we could, on the information before us, rule out the possibility of any further or separate argument on the lines

h of the second issue altogether. He said that it will, if it ever arises, have to be identified and dealt with later. In these circumstances and in the light of the way in which this case has been presented and argued on both sides, it seems to me that we must proceed on the basis for which Mr Gruder submits. If there is any scope at all for any second issue, after determination of the first issue identified

j above, that second issue will have to be identified and considered separately, whether in these or in the French proceedings. This means, however, that the scope of any declarations should be appropriately limited.

[25] I turn to the first issue. The parties' respective positions have already been stated. They throw up a choice between the proper law of the insurance and the *lex situs* of the insurance claim. But a proper legal analysis cannot depend exclusively upon the legal systems for which two parties happen to contend in

their own partisan interests. The jurisprudential and academic material which we have been shown indicates the existence of other possible candidates—such as the law of the assignor's place of residence or business and the law governing the contract of assignment—which may need to be kept in mind.

Principles governing identification of the appropriate law

[26] Both parties accept that, at common law, the identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue (see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585 at 589, [1996] 1 WLR 387 at 391–392 per Staughton LJ). The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England.

[27] While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage (2), if this is necessary to achieve the overall aim of identifying the most appropriate law (cf also *Dicey & Morris, The Conflict of Laws* (13th edn, 2000) Vol 1, p 34, para 2–005). That is implicit in the discussion in academic texts of the appropriate law by which to judge the validity of voluntary assignment (see eg *Dicey & Morris, The Conflict of Laws* (13th edn, 2000) Vol 2, p 979, para 24–049, *Cheshire & North's Private International Law* (13th edn, 1999) pp 957–958 and articles by PJ Rogerson 'The Situs of Debts in the Conflict of Laws—Illogical, Unnecessary and Misleading' [1990] CLJ 441 and M Moshinsky 'The Assignment of Debts in the Conflict of Laws' (1992) 108 LQR 591). So also, Professor Sir Roy Goode, while generally favouring as the appropriate law the *lex situs* of the debt assigned, prefers the law of the assignor's place of business in the context of global assignments of receivables, eg by factoring or discounting (cf *Goode Commercial Law* (2nd edn, 1995) p 1128).

[28] The three-stage process identified by Staughton LJ cannot therefore be pursued by taking each step in turn and in isolation. As Auld LJ said in the *Macmillan* case—

'the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly, so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other

a system ...' (My emphasis (see [1996] 1 All ER 585 at 604, [1996] 1 WLR 387 at 407).)

[29] There is in effect an element of interplay or even circularity in the three-stage process identified by Staughton LJ. But the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.

b [30] England, in common with France, is party to and has incorporated into its domestic law the principles of the Rome Convention. This led before us to abstract argument about whether an assignee's right or title to claim under the contract involves a question of contract or of (intangible) property. Viewing the issue of RZB's right or title to sue the insurers as involving a dispute about
c property, albeit intangible, the appellants submit that all issues relating to property are subject to the *lex situs* of the relevant property; and that here that means French law, since the claim is on insurers resident in France. RZB in contrast submits that the case involves a dispute about contractual rights, the right to sue the insurers, and that the relevant law is, under art 12(2) of the Rome Convention, that governing the insurance contract.

d [31] Article 12 provides:

'1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

e 2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.'

f [32] The appellants emphasise that the Rome Convention is concerned with the law applicable to contractual obligations. The Council Report on the Convention on the law applicable to contractual obligations (the Giuliano-Lagarde report (OJ 1980 C282 p 1)), which (under s 3(3) of the 1990 Act) 'may be considered in ascertaining the meaning or effect of any provision of that Convention', states
g in its commentary on art 1 (Scope of the Convention):

'First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original preliminary draft had expressly so provided. However, the Group considered that such a provision
h would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing as between the various legal systems of the Member States of the Community.'

[33] National courts must clearly strive to take a single, international or
j 'autonomous' view of the concept of contractual obligations, that is not blinkered by conceptions—such as perhaps consideration or even privity—that may be peculiar to their own countries. Further—and perhaps particularly so when the search is for an autonomous international view—the man-made concepts of contractual obligations and proprietary rights are neither so clear nor so inflexible that they may not receive shape from the subject matter and wording of the Convention itself.

Application of principles to present case

[34] Approaching the present issue on this basis, I confess to an initial impression that the case fits readily into a contractual, and less readily into a proprietary, slot. The dominant theme influencing the modern international view of contract is party autonomy. Parties are free to determine with whom they contract and on what terms. They are free to cancel or novate their contracts and make new contracts with third parties. A simple issue whether a contractual claim exists or has arisen in these situations cannot be regarded as an issue about property, however much an acknowledged contractual right may be identified as property in certain other contexts. An issue whether a contract has been novated appears to me essentially contractual. Under a contract which, from its outset, purports to confer on a third party a right of action, an issue whether the third party may enforce that right appears to me again essentially contractual. An issue whether, following an assignment, the obligor must pay the assignee rather than the assignor falls readily under the same contractual umbrella. a
b
c

[35] The appellants seek to re-describe the issue as being whether the title to the right of suit or cause of action which formerly vested in the assignor was vested in or was now owned by the assignee. In this way they seek to give the issue a proprietary aspect. However, it is unclear why it is necessary to talk of 'title to the right', or to focus on its transfer from assignor to assignee, rather than upon the simple question: who was in the circumstances entitled to claim as against the debtor? The artificiality seems to me to be underlined at the next stage of the argument, which seeks to refer any dispute about title to sue to the place where the 'property' consisting of such title is 'situated' (see below). d
e

[36] Mr Layton relies upon various factors as supporting a categorisation of the issue as involving property rights. He argues that there should be a single rule for all types of property, tangible and intangible. The rationale of the characterisation of issues as proprietary, and of the rule of English law referring such issues to the *lex situs*, is that control of property is exercisable at the place it is sited. In the case of intangible property, English law has, for various purposes (eg inheritance) traditionally allocated to it a *situs* at the place of the debtor's residence. This is on the basis that the debtor is there directly subject to the coercive power of the courts to enforce the obligation. The location of a right of action in this or any way is, however, evidently artificial. Parenthetically, I add that 'coercive power' would itself appear to be an unstable international concept, capable of widely differing interpretation—indeed, a 'power theory' forms the basis on which American courts exercise and recognise *long-arm* jurisdiction, which may extend to allow personal jurisdiction in respect of overseas defendants having 'minimum contacts' in the form of acts directed to the forum (cf Kevin M Clermont 'Jurisdictional Salvation and the Hague Treaty' (1999) 85 Cornell L Rev 89). f
g
h

[37] Modern conditions underline the artificiality of selecting supposed control at the debtor's residence as an appropriate basis for characterisation or choice of the relevant law to determine questions regarding the validity or effect as against the debtor of an assignment. Jurisdiction may be grounded on consent and various other bases apart from residence. Obligations are commonly enforced today not against the person, but against assets. Debtors often trade or hold some or even all of their assets overseas. Proceedings are as a result often begun and enforced against debtors in countries other than that of their residence (as in this case). The move towards single legal markets, like those involving j

a countries party to the Brussels Convention on Jurisdiction and Enforcement of
Judgments in Civil and Commercial Matters (Brussels, 27 September 1968
(OJ 1978 L304 p 77)) and the Lugano Convention on Jurisdiction and the
Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September
1988 (as set out in Sch 3C to the Civil Jurisdiction and Judgments Act 1982)), makes
b judgments readily exportable between countries. Even at the world level, with
the Preliminary Draft Convention on Jurisdiction and Judgments in Civil and
Commercial Matters adopted for further negotiation in the context of the Hague
Conference on Private International Law, there is the ambition, at least, of
greater legal coherence. To my mind, the 'control' or coercive power over a debt
which may be exercised by the courts of a debtors' residence is not a persuasive
c reason either for treating a debt as property in the present context or for looking
to the law of the place of the debtor's residence to determine the effect of an
assignment as between the assignee and the debtor.

[38] Advocates of a proprietary view themselves acknowledge that the
application of the *lex situs* cannot provide a satisfactory solution in all cases.
Thus, they accept that in cases of global assignments (eg under factoring or
d discounting arrangements) it may well not be appropriate to adopt a rule which
would make the validity of assignment depend upon consideration of the
residence of each debtor and *lex situs* of each debt assigned (see Goode *Commercial
Law* (2nd edn, 1995) p 1128 and 'The Assignment of Debts in the Conflict of Laws'
by M Moshinsky (1992) 108 LQR 591 at 613). Professor Goode and Mr Moshinsky
e both favour the law of the assignor's residence as the applicable law in such cases.
In the present case it happens that all the co-insurers were French resident
companies. But this is by no means typical in international insurance business.
Under a typical co-insurance involving insurers from different countries, the *lex
situs* rule could require the separate consideration of each of a large number of
different laws of the *situs*, with a view to determining separately, as regards each
f insurer's proportionate share, the validity of a purported assignment of insurance
proceeds. That would undermine the general intention (evident in the present
case in the leading underwriter provisions) that there should be a homogeneous
treatment of insurance underwriting and claims, despite the ultimate limitation
of each insurer's financial liability to its own proportionate share.

[39] Mr Layton submits that a proprietary analysis is appropriate, because any
g assignment diminishes the assignor's assets to the potential detriment of its
creditors; and that the *lex situs* ought to determine the validity of any such
assignment. This argument may have force in relation to physical assets in the
apparent ownership of an assignor in his country of residence. But, it also
demonstrates why it is not necessarily appropriate to attempt an analogy
h between physical assets and intangible rights. Whether a person has acquired or
retains contractual rights is a matter about which creditors are (especially in
modern business conditions) often unlikely to know anything.

[40] Mr Layton argues that the application of the *lex situs* in cases of voluntary
assignment would be consistent with its application in cases of involuntary assignment
(such as *Re Queensland Mercantile and Agency Co, ex p Australasian Investment Co,*
j *ex p Union Bank of Australia* [1892] 1 Ch 219, to which I return below). But
consensual and non-consensual situations are, in their nature, quite different, and
it is neither surprising nor even inconvenient, if the differences lead to the
application of different laws.

[41] Mr Layton next submits that any potential assignee or a third party can
without difficulty consider the *lex situs* in order to assess the validity of any

assignment. The submission assumes knowledge about the original contract and the assignment. Assuming such knowledge, the same submission can be made in favour of either the proper law of the obligation assigned or, indeed, the proper law of the assignor's place of business. a

[42] For his part, Mr Gruder suggests that a contractual analysis is assisted by the consideration that a claim against indemnity insurers sounds in damages for failure to hold the insured harmless (cf e.g. *Ventouris v Mountain (No 2)*, *The Italia Express* [1992] 3 All ER 414, [1992] 1 WLR 887). A claim for damages for breach of contract must, he submits, be essentially contractual. But the consideration to which Mr Gruder refers has itself an artificial and peculiarly domestic flavour about it, and I find it of no assistance to the exercise of characterisation in a broad internationalist spirit which has here to be undertaken. b

[43] In my view, there is a short answer to both characterisation and resolution of the present issue as between the insurers, Five Star and RZB. It is that art 12(2) of the Rome Convention manifests the clear intention to embrace the issue and to state the appropriate law by which it must be determined. Article 12(1) regulates the position of the assignor and assignee as between themselves. Under art 12(2), the contract giving rise to the obligation governs not merely its assignability, but also 'the relationship between the assignee and the debtor' and 'the conditions under which the assignment can be invoked as against the debtor', as well as 'any question whether the debtor's obligations have been discharged'. On its face, art 12(2) treats as matters within its scope, and expressly provides for, issues both as to whether the debtor owes moneys to and must pay the assignee (their 'relationship') and under what 'conditions', eg as regards the giving of notice. c

[44] Mr Layton submits that this is to read art 12(2) too comprehensively. In his submission, the 'relationship' between debtor and assignee merely refers to their relationship under the contract, *provided* there has been an effective passing of property; the reference to 'conditions' under which the assignment can be invoked merely refers to any *contractual* conditions, which must be satisfied before any assignment will be recognised; it says nothing again about the general requirement that there should have been an effective *passing of property*; and that requirement must be further satisfied in each case by reference to the *lex situs* of the relevant property. d

[45] To my mind, however, these submissions by Mr Layton postulate a most unlikely thought process on the part of the draughtsmen of the Convention, and a misleadingly drafted article. Article 12(1) concentrates on its face on the contractual relationship between assignor and assignee. In contrast, there is no hint in art 12(2) of any intention to distinguish between contractual and proprietary aspects of assignment. The wording appears to embrace all aspects of assignment. If the draughtsmen had conceived that the basic issue, whether and under what conditions an assignee acquires the right to sue the obligor, could involve reference to a quite different law to either of the two mentioned in art 12(1) and (2), one would have expected them to say so, if only to avoid confusion. Further, on Mr Layton's case, it is unclear why the draughtsmen troubled to refer so explicitly in art 12(2) to the relationship of the parties and the conditions under which the assignment could be invoked against the debtor. It seems self-evident that an assignee could not succeed to any other relationship with the debtor than that established by the contract assigned, and that he could not avoid any conditions prescribed by that contract. I note that, in an interesting article 'The proprietary aspects of international assignment of debts and the Rome Convention, e

f

g

h

j

a Article 12' [1998] LMCLQ 345 at 354 by Professor Teun HD Struycken of Nijmegen University, the writer suggests that—

b 'Article 12(2) is not about the person to whom the debtor owes the debt nor about who has the right to demand payment, but only about the conditions on which the creditor—either assignor or assignee, depending on whether there has been a valid and effective transfer of ownership—may exercise the right to demand payment, whether notice to the debtor is required, and about the contractual aspects of the obligation to pay such as the terms, the place and the time of payment, and the possibilities of set-off, and the like. It is also about the conditions under which there is a valid discharge of the debtor, i.e., about bona fide payment to the wrong person.'

c [46] On this basis, as Professor Struycken (at 358) acknowledges, it would follow that the debtor always enjoys not merely the protection of the proper law of the obligation assigned, but also 'the additional benefit of the law governing the debt he owes', in other words the benefit of any 'additional defence from the law governing the proprietary aspects' (which Professor Struycken suggests should be identified with the law of the assignor's place of residence). This highlights the double hurdle, which would, on Mr Layton's case, apply and the extent to which art 12 would then have to be regarded as presenting a partial and misleading picture.

d [47] The Giuliano-Lagarde report states bluntly under art 12 that—

e '[t]he words "conditions under which the assignment can be invoked" cover the conditions of transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor.' (See OJ 1980 C282 p 1 at 34–35.)

f [48] That, in my judgment, is a compelling indication that (whatever might be the domestic legal position in any particular country) the Rome Convention now views the relevant issue—that is, what steps, by way of notice or otherwise, require to be taken in relation to the debtor for the assignment to take effect as between the assignee and debtor—not as involving any 'property right', but as involving—simply—a contractual issue to be determined by the law governing the obligation assigned.

g [49] While there is, as yet, no international court to which issues of construction of the Rome Convention may be mandatorily referred, we have had our attention drawn to a limited number of cases in other European jurisdictions. Of particular relevance are two decisions of the German Supreme Court. In its judgment of 20 June 1990 (VIII ZR 158/89) (1990) RIW 670, the German Supreme Court held that priority as between successive assignments fell to be determined by reference to the law governing the claim assigned. The assignments related to instalments due under a shipbuilding contract, between a wharf and a foreign state, made subject to English law. In July 1986 the wharf contracted to acquire the new vessel's rudders from the claimant on terms assigning the wharf's claim to the instalments due for the vessel to the claimant, as security for the price of her rudders. On or about 8 September 1986, the wharf obtained a loan from the defendant again in return for an assignment of its claim to the instalments. In May 1987 the wharf became insolvent. Notices were given of these assignments in reverse order, that is first by the defendant and later by the claimant (although the claimant contended that the defendant had known of its prior assignment, when taking its own). The Supreme Court held that assignment was governed

by the so-called law of the debt. It relied both upon consistent German case law, giving a number of references, and prevailing doctrine (including a learned article by a most distinguished comparativist, Professor Christian von Bar of Osnabrück University, 'Abtretung und Legalzession in neuen deutschen Internationalen Privatrecht' RabelZ 53 (1989) 462). The Court of Appeal had reached its conclusion based on the incorporation into German law of art 12(2) of the Rome Convention as art 33(2) of the EGBGB. It was objected that this incorporation only took effect from 1 September 1986, but the Supreme Court held that the objection was unimportant, since, as Professor von Bar had maintained, art 33(2) merely reproduced the previous German legal position. The case was remitted to the lower court, for reconsideration, applying English law principles, of the issue regarding knowledge.

[50] In a later decision of 26 November 1990, concerned with an assignment prior to 1 September 1986, the German Supreme Court repeated that art 33(2) reflected the previous law. The first issue was whether the assignment by the creditor of the benefit of a loan debt subject to German law was invalidated by virtue of the fact that the claim was assigned pursuant to an agreement to contribute the claim as capital in return for shares in a Swiss company, which agreement was apparently invalid under Swiss law in the absence of any resolution to increase that company's capital. The Supreme Court held that it was not. The decision identifies the distinction made in some Continental legal systems, to which both Mr Layton before us and Professor Struycken in his article have drawn attention, between an agreement to assign and the assignment itself. But it also shows that this distinction would not lead the German Supreme Court to accept Mr Layton's submissions that art 12 only embraces the contractual and not the 'proprietary' aspect of a voluntary assignment. In the decision of 26 November 1990 the latter aspect was determined under principles which the Supreme Court said were now reflected in art 33(2) of the German law, which in turn reflects art 12(2) of the Rome Convention.

[51] The Dutch Supreme Court has addressed the application of art 12 in the case of *Brandsma qq v Hansa Chemie AG* (16 May 1997) (RvdW 1997, 126C). This is a more problematic and evidently controversial decision, discussed both by Professor Struycken in his article and also by M E Koppenol-Laforce in 'The Property Aspects of an International Assignment and Article 12 Rome Convention' (1998) Neth ILR 129. Hansa Chemie SA was the German supplier to Brandsma qq, a Dutch company, under a contract subject to German law which contained terms assigning, to Hansa, Brandsma's claims under Dutch law against its Dutch sub-buyers as security for the price due to Hansa. German law recognises such an assignment as valid. Dutch law does not, even as between assignor and assignee (a) because the claims assigned could not be and were not specified and individualised at the moment of assignment and (b) because they were only assigned by way of security (cf Struycken [1998] LMCLQ 345 at 352). The liquidator of Brandsma therefore challenged Hansa's right to the moneys receivable from the sub-buyers. The Dutch Supreme Court held that art 12 applied to govern the requirements necessary in order to transfer a debt, in a way having effect against third parties (as the liquidator was apparently viewed as being). But it rejected the application of art 12(2) on the grounds that this article was in restrictive terms and that its application could require the application of a number of different legal systems (eg presumably, in cases of assignment of global assignments of receivables) and would deprive the assignor and assignee of full freedom of choice. In the court's view, art 12(1) applied. It also considered

a that art 12(1) would otherwise be superfluous, having regard to arts 3 and 4 of the Rome Convention.

[52] I find it difficult to express any definite views on the reasoning or outcome of the Dutch Supreme Court's decision, not having seen a full translation. Its effect, Professor Struycken points out, was to sidestep recently enacted, but much criticised, provisions of Dutch law, in the context of an assignment of a Dutch debt by a Dutch creditor. I find unconvincing the argument that art 12(1) must have been intended to cover the issue or would be superfluous. It would seem no surprise that the first paragraph of an article dealing specifically with voluntary assignment should, for clarity, recapitulate a result which was consistent with and could anyway flow from other provisions of the Convention (cf also Struycken's comment to like effect in his article [1998] LMCLQ 345 at 351). On the face of it, the issue which arose before the Dutch court might appear to have been one of assignability within art 12(2). It is unclear what (if any) significance may have been attached to the fact that the issue involved a liquidator of Brandsma, and was being litigated between the liquidator and Hansa, rather than (for example) between Hansa and the Dutch sub-buyers. A liquidator may by law sometimes stand in a stronger position than the company would have had prior to its winding up (cf *Chitty on Contracts* (28th edn, 1999) Vol 1, p 1057, para 20–063, instancing ss 395–398 of the English Companies Act 1985). The Dutch Supreme Court's decision also relates to a situation where the governing laws of the debt and the assignment differed and had different effects—so that a choice between art 12(1) and art 12(2) was critical. As it happens in the present case, both the insurance contract claims and their assignment by Five Star to RZB were expressly made subject to English law. The claims and their assignment, together with all aspects of the resulting relationship between the insurers, Five Star as assignor and RZB as assignee, are in my judgment clearly covered by art 12(1) and (2). In these circumstances—even if one were to follow the Dutch Supreme Court's reasoning (which, so far as I follow it, I find myself presently unable to do)—the effect of Five Star's voluntary assignment to RZB and of the notice given of it to the insurers, would here fall to be determined by English law.

[53] Mr Layton referred to *Re Maudslay, Sons & Field, Maudslay v Maudslay, Sons & Field* [1900] 1 Ch 602. In that case the English company, Maudslay, was owed money by a French firm, Delaunay & Cie. In October 1899, receivers were appointed in respect of Maudslay's undertaking and assets in debenture-holders' actions. In November 1899, Thomas Piggott & Co Ltd, English creditors of the company, took proceedings in France to attach the French debt. The debenture-holders sought to injunct Piggott & Co from, inter alia, such attachment. Cozens-Hardy J refused such relief, holding (at 609–610) that the French debt had a 'locality' or 'quasi-locality' and that—

'It seems to me that I must treat the debt due from Delaunay & Cie. as being situate in France, and subject to the French law, and I cannot therefore prevent the claimants, at the suit of the debenture-holders, from taking any proceedings the law of France allows for recovering their debt out of this French asset.'

[54] He went on (at 610) to hold, on the evidence of French law before him, that the French attachment prevailed over any title of the debenture-holders:

“The debenture-holders having according to English law a good assignment of the French debt, but having according to French law no such assignment, and the claimants having according to French law a good inchoate charge or assignment, which ought to prevail? It seems to me that I am bound to hold that that assignment which alone is recognised by the law of France ought to prevail, and that the claimants have a better title than the debenture-holders. This is the view taken by Mr. Dicey in his work on the Conflict of Laws, rule 141: “An assignment of a movable which cannot be touched, i.e., of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid.” I am not satisfied that the authorities cited by him necessarily involve this principle; but I think it is correct, and, indeed, is a necessary consequence from the admission that a debt has a locality or quasi-locality.’

Finally, he held that the appointment of English receivers made no difference to this result.

[55] I do not find this case of assistance. Firstly, on the facts, the debt was both against a French debtor and subject to French law. Cozens-Hardy J did not have to choose between the *lex situs* and the proper law of the debt, or indeed to distinguish between the voluntary and involuntary aspects of the facts in the manner involved in the present case. Secondly, the decision is only a first instance decision. Thirdly, it was a decision on the common law; we are concerned with an international convention, which must be approached on its own terms and given an appropriate international interpretation.

[56] We were also referred to *Re Queensland Mercantile and Agency Co, ex p Australasian Investment Co, ex p Union Bank of Australia* [1892] 1 Ch 219. The Queensland company had charged to an English debenture-holder (a bank) the unpaid capital in respect of its shares. The Queensland company made calls on such capital on, inter alios, Scottish shareholders. The shareholders did not pay such calls, and had no notice of the debenture. An Australian creditor of the Queensland company obtained Scottish arrests in respect of the claims on such shareholders. The Queensland company was then ordered to be wound up both in Australia and in England. The question of priority between the debenture-holder and the creditor was argued in the English winding up. The evidence was that the Scottish arrest had the effect of an assignment with notice and took priority over an earlier assignment without notice. This case therefore concerned an issue of priority between an earlier voluntary assignment and a later involuntary assignment by operation of law. North J took the simple approach that the debt was situated in Scotland, where the debtors resided (see [1891] 1 Ch 536). The Court of Appeal upheld his decision, after receiving further evidence of Scottish law and rejecting an argument that this should be disregarded as being in conflict with international law. The case is of no assistance on the issue of the effect between insurers, Five Star and RZB of Five Star’s voluntary assignment to RZB. It might have relevance as an authority in favour of applying the *lex situs* to determine any issue arising along the lines of the second issue identified earlier in this judgment—if for example there were evidence to suggest that a French attachment takes effect as an involuntary assignment and overrides a prior voluntary assignment completed by notice under the law governing the validity of such a voluntary assignment (see the citation of the *Queensland* case in *Cheshire & North’s Private International Law* (13th edn, 1999) p 965, and the text to *Dicey & Morris, The Conflict of Laws* (13th edn, 2000) rule 119, citing at Vol 2, p 991, para 24-076

- a a dictum of Lord Goff of Chieveley in *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Xas Al-Khaimah National Oil Co* [1988] 2 All ER 833 at 853, [1990] 1 AC 295 at 354—although I would also note the vigorous attack on the appropriateness of the *lex situs* to govern even this type of issue by Rogerson in her article in [1990] CLJ 441 cited above. As I have said earlier in this judgment, no such second issue arises on the material before us, and so the *Queensland* case is of no present relevance.

b [57] I therefore conclude that art 12 of the Rome Convention applies and that the effect, as between insurers, Five Star and RZB, of Five Star's assignment to RZB falls to be determined by reference to English law.

The nature and scope of the assignment

- c [58] Under English law, an assignment may occur in a pot-pourri of three different forms, with variegated terminology. First, s 50 of the Marine Insurance Act 1906 (re-enacting s 1 of the Policies of Marine Assurance Act 1868) provides:

d '(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

e (3) A marine policy may be assigned by indorsement thereon or in other customary manner.'

[59] Secondly, s 136(1) of the 1925 Act (re-enacting s 25(6) of the Judicature Act 1873) provides:

- f 'Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—(a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor ...'

- g [60] Thirdly, there may be an equitable assignment, which, once notified to the debtor, will have the effects of obliging the debtor to pay the assignee, of preventing further equities attaching to the debt and of protecting the assignee against subsequently notified assignments. An equitable assignment may relate either to the whole interest in a thing in action or to a partial interest: see *Chitty on Contracts* (28th edn, 1999) Vol 1, pp 1047–1048, paras 20–037 to 20–040). First
- j *National Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg)*, *The Evelpidis Era* [1981] 1 Lloyd's Rep 54 is an example of the latter. There is a rule of practice that the assignor should be joined, but that rule will not be insisted upon where there is no need, in particular if there is no risk of a separate claim by the assignor (see *Central Insurance Co Ltd v Seacalf Shipping Corp*, *The Aiolos* [1983] 2 Lloyd's Rep 25 at 33–34; *Weddell v JA Pearce & Major (a firm)* [1987] 3 All ER 624 at 635–636, [1988] Ch 26 at 40–41; and

a
b
a decision of my own in *Sim Swee Joo Shipping Sdn Bhd v Shirlstar Container Transport Ltd* (17 February 1994, unreported)). The case for joinder will obviously be strongest if there is an issue between assignor and assignee regarding the existence of an assignment or the equitable assignee has acquired only part of a chose in action (see eg *Chitty on Contracts* (28th edn, 1999) Vol 1, pp 1047, 1048, paras 20–037 and 20–040). In the present proceedings, no problem about joinder arises, since all relevant parties are before the court. Although at law future things in action could not be assigned, equity will give effect to the assignment of a future thing in action (or ‘expectancy’) supported by consideration (see *Chitty on Contracts* (28th edn, 1999) Vol 1, p 1044, para 20–032. I return to this aspect below.

c
[61] RZB has asserted that Five Star’s assignment took effect in each of these three ways. Longmore J held that any assignment took effect either under s 50 or in equity and regarded any question of an assignment under s 136 as beside the point.

d
e
f
[62] Prior to the 1868 Act and the 1873 Act (and leaving aside further presently immaterial statutory provisions relating to life insurance), choses or things in action were assignable if at all only in equity. The statutory provisions of ss 50 and 136 must be seen against this background. Section 50 must also be seen in the context of ss 15 and 51 of the 1868 Act providing that an assured parting with his interest in a subject matter insured does not thereby assign his rights under the contract of insurance, unless he expressly or impliedly agrees to do so; and further providing that any such agreement must occur before or when the assured parts with his interest and not subsequently, save in the case of assignment of a policy after loss. The operation of s 50 depends upon there having been an assignment of ‘the beneficial interest in such policy’, but no notice is required to the insurers. The operation of s 136 depends upon there having been an ‘absolute assignment’ of ‘a debt or other legal thing in action’ and upon express notice in writing being given to (in this case) the insurers.

g
h
j
[63] The reference in s 50 to assignment ‘so as to pass the beneficial interest in such policy’ has been held to require the passing of the whole beneficial interest in the policy: see *Arnould’s Law of Marine Insurance and Average* (16th edn, 1981) Vol 1, p 170, para 254; *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, [1932] All ER Rep 32; *The Evelpidis Era* [1981] 1 Lloyd’s Rep 54 at 64. In these two cases the assignment did not satisfy this requirement because, it was held, the assignors retained at least a limited interest in recoveries that might be made under the policy. In order to identify when the beneficial interest passes, it is also necessary to distinguish between situations of assignment before and after loss. Before loss, the policy is alive, and the assured cannot, in my judgment, be said to have parted with all beneficial interest in it, so long as he retains and does not part with the insurable interest in the subject matter insured that the policy is intended to cover. The classic application of s 50 is thus to circumstances where the assured sells the subject matter insured (be it cargo, as happens daily, or ship) to another person with the benefit of the policy. Section 1 of the 1868 Act made this point clear, by providing:

‘Whenever a Policy of Insurance on any Ship, or on any Goods in any Ship, or on any Freight, has been assigned, so as to pass the beneficial Interest in such Policy to any Person entitled to the Property thereby insured, the Assignee of such Policy shall be entitled to sue thereon in his own Name ...’

a [64] In *Lloyd v Fleming*, *Lloyd v Spence* (1872) LR 7 QB 299 at 303, Blackburn J, delivering the judgment of the Court of Queen's Bench, said that—

'The words relied on [namely "Entitled to the property"], in the case of an assignment before loss, express what is necessarily implied, and so are superfluous; perhaps inserted *pro majore cautela*.'

b The 1906 Act was expressly a codifying measure. Sir Mackenzie Chalmers prepared it to reflect pre-existing statute and case law, citing *Lloyd's* case both in his and Owen's pre-Act *Digest of the Law relating to Marine Insurance* (1st edn, 1901 and 2nd edn, 1903), under what became ss 50 and 51, and in their post-Act work entitled *Chalmers' Marine Insurance Act 1906* (10th edn, 1993). The inference is not
c that the change in s 50 from the wording of s 1 of the 1868 Act was intended to alter the effect, but that the words omitted were considered, as Blackburn J had said, superfluous in relation to assignment before loss—as well as inappropriate and potentially misleading (see the losing argument in *Lloyd's* case and see [66] below) in relation to assignment after loss. A person cannot be said to have parted with his beneficial interest in ongoing insurance cover if he remains the
d person whose interest is insured, even if (for example) he has assigned the entire right to the benefit of any claims which arise in respect of his interest. As *MacGillivray on Insurance Law* (9th edn, 1997) p 491, para 20–9 points out, the assignor remains the insured in such circumstances, and only he can cancel the policy. The analysis which I have set out is expressly adopted, though without
e citation of authority, in *Arnould's Law of Marine Insurance and Average* (16th edn, 1981) Vol 1, p 169, para 253:

'A valid assignment before loss supposes the coexistence of three things at the time of assignment: (1) an insurable interest in the subject-matter of the policy in the assignor; (2) the continuance of the risk insured in the policy;
f (3) the assignment of an insurable interest in the subject-matter of the policy to the assignee, and its exposure to the perils during the continuance of the risk.'

[65] A similar proposition in an earlier edition of *Arnould* was approved by Slesser LJ in his judgment in *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81 at 105,
g [1932] All ER Rep 32 at 41:

'The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot while it remains in force be severed from the interest insured: *Arnould*, 11th ed., s.176.'

h [66] After a loss, different considerations apply. The interest in a claim on insurers, the chose in action, may then be regarded as 'the only property which is covered by the policy' and the words of the Act thus 'literally complied with' by a simple assignment of the benefit of such a claim (see *Lloyd v Fleming* (1872) LR 7 QB 299 at 303 per Blackburn J). This is obviously so when the subject matter
j insured has become totally lost so as to exhaust the policy. It may also be so in the case of a partial loss, at least once the policy has expired (see eg *Swan v Maritime Insurance Co* [1907] 1 KB 116 (a case of assignment after a partial loss and after the expiry of a time policy)).

[67] In Mr Gruder's submission the assignment took effect under s 50. The assignment took place before any loss. Did Five Star assign to RZB an insurable interest in the subject matter of the insurance? So far as the hull and machinery cover

is concerned, it can be said that it did. The mortgage dated 17 September 1997, which was subject to the laws of St Vincent and the Grenadines, was expressed to— a

‘grant, convey, mortgage, pledge, assign, transfer, set over and confirm to the Mortgagees the whole of the vessel and all shares in the Vessel TO HAVE AND TO HOLD the same unto the Mortgagees for ever upon the terms set forth in this Mortgage for the enforcement of payment to the Mortgagees of the Indebtedness ...’ b

[68] *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 614, [1911–1913] All ER Rep 861 instances the application of s 50 to an assignment in favour of a mortgagee. However, the fact that Five Star transferred an insurable interest to RZB does not necessarily mean that it intended to or did transfer the benefit of its insurance so as to cover the assignee in respect of that interest. Whatever interest it transferred, it clearly also retained an insurable interest of its own as mortgagor and operator of the vessel. Bearing this in mind, I find it hard to see how other terms of the present mortgage (as summarised at the start of this judgment) can be reconciled sensibly with any idea that Five Star and RZB intended that the whole beneficial interest of even the hull cover should be transferred to RZB in order to protect the interest that RZB acquired as mortgagee. The thrust of cl 5 of the mortgage is that Five Star would ensure that it continued to take out insurances in respect of its own insurable interests and continue (subject to the proviso in cl 5.11) to receive any insurance payments in reimbursement of insured losses which it incurred. It may, however, be said that the mortgage is not the, or the only, relevant document. The deed of assignment deals directly with the assignment of the insurances. For my part, whatever policy or cosmetic considerations led to these two separate documents, I would think it appropriate to look at the overall position resulting from both. But, even if it is right to restrict one’s vision to the deed dealing expressly with the assignment of insurances, it seems to me that, although its draughtsman started in cl 5.1.1 with a valiant attempt to express an assignment in the widest and most absolute terms, the underlying reality (that the insurance was to continue to cover Five Star’s insurable interest, although losses would be payable as set out in the loss payable clause) appears from the provisions of cll 2.3.2 and 2.3.4 referring to the letters of undertaking and the loss payable clause. c
d
e
f
g

[69] The form of loss payable clause set out in App B provided as follows:

‘It is noted that by an Assignment in writing dated the ... day of ... 1997 (together “the Assignment”) made in consideration of the Bank advancing a loan to us pursuant to a Loan Facility dated ... 1997 (“the Loan Agreement”) we FIVE STAR GENERAL TRADING of PO Box 2274, Ajman, United Arab Emirates, (“the Owners”) owners of the vessel MOUNT I (ex “MOUNT ATHOS I”) (“the Vessel”) assigned absolutely to RAIFFEISEN ZENTRALBANK ÖSTERREICH AKTIENGESELLSCHAFT of 36–38 Botolph Lane, London EC3R 8DE (“the Bank”) this policy and all benefits thereof including all claims of whatsoever nature (including return of premiums) hereunder. Claims hereunder payable in respect of a total or constructive total or an arranged or agreed or compromised total loss or unrepaired damage and all claims which (in the opinion of the Bank) are analogous thereto shall be payable to the Bank. Subject thereto all other claims, unless and until underwriters have received notice from the Bank of a default under the Loan Agreement h
j

a in which event all claims hereunder shall be payable directly to the Bank,
shall be payable as follows: (i) a claim in respect of any one casualty where
the aggregate claim against all insurers does not exceed ONE HUNDRED
THOUSAND UNITED STATES DOLLARS (US \$100,000) or the equivalent in
b any other currency prior to adjustment for any franchise or deductible under
the terms of the policy shall be paid directly to the Owners for the repair
salvage or other charges involved or as a reimbursement if they have fully
repaired the damage and paid all of the salvage or other charges; (ii) a claim
c in respect of any one casualty where the aggregate claim against all insurers
exceeds ONE HUNDRED THOUSAND UNITED STATES DOLLARS (US \$100,000)
or the equivalent in any other currency prior to adjustment for any franchise
or deductible under the terms of the policy shall subject to the prior written
consent of the Bank be paid to the Owners as and when the Vessel is restored
d to her former state and condition and the liability in respect of which the
insurance loss is payable is discharged provided that the insurers may with
such consent as aforesaid make payment on account of repairs in the course
of being effected. Notwithstanding the terms of the said Loss Payable Clause
and Notice of Assignment unless and until Brokers receive notice from the
e Bank to the contrary Brokers shall be empowered to arrange their
proportion of any collision and /or salvage guarantee where the aggregate
liability under all guarantees given in respect of any one casualty shall not
exceed ONE HUNDRED THOUSAND UNITED STATES DOLLARS (US \$100,000)
or the equivalent in any other currency to be given in the event of bail being
required in order to prevent the arrest of the Vessel or to secure the release
of the Vessel from arrest following a casualty. All collections are to be made
through [...].’

f This wording seems to me to recognise, as I have said, that the insurances, despite
and following any assignment, were intended to and did continue to protect Five
Star’s insurable interests in respect of any losses and liabilities which it incurred
as mortgagor (and, in commercial terms, owner) or as operator of the vessel.

[70] This conclusion is to my mind reinforced when one remembers that the
g present insurance provided more than mere hull and machinery cover. It
included both collision cover and protection and indemnity cover. It is an
essential part of RZB’s case that the assignment embraced—in some sense—not
merely the total loss cover on hull and machinery cover, but also the protection
and indemnity cover and, above all, the collision cover. They submit that these
too were assigned to RZB under s 50. The appellants take issue with these
propositions at each point. In their submission, the risks of liability insured by the
h protection and indemnity and collision cover remained Five Star’s risks, and
cannot have been transferred to RZB. Five Star continued to operate and crew
the vessel. RZB as mortgagee never took possession or took over operation of the
vessel. That seems to me clearly correct. Accordingly, if the assignment of the
insurances to RZB embraced the protection and indemnity and collision cover at
j all, it cannot have done more than transfer to RZB the benefit of any claims that
might subsequently accrue under such cover. The insurable interest in the
subject matter to which such cover related, namely Five Star’s pecuniary interest
in maintaining its patrimony free of the burden of such expenditure or liability,
must then have remained with Five Star. On that basis, once again s 50 could not
apply. If, on the other hand, the assignment did not even transfer to RZB the
benefit of any claims arising under the collision cover, then again s 50 could not

apply—the policy cannot be split into a series of sub-policies; if the collision cover was not assigned at all, then the whole beneficial interest in the policy was not assigned for that even broader reason. a

[71] For these reasons, s 50 cannot in my judgment have applied to the present assignment.

[72] We were referred to Mocatta J's brief treatment of the application of s 50 in *The Evelpidis Era* [1981] 1 Lloyd's Rep 54 at 64, which was relied upon as pointing in the contrary direction to the conclusion which I have just expressed. An assignment to the mortgagee bank of the benefit of protection and indemnity cover was there held outside s 50, but the sole reason given was the provisions of a letter of undertaking which provided for the club to continue to pay claims directly to the shipowners or their creditors until receipt of notice to the contrary from the bank. In Mocatta J's judgment the whole of the beneficial interest in the policy had not therefore been assigned. The fact that the shipowners remained the persons at risk in respect of the expenditure or liability insured (for example, on the facts of that case, the repatriation expenses (see [1981] 1 Lloyd's Rep 54 at 57)) does not appear to have been suggested as a further and more fundamental reason why s 50 could not apply. Nor does *Arnould* raise this as a problem when referring to the case (see *Arnould's Law of Marine Insurance and Average* (16th edn, 1997) Vol 3, p 266, para 254). Nevertheless, and despite the distinction and expertise of counsel and the judge in *The Evelpidis Era*, this further reason must, in my view and for reasons I have explained, prevent the application of s 50 in such a case. b
c
d

[73] There is a further reason why s 50 was in my view inapplicable in this case. Clause 2.3.4 of the deed of assignment contemplated that the loss payable clause set out above, providing, inter alia, for insurers to continue to pay some, though not all, claims directly to Five Star until notice to insurers of a default under the loan agreement, would be endorsed upon or attached to the insurance. There are differences between the terms of the assignment and intended loss payable clause in this case and those of the assignment and the letter of undertaking in *The Evelpidis Era*, and no loss payable clause was actually endorsed upon or attached to the present insurance. Nevertheless, the parties agreed in both the mortgage and the deed of assignment that there should be a loss payable clause, in terms defined by App B of the deed and entitling Five Star, at least until further notice, to receive certain claims payments. The intention, although this does not appear to have been effected, was also that this clause should also be endorsed on the policy, so as to affect the insurers. It seems to me that these facts alone would prevent s 50 from applying—as Mocatta J considered the letter of undertaking did on the facts before him. e
f
g

[74] I turn to s 136 of the 1925 Act. The requirement here is that there should have been an absolute assignment of the legal thing in action. A legal thing in action may be either the policy as a whole or a right of claim under it. Despite the different terminology, somewhat similar considerations to those relevant under s 50 may arise here. First, in my judgment, an agreed assignment of the whole benefit of an insurance policy in conjunction with a sale or other transfer of the subject matter insured could come within s 136 (so that the section represents in that respect, prior to any loss, an alternative means to the same end as s 50). As *Clarke*, *The Law of Insurance Contracts* (3rd edn, 1997) p 177, para 6–3 and p 181, para 6–4 observes: 'Under a contract of insurance the insured has present rights which are assignable, although their full value may not yet have matured.' Compare also the examples of other contracts assignable under s 136 h
j

- a given in 6 *Halsbury's Laws* (4th edn reissue) para 15, citing *Tolhurst v Associated Cement Manufacturers (1900) Ltd* [1903] AC 414, [1900–1903] All ER Rep 386 (assignment of the benefit of a contract to be supplied with chalk) and *Torkington v Magee* [1902] 2 KB 427, [1900–1903] All ER Rep 991 (assignment of a contract for the purchase of a reversionary interest; reversed on a different point (see [1903] 1 KB 644)). I also accept that, for the purposes of s 136, an assignment is not prevented from being absolute by virtue of the fact that it may have been entered into for the purpose of security and may (as here) be subject to an equity of redemption, in the form of a provision for reassignment on repayment of the loan (see *Chitty on Contracts* (28th edn, 1999) Vol 1, p 1035, para 20–012).

- [75] Nevertheless, s 136 is not, in my judgment, applicable on the facts of this case. First, for reasons which parallel those which I have given in relation to s 50, there was here no assignment of the whole benefit of the insurance cover, and so, in the terms of s 136, no absolute assignment of this nature. On the contrary, Five Star remained covered as mortgagor and operator of the vessel. Second, the most that the assignment may therefore have achieved, whatever the generality of the language used in cl 2.1.1 of the deed of assignment, was to assign the benefit of any particular claims arising. There may under s 136 be an absolute assignment of a claim or claims, but only of a *present* claim or claims. At the date of Five Star's assignment to RZB, any insurance claim(s) were merely an unwished-for future possibility dependant upon some future casualty. The distinction between present claims (which category includes rights that may mature in future under a presently existing contract) and future claims is not always easy. But future insurance claims which depend on future casualties which may never occur appear to me to fall clearly into the latter category and not to be assignable under s 136 (see the discussion in *Chitty on Contracts* (28th edn, 1999) Vol 1, p 1042–1043, paras 20–028 and 20–029). Third, quite apart from the objection that what was agreed was an assignment of future, not present claims, the parties' agreement on the provisions of the loss payable clause—splitting the proceeds of such claims between them, at least until further notice—means, despite the language of cl 2.1.1 of the deed of assignment, the assignment cannot be regarded as having been absolute.

- [76] It follows that the assignment cannot have taken effect under s 50 or s 136. But these are, as I have indicated, merely two specific statutory possibilities, which, where applicable, offer some advantages either in relation to the general requirement of notice (dispensed with under s 50) or procedure (the general facility to sue without any need to consider joining the assignor under both sections). Where they do not apply, effect may still be given to an assignment in equity, both as between the parties to it and as against the debtor (or here the insurers) in consequence of the notice given to them. Before considering this further, however, I propose to deal with the issue raised relating to the scope of the assignment. The appellants submit that this excluded altogether the benefit of any claims that might arise under the collision cover. The submission is consistent with their likely overall objective. The mortgage contemplated insurance against both marine risks and P&I risks. It may be observed that marine risks on hulls are commonly insured (as this vessel was) on the Institute Voyage Terms—Hulls, cl 6 of which includes collision cover. It is perhaps also worth noting that cl 3 of the standard wording of such terms (where not deleted, as it was in this particular case) purports to regulate assignment of 'this insurance or ... any moneys ... payable thereunder' without suggesting any distinction between the pure hull cover and the collision cover conferred by the

Institute terms. The deed of assignment, cl 2.1 of which witnessed that Five Star 'with full title guarantee assign absolutely and unconditionally and agree to assign to the Bank all their right, title and interest in and to the Insurances'. 'Insurances' was defined as meaning—

'all policies and contracts of insurance (including all entries in Protection and Indemnity or War Risks Associations) which are from time to time taken out or entered into in respect of or in connection with the Vessel or her increased value and (where the context permits) all benefits thereof including all claims of whatsoever nature and returns of premium.'

Thus far the scope of the assignment seems on its face to embrace collision cover.

[77] In the appellants' submission, the terms of the loss payable clause (as agreed between Five Star and RZB, although never actually endorsed on the policy) suggest that the collision cover was not being assigned. The appellants point out that, although the first paragraph of the loss payable clause refers to 'this policy and all benefits thereof including all claims of whatsoever nature (including return of premiums) hereunder', the next paragraphs, dealing with total losses or unrepaid damage and 'all other claims', focus on physical loss or damage. But this submission itself requires some qualification, in so far as the penultimate paragraph would have allowed the brokers to put up collision and/or salvage guarantees if required to prevent the arrest of the vessel or to secure her release from arrest following a casualty. This paragraph suggests that collision liability claims fall within the scope of the assignment, but would have allowed the limited incurring of expenditure under cl 6.3 and/or under the sue and labour provisions in cl 11 of the Institute Voyage Clauses—Hulls—Total Loss.

[78] Mr Layton submits that an assignment of collision liability claims is either impossible or inimical to the concept and purpose of an insurance like the present. The purpose of collision liability insurance is to cover the assured against third party liability. Assignment would, he submits, undermine this. I do not consider that this proposition is made good, even if one assumes that the collision insurance was intended to produce funds which the assured would be able to use to pay third party claimants. Even if that was its intention and effect, it does not follow that the assured was bound to use any insurance recoveries for that purpose; he would remain free to pay the third party claimants from any funds he wished (and indeed free not to pay them at all, if he wished); likewise he could dispose of any recovery made from insurers in any way he wished. In reality, however, the terms of the present collision insurance (although not as crystal-clear as those considered in *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti, Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd, The Padre Island* [1990] 2 All ER 705, [1991] 2 AC 1) probably mean that Five Star could not recover from the insurers in respect of collision liability except in respect of sums previously 'paid', in the sense of disbursed, to the third party claimants by reason of such liability. On that basis, it is clear that, having paid the third party, the assured could dispose of any insurance recoveries in any way he wished, including by assignment.

[79] It follows that I see nothing about the collision insurance cover which either makes assignment impossible or is inimical to the concept or purpose of such insurance. Indeed, the scenario presented to us—according to which, under the law of Malaysia where the fund representing the vessel is held and where the collision action is proceeding, the appellants as third party claimants may take priority over the vessel's mortgages—indicates a good reason why it may be very

a prudent for a mortgagee to take from a shipowner an assignment of the benefit of collision insurance claims. Here, the assignment was in the widest terms. The context does not require any exclusion of the benefit of the collision insurance claims, and I would hold that they were duly assigned.

[80] On that basis, I consider that there was an assignment of the benefit of any claims under the policy, including collision liability claims. Further, although b such assignment cannot in my judgment have taken effect under either s 50 or s 136, there is no reason why it did not take effect in equity. Equity recognises and gives effect to any assignment, for value, of a thing in action depending on a future contingency (an 'expectancy') (see *Chitty on Contracts* (28th edn, 1999) Vol 1, p 1044, para 20–032; and also *Snell's Equity* (30th edn, 2000) p 97, para 5–28, c summarising the position on the authorities as follows:

'The principle that equity regards as done that which ought to be done is applied so that, once the assignor has received the valuable consideration and became possessed of the property, the beneficial interest in the property passes to the assignee immediately ...'

d [81] An assignor and assignee are thus bound from the moment of their agreement, while the debtor is (subject to notice) bound as soon as the expectancy develops into an actuality. Here, Five Star's assignment to RZB was for value—being supported (as recited in the deed of assignment) by ample consideration in the form of the loan advance. It had at least contractual effect e between Five Star and RZB from 17 September 1997 onwards. Once the collision occurred on 26 September 1997, Five Star acquired present rights to look to the insurers pursuant to (technically, under English law, for breach of) the insurers' duty to hold them harmless or indemnify them in respect of any loss or liability f falling within the policy terms and arising out of the collision. One can accept for present purposes that liability claims made against Five Star, for example by the appellants as cargo owners, would fall to be agreed or adjudicated upon, before insurers could actually be required to disburse moneys under the policy. Even so, as from the collision, any entitlement to indemnity under the policy as against the insurers in respect of the consequences of such collision was in law no longer g an expectancy; an insured loss had occurred and there was a present and assignable right to be indemnified against any loss or liability which might result. The previously agreed assignment could in equity operate accordingly and pass to RZB the beneficial interest in relation to any insurance claims. Finally, notice of such assignment was given by or on behalf of RZB to the insurers on 7 October 1997. In these circumstances, all the ingredients of a valid equitable assignment, h binding not only on Five Star and RZB, as assignor and assignee, but also on the insurers, were fulfilled from 7 October 1997. The insurers were from that moment onwards bound to RZB, rather than Five Star, in relation to any claim under the insurance as and when it fell to be settled. All these parties being before this court, we are both entitled and bound to recognise and give effect to that j assignment.

[82] There is nothing to indicate that the loss payable clause has any relevance in relation to any such insurance claims as have arisen. There is nothing to indicate that any such claim, or any part of it, would, under sub-cl (i) or (ii) or the penultimate paragraph of the loss payable clause, fall for payment to Five Star, rather than to RZB. I also add, for completeness, that there is nothing to indicate whether or when the insurers may have received any notice from RZB of a

default under the loan agreement precluding the operation of sub-cl (i) and (ii) or notice precluding the operation of the penultimate paragraph. a

[83] Accordingly, the situation is on the face of it one in which RZB as assignee became entitled in equity as against Five Star and the insurers to the whole benefit of all claims arising from the collision. But, even if (contrary to the position so far as it appears) Five Star could be said, under the loss payable clause, to retain any interest in any part of any claim that may have arisen, RZB is still b entitled in equity in relation to, and by virtue of, the assignment of the remainder of such claim. Further, all parties being before the court, there is no obstacle to giving effect to any partial interest; since Five Star is in fact before the court, it is unnecessary to consider whether, as a matter of procedure, the court would, in the case of either a complete or a partial assignment in equity, have insisted upon c its presence before granting RZB appropriate relief.

The appropriateness of declaratory relief

[84] Having reached clear conclusions as to the legal positions of Five Star, RZB and the insurers, all of whom are before this court, the question remains what if any relief the court should now grant. In this court, the appellants d submit—with I think considerably greater emphasis than before Longmore J—that, whatever the rights and wrongs of the substantive issues argued, this is not a case where it is appropriate for the English courts to grant any declaratory relief. Mr Layton seeks to support this submission by four considerations: the declarations sought are intended for use in France to challenge the French attachments; the e declarations relate to contracts to which the appellants were not party; they would serve no useful purpose, since there will have inevitably to be French proceedings; and great caution should always be exercised before granting any declarations. To these he added the arguments relating to collision cover, which I have already resolved against the appellants.

[85] The present proceedings were begun against Five Star and the insurers, f who in each case submitted to the English jurisdiction. Leave to serve the appellants out of the jurisdiction was obtained on the basis that they were necessary and proper parties to the litigation against Five Star and the insurers, and they in turn submitted to the jurisdiction. I agree that that does not preclude the appellants from raising points on the appropriateness of declaratory relief. g But the fact remains that English jurisdiction has been accepted by all parties involved, in relation to the legal position of the parties to an insurance and an assignment, each of which is subject to English law. If this were, as Mr Layton submits, a case of ‘naked forum shopping’, one would expect that to have been raised as a jurisdictional objection. In fact, however, it is a case where the first h issue, as identified earlier in this judgment, concerns the effect of the voluntary assignment of the insurance as between Five Star, RZB and the insurers. That involves identifying the appropriate law by which to consider such effect. My conclusions have been that art 12 of the Rome Convention applies to identify the relevant law, that this is English law and that under English law there was a valid equitable assignment of the benefit of claims arising under the insurance, j including any claim in respect of collision liability. It is true that the Rome Convention should mean that the same conclusions would have been, or would be, reached in France if the issue had been, or were to be, litigated there. But that is no reason at all for refusing to grant declaratory relief to record the decision here by the courts of the country whose law governs under art 12—rather the contrary. The declaratory relief which this court grants may indeed (as I have

a noted in para [23] of this judgment) prove the end of the whole matter. But even if, after the present judgment, there do remain further matters for argument either in England or in France, it is clearly appropriate to grant declaratory relief to confirm what has been now decided. That will then serve as a starting point for any further argument.

b [86] That the declarations relate to the effect of an English law insurance contract and an assignment to which the appellants were not party is no objection to declaratory relief. The appellants, by their French attachments, have themselves put in issue the effect of the insurance and its assignment. The issue as to its effect has to be resolved somewhere. For reasons just given, England is the appropriate place to resolve it, not just because all parties have submitted to English jurisdiction on the point, but because, under art 12, English law is the relevant law. The fact that other parties to the insurance contract and the assignment have been content to leave the English court to decide the point, without submitting arguments of their own, is neither here nor there. They may not mind what answer is given. The present judgment and any declarations granted will still establish their position with certainty, and they will be both bound and protected by them, here and no doubt in France.

c [87] The case of *Meadows Indemnity Co Ltd v Insurance Corp of Ireland plc* [1989] 2 Lloyd's Rep 298 is neither analogous nor helpful. In that case, Meadows, as reinsurers, sought to claim declarations against the original insured (International Commercial Bank (ICB)) to the effect that the original insurer (Insurance Company of Ireland (ICI)) was entitled to avoid the original insurance and was not obliged to indemnify ICB. This court took the view that no contested issue arose between Meadows and ICB and that there was no basis for any claim for declaratory relief. Meadows had rights in relation to ICI and no one else. That is quite a different situation from the present, where the appellants have obtained attachments against a claim on insurers on the basis that Five Star has the right to claim. The appellants themselves, by their attachments and by the basis on which these were obtained, have raised an issue as to who had the benefit of the claim against insurers as at the date of such attachments.

f [88] Nor do I find in other cases cited by Mr Layton, including *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, [1921] All ER Rep 329 and *Messier-Dowty Ltd v Sabena SA (No 2)* [2000] 1 All ER (Comm) 833, [2000] 1 WLR 2040, any principle or statements that should discourage the court from granting declaratory relief on the issue which arises and which I have determined. These are not authorities requiring either extreme circumstances or extreme, or even great, caution before granting declaratory relief. Of course the court will always scrutinise with care the context, utility and likely effect of any such relief. But where its grant 'would help to ensure that the aims of justice are achieved' the courts should not be reluctant to grant even negative declarations (see the *Messier-Dowty* case [2000] 1 All ER (Comm) 833 at 843, [2000] 1 WLR 2040 at 2050, para 41 per Lord Woolf MR). At least as favourable a test must apply in the present context. For all the reasons I have given, I regard the grant of declaratory relief in this case as both useful and called for.

j
Conclusion and relief to be granted

[89] In the result I would dismiss the appeal in so far as it maintains, on the basis of the evidence of French law before the court, that the assignment to RZB was invalid, that RZB acquired no right or title by virtue thereof as against Five Star and the insurers and that RZB's claim to any insurance proceeds was bound

to fail. I would also dismiss the appeal in so far as it maintains that, even if (as I have held) the appellants are wrong on these points, declaratory relief is not appropriate. It remains only to consider the detailed terms of the appropriate declaratory relief, on which the appellants took a number of further points. In the light of my conclusions as to the nature of the issue regarding entitlement under the insurance that we have at this stage to address, and as to the nature of the assignment that took place, some reformulation of the declarations granted by Longmore J will be required. As suggested during argument, I would invite counsel, after considering this judgment, to submit redrafted declarations in the forms for which they would now contend, with a view to our hearing further oral argument on this aspect when this judgment is handed down.

a
b
c

CHARLES J.

I agree.

ALDOUS LJ.

I also agree.

Order accordingly.

Gillian Crew Barrister.

a **A and others v National Blood Authority
and another**

QUEEN'S BENCH DIVISION

b BURTON J

10–13, 16–20, 23–27, 30 OCTOBER, 1, 6–9, 13, 15, 16, 20, 21, 27–29 NOVEMBER, 1, 4–6, 8, 11–13
DECEMBER 2000, 9–12, 15–19, 26, 29, 30 JANUARY, 26 MARCH 2001

c *European Community – Consumer protection – Product liability – Whether unavailability of risk relevant in determining whether product defective – Whether unavoidable risk falling within development risks defence if producer unable to discover defect in particular product by means of accessible information – Consumer Protection Act 1987 – Council Directive (EEC) 85/374, arts 6, 7(e).*

d The claimants had been infected with Hepatitis C (the virus) through blood transfusions which had used blood or blood products obtained from infected donors. They brought actions for damages against the defendants, the authorities responsible for the production of blood and blood products. During the period when most of the claimants were infected, the risk of such infection through blood transfusions, though known to the medical profession, was impossible to avoid, either because the virus itself had not yet been discovered or because there was no way of testing for its presence in blood. Accordingly, the claims were brought not in negligence, but under the Consumer Protection Act 1987 which implemented Council Directive (EEC) 85/374 (on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products). Under that directive, a producer was liable for damage caused by a defect in his product. By virtue of art 6(1)^a, a product was defective when it did not provide the safety which a person was entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put and the time when the product was put into circulation. Article 7(e)^b provided the producer with a defence if he could establish that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable 'the existence of the defect' to be discovered. On the trial of the six lead cases, the defendants accepted that a producer's liability under art 6 was irrespective of fault. They nevertheless contended that, in assessing whether the infected blood was defective, the unavailability of the risk was a circumstance to be taken into account, and that the most that the public was entitled to expect was that all reasonably available precautions had been carried out, not that the blood would be 100% clean. In so contending, the defendants submitted that the infected blood was to be regarded as an inherently risky standard product (ie one which performed as the producer intended) rather than a non-standard product (ie a product which was deficient or inferior in terms of safety from the standard product, and whose harmful characteristic, not present in the standard product, had caused the material injury

e

f

g

h

j

a Article 6(1) is set out at [16], below

b Article 7 is set out at [16], below

or damage). They also relied on the fact that they were obliged to produce blood and had no alternative but to supply it to hospitals and patients, as a service to society. Alternatively, the defendants sought to rely on the art 7(e) defence, contending that an unavoidable risk qualified for protection under it if the producer was unable to discover, by means of accessible information, the defect in a particular product.

Held – (1) Avoidability was not one of the circumstances to be taken into account under art 6, even in respect of a harmful characteristic in a standard product. In that provision, ‘all circumstances’ meant all relevant circumstances. Avoidability was not a relevant circumstance since it fell outside the purpose of the directive, which was intended to eliminate proof of fault or negligence. That was not simply a legal consequence. It was also intended to make it easier for claimants to prove their case, such that not only would a consumer not have to prove that the producer had not taken reasonable steps, or all reasonable steps, to comply with his duty of care, but also that the producer had not taken all legitimately expectable steps either. Even without the full panoply of allegations of negligence, the adoption of tests of avoidability or of legitimately expectable safety precautions would inevitably involve a substantial investigation. If it had been intended that avoidability would be included as a derogation from, or a palliation of, the directive’s purpose, it would have been mentioned. It would have been an important circumstance, and it was intended that the most significant circumstances were those listed. In the case of a non-standard product, the circumstances specified in art 6 might obviously be relevant, as well as the circumstances of the supply. However, the primary issue might be whether the public at large accepted the non-standard nature of the product, ie whether they accepted that a proportion of the products was defective. That was not the end of the matter, because the question was one of legitimate expectation, and the court might conclude that the expectation of the public was too high or too low. Questions such as warnings and presentations would be in the forefront, but the avoidability of the harmful characteristic, the impracticability, cost or difficulty of precautionary measures, and the benefit to society or the utility of the product (except in the context of whether, with full information and proper knowledge, the public had and should have accepted the risk) were not relevant. In the instant case, the infected blood products were non-standard products since they were different from the norm which the producer intended for use by the public. They were defective within art 6 because the public at large was entitled to expect that the blood transfused to them would be free from infection. There had been no warnings and no material publicity. The knowledge of the medical profession, not materially or at all shared with the consumer, was of no relevance. Nor was it material to consider whether any further steps could have been taken to avoid or palliate the risk that the blood would be infected (see [57], [58], [63], [65], [66], [68], [80], [82], below); *European Commission v UK* Case C-300/95 [1997] All ER (EC) 481 considered.

(2) The defence in art 7(e) of the directive did not apply where the existence of the generic defect was known or should have been known in the context of accessible information. Once the existence of the defect was known, there was the risk of that defect materialising in any particular product, and it was immaterial that the known risk was unavoidable in the particular product. It would be inconsistent with the purpose of the directive if a producer, in the case

a of a known risk, continued to supply products simply because, and despite the fact, that he was unable to identify in which of his products that defect would occur or recur, or, more relevantly in a case where the producer was obliged to supply, he continued to supply without accepting the responsibility for any injuries resulting, by insurance or otherwise. Such a conclusion did not mean that non-standard products were incapable of coming within art 7(e). Such
b products might qualify *once*—ie if the problem which led to an occasional defective product was not known. However, once the problem was known by virtue of accessible information, the non-standard product would no longer qualify for protection under art 7(e). Accordingly, in the instant case, art 7(e) was of no avail to the defendants, and the claimants were therefore entitled to recover against them (see [74], [77], [78], [82], below).

c (3) If, contrary to the court's primary conclusion, the issues of avoidability or discoverability of the defect in the particular donation of blood had arisen, precautions to prevent or make a material reduction in the transfer of transmitted infection through infected blood were available and not taken. From 1 March 1988 the blood was defective in all the circumstances and from 1 March 1990 the defect in the donations was discoverable (see [106]–[107], [173], [181]–[187],
d below).

(4) The damages recoverable by the claimants were not based upon loss of a chance. They could include, dependent upon the facts, provisional or final damages in respect of invasive or debilitating treatments, handicap in respect of employment and insurability, and the provision of gratuitous services. In the
e absence of any special evidence of exceptional circumstances, the proper recompense for gratuitous services in the instant cases would normally be commercial cost, less a deduction to allow at least for tax and national insurance (see [176]–[180], [211], [214]–[216], [219]–[225], [226]–[231], below).

f Notes

For liability for defective products, see 41 *Halsbury's Laws* (4th edn reissue) paras 515–520.

For the Consumer Protection Act 1987, see 39 *Halsbury's Statutes* (4th edn) (1995 reissue) 150.

g Cases referred to in judgment

Abouzaid v Mothercare (UK) Ltd [2000] CA Transcript 2279.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Biesheuvel v Birrell [1999] PIQR Q40.

h *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582.

Brody v Overlook Hospital (1974) 317 A (2d) 392, NJ Sup Ct; *affd* (1975) 332 A (2d) 596, NJ SC.

Cook v Consolidated Fisheries Ltd [1977] ICR 635, CA.

Cunningham v Harrison [1973] 3 All ER 463, [1973] QB 942, [1973] 3 WLR 97, CA.

j *Cunningham v McNeal Memorial Hospital* (1970) 47 Ill (2d) 443, Ill SC.

Curi v Colina [1998] CA Transcript 1300, referred to in Kemp and Kemp *The Quantum of Damages* vol 3, para B2-008/1.

Donnelly v Joyce [1973] 3 All ER 475, [1974] QB 454, [1973] 3 WLR 514, CA.

European Commission v UK Case C-300/95 [1997] All ER (EC) 481, [1997] ECR I-2649, ECJ.

- Fairhurst v St Helens and Knowsley Health Authority* [1995] PIQR Q1. a
Fish v Wilcox and Gwent AHA (1993) 13 BMLR 134, CA.
Fitzgerald v Ford [1996] PIQR Q72, CA.
Foster v Tyne and Wear CC [1986] 1 All ER 567, CA.
German Bottle Case, The (9 May 1995) NJW 1995, 2162, Bundesgerichtshof.
Goldborough v Thompson [1996] PIQR Q86, CA.
Graham Barclay Oysters Pty Ltd v Ryan (2000) 177 ALR 18, Aust FC. b
Harris v Brights Asphalt Contractors Ltd [1953] 1 All ER 395, [1953] 1 QB 617, [1953] 1 WLR 341.
Henning Veedfald v Arhus Amstokommune Case C-203/99 (14 December 2000, unreported).
Hotson v East Berkshire Area Health Authority [1987] 1 All ER 210, [1987] AC 750, [1987] 2 WLR 287, CA; *rvsd* [1987] 2 All ER 909, [1987] AC 750, [1987] 3 WLR 232, HL. c
Housecroft v Burnett [1986] 1 All ER 332, CA.
Hunt v Severs [1994] 2 All ER 385, [1994] 2 AC 350, [1994] 2 WLR 602, HL.
Judge v Huntingdon Health Authority (1994) 27 BMLR 107.
Lamey v Wirral Health Authority (22 September 1993, unreported). d
Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq) [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.
Mallett v McMonagle [1969] 2 All ER 178, [1970] AC 166, [1969] 2 WLR 767, HL.
McCamley v Cammell Laird Shipbuilders Ltd [1990] 1 All ER 854, [1990] 1 WLR 963, CA. e
Mitchell v Liverpool AHA (1985) Times, 17 June, [1985] CA Transcript 228.
Moeliker v A Reyrolle & Co Ltd [1977] 1 All ER 9, [1977] 1 WLR 132, CA.
Morris v West Hartlepool Steam Navigation Co Ltd [1956] 1 All ER 385, [1956] AC 552, [1956] 1 WLR 177, HL.
Nash v Southmead Health Authority [1993] PIQR Q156.
Petrovska v Mullings (13 August 1999, unreported), QBD. f
Richardson v LRC Products Ltd [2000] Lloyd's Rep Med 280.
Scholten v Foundation Sanquin of Blood Supply (3 February 1999, unreported), County Court of Amsterdam.
Smedleys Ltd v Breed [1974] 2 All ER 21, [1974] AC 839, [1974] 2 WLR 575, HL.
Smith v Manchester Corp [1974] 17 KIR 1, CA.
South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL. g
Thurman v Wiltshire and Bath Health Authority (1997) 36 BMLR 63.
Warren v Northern General Hospital NHS Trust (No 2) [2000] 1 WLR 1404, CA.
Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc [1998] 3 All ER 481, [1999] 1 AC 345, [1998] 3 WLR 329, HL. h
Willson v Ministry of Defence [1991] 1 All ER 638.

Cases also cited or referred to in skeleton arguments

- AM & S Europe Ltd v EC Commission* Case 155/79 [1983] 1 All ER 705, [1983] QB 878, ECJ. j
Amanpreet Dhaliwal v Hunt [1995] PIQR Q56, CA.
Ashcroft v Curtin [1971] 3 All ER 1208, [1971] 1 WLR 1731, CA.
Auty v National Coal Board [1985] 1 All ER 930, [1985] 1 WLR 784, CA.
Barry v Ablere Construction (Midlands) Ltd [2000] PIQR Q263.

- Beech v ESI Engineering* (16 June 1999, unreported).
- a** *Carpenter v Easton* (18 July 1997, unreported), Weymouth CC.
Davies v Mersey Regional Ambulance [1998] CA Transcript 684.
Díaz García v European Parliament Case T-43/90 [1992] ECR II-2619.
EC Commission v Italian Republic Case 39/72 [1973] ECR 101, EJC.
Evans v Mid-Glamorgan Health Authority (26 August 1992, unreported), Cardiff CC.
- b** *Fairley v John Thompson (Design and Contracting Division) Ltd* [1973] 2 Lloyd's Rep 40, CA.
Ferriere Nord SpA v European Commission Case T-143/89 [1995] ECR II-0917.
Foster v British Gas plc Case C-188/89 [1990] ECR I-3313.
France v European Commission Joined cases C-68/94 and C-30/95 [1998] ECR I-1375.
- c** *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357.
Freight Transport Association Ltd v London Boroughs Transport Committee [1991] 3 All ER 915, [1991] 1 WLR 828, HL.
GB-INNO-BM (NV) v Vereniging van de Kleinhandelaars in Tabak (ATAB) Case 13/77 [1977] ECR 2115.
- d** *Germany v Commission* Case 18/76 [1979] ECR 343, ECJ.
Giloy v Hauptzollamt Frankfurt am Main-Ost Case C-130/95 [1997] ECR I-4291.
Heil v Rankin [2000] 3 All ER 138, [2001] QB 272, CA.
Herod v Birds Eye Food [1975] CA Transcript 506.
Howell v Bolton Hospitals NHS Trust (16 November 1995, unreported), Bolton CC.
Jefford v Gee [1970] 1 All ER 1202, [1970] 2 QB 130, CA.
- e** *Jenkins v Grocott* (30 July 1999, unreported), QBD.
Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB, Konsumentombudsmannen (KO) v TV-Shop i Sverige AB Joined cases C-34-36/95, [1997] All ER (EC) 687, [1997] ECR I-3843, ECJ.
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL.
- f** *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135.
Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) Case 152/84 [1986] 2 All ER 584, [1986] QB 401, ECJ.
Meroni & Co v High Authority of the European Coal and Steel Community Case 9/56 [1957-58] ECR 133, ECJ.
- g** *Milac GmbH Gross-und Aussenhandel v Hauptzollamt Freiburg* Case 28/76 [1976] ECR 1639, ECJ.
Milk Marketing Board of England and Wales v Cricket St Thomas Estate Case C-372/88 [1990] ECR I-1345.
Nationale Raad van de Order van Architecten v Egle Case C-310/90 [1992] ECR I-177,
- h** ECJ.
Netherlands v EEC Commission Case 11/76 [1979] ECR 245.
Officer van Justitie v Haaster Case 190/73 [1974] ECR 1123, ECJ.
Page v Enfield and Haringey AHA (1986) Times, 7 November, [1986] CA Transcript 991.
Page v Sheerness Steel plc [1996] PIQR Q26.
- j** *R v Dudley Magistrates' Court, ex p Hollis, Hollis v Dudley Metropolitan BC, Probert v Dudley Metropolitan BC* [1998] 1 All ER 759, [1999] 1 WLR 642, DC.
R v Licensing Authority of the Dept of Health, ex p Generics (UK) Ltd Case C-368/96 [1998] ECR I-7967.
R v Secretary of State for Health, ex p Imperial Tobacco Ltd Case C-74/99 [2000] All ER (EC) 769, [2000] ECR I-8599, ECJ.

- Retter v Caisse de Pension des Employés Privés* Case 130/87 [1989] ECR 865, ECJ. a
Roberts v Heavy Transport (EEC) Ltd [1975] CA Transcript 213.
Rockfon A/S v Specialarbejderforbundet i Danmark Case C-449/93 [1995] ECR I-4291.
Simon v Court of Justice of the European Communities Case 15/60 [1961] ECR 115, ECJ.
Slimmings v South Glamorgan Health Authority (15 July 1992, unreported), Cardiff HC.
Smith v Vine [1993] CA Transcript 1538.
Spain v EU Council Case C-350/92 [1995] ECR I-1985. b
Stahlwerke Peine-Salzgitter v EC Commission Case T-120/89 [1991] ECR II-279.
Stauder v City of Ulm, Sozialamt Case 29/69 [1969] ECR 419.
Szulc v Howard (24 February 1995, unreported), Birmingham CC.
Thorn v Powergen plc [1997] PIQR Q71, CA.
Three Rivers DC v Bank of England (No 3) [2000] 3 All ER 1, [2000] 2 WLR 1220, HL. c
Union Royale Belge des Sociétés de Football Association ASBL v Bosman Case C-415/93
 [1996] All ER (EC) 97, [1995] ECR I-4921, ECJ.
Wagamama Ltd v City Centre Restaurants [1995] FSR 713.
Wiener SI GmbH v Hauptzollamt Emmerich Case C-338/95 [1997] ECR I-6518, ECJ.
Worrall v Powergen plc (17 November 1998, unreported).
Wren v North Eastern Electricity Board [1978] CA Transcript 793. d

Action

By writ issued on 1 May 1998, 114 claimants sought damages, pursuant to the Consumer Protection Act 1987, from the defendants, the National Blood Authority and Velindre NHS Trust, for damage suffered by them as a result of receiving blood or blood products infected with the Hepatitis C virus. By order dated 26 February 1999, Burton J required the identification of generic issues to be determined at the trial of the six lead cases, those of Ms T, Ms V, Mr U, Mrs X, Mr W and Mr S. The facts are set out in the judgment. e

Michael Brooke QC, Stuart Brown QC, Ian Forrester QC and Jalil Asif (instructed by *Deas Mallen*, Newcastle upon Tyne) for the claimants on the generic issues. f

Michael Brooke QC and Jalil Asif (instructed by *Deas Mallen*, Newcastle upon Tyne) for Ms T, (instructed by *Donne Mileham & Haddock*, Brighton) for Ms V, (instructed by *Evill & Coleman*) for Mr U, (instructed by *Freeth Cartwright*, Nottingham) for Mrs X and Mr W and (instructed by *Howard Cohen & Co*, Leeds) for Mr S. g

Nicholas Underhill QC, Philip Brook Smith and Louise Merrett (instructed by *Davies Arnold Cooper*) for the defendants.

Cur adv vult

26 March 2001. The following judgment was delivered. h

BURTON J.

CONTENTS

THE CLAIMANTS
 CAUSE OF ACTION
 THE DEFENDANTS
 THE PROCEEDINGS

Paragraphs j

[1]
 [2]
 [3]
 [4]

	SETTLEMENT	[5]
<i>a</i>	BLOOD TRANSFUSION	[6]–[7]
	HEPATITIS	[8]
	TESTING IN RESPECT OF NANBH/HEPATITIS C	[9]–[11]
	Surrogate tests	[9]–[11]
	THE CLAIMS	[12]
<i>b</i>	THE DIRECTIVE	[13]–[16]
	THE CPA	[17]–[23]
	THE STRUCTURE OF THIS JUDGMENT	[24]
	THE SIX ISSUES	[25]–[30]
	ARTICLE 6	[31]–[46]
	The common ground	[31]
<i>c</i>	The differences between the parties	[32]
	All circumstances	[33]–[35]
	Non-standard products	[36]–[38]
	Boxes	[39]–[41]
	The status of the defendants	[42]
<i>d</i>	Travaux préparatoires	[43]
	Court decisions	[44]
	Academic literature	[45]
	Summary	[46]
	ARTICLE 7(e)	[47]–[54]
	The issues between the parties	[50]–[51]
<i>e</i>	Travaux préparatoires	[52]
	Court decisions	[53]
	Academic literature	[54]
	CONCLUSIONS ON ARTICLE 6	[55]–[73]
	Non-standard products	[68]–[70]
<i>f</i>	Standard products	[71]–[73]
	CONCLUSIONS ON ARTICLE 7(e)	[74]–[77]
	THE RESULT IN LAW ON ISSUE I	[78]–[84]
	The consequence	[82]–[84]
	ISSUE II	[85]–[107]
	The defendants' factual witnesses	[87]–[88]
<i>g</i>	The defendants' expert witnesses	[89]–[92]
	The claimants' factual witnesses	[93]–[94]
	The claimants' expert witnesses	[95]
	The oral evidence	[96]
	The literature	[97]–[98]
<i>h</i>	The background facts	[99]
	The approach to be adopted	[100]
	The proper analysis	[101]–[107]
	SURROGATE TESTS	[108]
	The literature	[109] ^c
<i>j</i>	The United States	[110]–[113]
	The rest of the world	[114]–[118]
	THE PROS AND CONS OF SURROGATE TESTING	[119]–[142]
	The points in favour	[120]–[129]

^c Paragraphs [109]–[140] are not included in this report.

The points against	[130]–[140]	<i>a</i>
Conclusion on surrogate testing	[141]–[142]	
THE ASSAY	[143]–[172] ^d	
The chronology of the introduction of the assay in the UK	[147]–[157]	
The background facts	[158]	
What had to be allowed for	[159]	
Practical trials	[160]	<i>b</i>
The need for evaluation of the assay	[161]–[162]	
The need for confirmation	[163]–[165]	
The need to compare Ortho with Abbott	[166]–[167]	
Implementation in the RTCs	[168]	
Funding and decision-making	[169]	
Conclusion on routine screening	[170]–[172]	<i>c</i>
DEFECTIVE WITHIN ARTICLE 6	[173]	
NATURE AND MEASURE OF DAMAGES	[174]	
ISSUE IIIa	[175]	
ISSUE IIIb: LOSS OF A CHANCE	[176]–[180]	
ISSUE IV: AVAILABILITY OF ARTICLE 7(e)	[181]–[187]	<i>d</i>
ISSUE V: GENERIC ISSUES OF QUANTUM ARISING OUT OF THE LEAD CASES	[188]–[189]	
Evidence	[189]	
HEPATITIS C: THE DISEASE AND ITS TREATMENT	[190]–[210]	
Clearance of the virus	[191]–[192]	<i>e</i>
The course of the disease	[193]–[195]	
Prevalence of Hepatitis C	[196]	
Transmission of Hepatitis C	[197]–[199]	
Prognosis	[200]	
Treatments	[201]–[205]	
The effect of Hepatitis C	[206]–[210]	<i>f</i>
ISSUES OF DAMAGES	[211]–[212]	
Provisional damages	[211]	
Heads of damage	[212]	
PSLA	[213]–[232]	
'Stigma' or handicap	[219]–[220]	<i>g</i>
Employment handicap	[221]–[222]	
Financial products/insurance handicap	[223]–[225]	
The provision of gratuitous services	[226]–[227]	
The claimants' submissions	[228]	
The defendants' response	[229]–[231]	<i>h</i>
Discount rate	[232]	
ISSUE VI: THE SIX LEAD CASES	[233]–[283] ^e	
JUDGMENT	[284]	

THE CLAIMANTS

[1] This trial has concerned the claims of 114 claimants for recovery of damages arising out of their infection with Hepatitis C from blood and blood products through blood transfusions from 1 March 1988. It has been the first and

d Paragraphs [147]–[169] are not included in this report.

e Paragraphs [233]–[283] are not included in this report.

a main trial heard by me as the assigned judge within the Hepatitis Litigation, which was the subject matter of a Practice Direction issued by the Lord Chief Justice on 30 July 1998. This trial has been limited to consideration of the case brought by those claimants infected with Hepatitis C from blood and blood products who are making claims under the Consumer Protection Act 1987 (CPA). There is a small number of other claimants within the group action whose claims
b are not being dealt with by this trial, for example those not claiming under the CPA and/or claiming in relation to infection as a result of the transplant of body parts and/or with Hepatitis B: their claims are to be dealt with so far as possible later this year. The 114 claimants received blood transfusions or blood products usually in the course of undergoing surgery, whether consequent upon having suffered an accident or otherwise, or immediately after childbirth or in the course
c of treatment for a blood disorder. The earliest date of infection in respect of which claimants can make such claims is 1 March 1988, being the date when the CPA was brought into effect. Most of the claimants have been identified by the defendants' own admirable Look-Back programme, which began in 1995. There were, fortunately, relatively few such sufferers, and it should be said immediately
d that there is no question of their having received 'contaminated' blood, that is blood infected by some outside agent: the blood they received was 'infected' because, exceptionally, the donor's blood was infected by Hepatitis C.

CAUSE OF ACTION

e [2] The claims the subject matter of this trial are not in negligence, but are put against the defendants by way of 'strict' or 'objective' liability by virtue of the CPA, which implemented in the United Kingdom the European Union (then the EEC) Product Liability Directive of 1985: Council Directive (EEC) 85/374 (on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products). The directive is not,
f in any event in this action, said to be directly enforceable against the defendants by the claimants, who rely for their cause of action on the CPA. However, as below appears, the European Commission complained, by application lodged at the Court of Justice of the European Communities on 20 September 1995, that the United Kingdom Government had not fulfilled its obligations under the directive and under the EC Treaty by implementing the CPA in the terms it had.
g Although the Court of Justice dismissed that application, it is apparent from the judgment of the Court of Justice, reported as *European Commission v UK* Case C-300/95 [1997] All ER (EC) 481, that, there not at that stage having been any decisions of the English courts, nor indeed any facts before the Court of Justice, the Court of Justice was concluding that, whatever be the precise terms of the
h CPA, the United Kingdom *would* so implement and construe the CPA as to be consistent with the directive—not least by virtue of s 1(1) of the CPA, which reads as follows: '[Part I] shall have effect for the purpose of making such provision as is necessary in order to comply with the Product Liability Directive and shall be construed accordingly.' Consequently both parties have during this trial almost
j exclusively concentrated on the terms of the directive, on the basis that, in so far as the wording of the CPA, in relation to matters which have been the subject matter of particular issue in this case, differs from the equivalent articles in the directive, it should not be construed differently from the directive; and consequently the practical course was to go straight to the fount, the directive itself. As will be seen, the arguments were directed mainly to the true and proper

construction of art 6 of the directive (the equivalent being s 3 of the CPA) and art 7(e) (the equivalent being s 4(1)(e)), and consequently it is with those articles, and not the relevant sections, with which this judgment will be primarily, if not exclusively, concerned. It is conceded for the purpose of these proceedings that the blood or blood products by which the claimants were infected are products within the meaning of the CPA and the directive, and that the defendants' production of blood was, for the purpose of the directive, an industrial process.

THE DEFENDANTS

[3] The National Health Service bodies responsible for the production and supply of blood and blood products prior to 1 April 1993 in England (and also covering northern Wales) were 14 regional blood transfusion centres (RTCs), controlled and administered by regional health authorities. From that date, by the National Blood Authority (Establishment and Constitution) Order 1993, SI 1993/583, the National Blood Authority (NBA) was established, with responsibility for the RTCs and both central blood laboratories (the Central Blood Laboratory Authority (CBLA), which itself had responsibility for the Blood Products (later Bio Products) Laboratory (BPL), and the Blood Groups Research Laboratory (BGRL)). Subsequently the National Blood Authority (Establishment and Constitution) Amendment Order 1994, SI 1994/589 provided that all rights enforceable by or against a regional health authority in respect of the exercise of functions which became exercisable by the NBA were to be exercisable against the NBA. So far as Wales is concerned, those parts of Wales not serviced by the Mersey RTC were covered by a transfusion centre in Cardiff operated by the South Glamorgan Health Authority. Responsibility for that, and for the provision of a blood transfusion service in Wales, was transferred not to the NBA but to the Welsh Health Common Services Authority, and as from 1 April 1999 was further transferred to Velindre NHS Trust, which is now the relevant defendant so far as any liabilities to the claimants in respect of the balance of Wales is concerned. I shall refer in this judgment to 'the defendants' without taking into account the various changes of identity and responsibility.

THE PROCEEDINGS

[4] The group action effectively commenced with a generic order for directions on 1 May 1998 made by Master Eyre, who was assigned master, which set out the basic rules for the conduct of the Hepatitis Litigation, gave leave to issue an omnibus writ and provided for the maintenance of a Hepatitis Register. The omnibus writ was issued on 1 May 1998. I was appointed as assigned judge in February 1999, and Master Eyre and I have made a number of orders since then, which have, with the considerable co-operation of those representing the parties, led to the identification and trial of generic issues and of six lead cases. Each claimant has been entitled to have his or her own solicitor, but the generic aspects of the action have been handled, and the individual cases co-ordinated, on the claimants' behalf by Messrs Deas Mallen, instructing Michael Brooke QC, Stuart Brown QC, Ian Forrester QC and Jalil Asif. The defendants' solicitors have been Messrs Davies Arnold Cooper, instructing Nicholas Underhill QC, Philip Brook Smith and Louise Merrett. They have together worked extraordinarily hard in order to achieve a miracle of good order and clarity, by slimming down the issues, where at all possible, and managing to contain a myriad of documentation within a relatively small compass and a relatively small number

a of files. By the third generic order of 26 February 1999 I ordered that the generic trial of issues to be agreed and/or determined take place in October 2000, and by dint of the co-operation and hard work to which I have referred, this has occurred, and was more or less contained within the original time estimate of three months: I have been enormously assisted by the way the case has been both industriously prepared and skilfully, persuasively and economically argued and presented. The generic issues effectively amounted to whether the defendants are liable to the claimants under the CPA, ie whether the claimants as a whole can prove that (assuming injury, causation and loss can be proved in respect of each claimant) the defendants are liable under s 3 (art 6) and not exonerated within s 4(1)(e) (art 7(e)), to which I shall refer. I have also heard six lead cases, in which, on the assumption of having established liability generically under the CPA, such claimants have sought to prove individual liability and quantum, both on their own behalf and in order to resolve generic issues relating to quantum in such a way as to assist in the subsequent disposal of the other cases. All the claimants have, by an unopposed order in May 1998, been entitled to remain anonymous, and the six lead claimants have been known by the codes of Mr S, Miss T, Mr U, Ms V, Mr W and Mrs X. As will be seen, these six lead claimants have been carefully chosen (the equal balance of their sex is, I believe, a coincidence) to cover and illustrate a spread of consequences from their Hepatitis C infection: ranging from Mr S, now 17, who was infected by a blood transfusion after a road traffic accident at the age of 7, but had the good fortune that the virus spontaneously cleared his blood and has not recurred: through to Mrs X, a lady of 56, who at the age of 45 was infected by a blood transfusion in the course of routine surgery, and whose treatment for Hepatitis C was not successful, such that her condition progressed to cirrhosis of the liver (severe damage and/or scarring to liver tissue (fibrosis)), resulting in progressive deterioration in liver function, and a consequent liver transplant, which to date has been successful, although her Hepatitis C infection remains.

SETTLEMENT

[5] After the case started, I was informed that it had been agreed between the parties that the claims of almost all those claimants already then party to the action who were infected on or after 1 April 1991 would no longer be opposed, on the basis that they would each receive 90% of whatever sum I should find (in the case of those lead claimants falling within such category, being Mr S and Mr W), or as should thereafter be agreed or determined (in the case of the other claimants) in the light of my determination of the issues, and my resolution of the amounts otherwise due in respect of the lead cases. This agreement made the need for any detailed consideration of the facts relating to the period subsequent to 1 April 1991 very much reduced. Its effect, however, overall is that, subject to that somewhat foreshortened consideration of the timescale, in so far as I have had to consider the factual history, the issue of liability which I have to decide remains unaltered; but so far as concerns two of the lead claimants and 19 of the other claimants, their individual liability no longer being contested, their dispute has become one as to quantum only.

BLOOD TRANSFUSION

[6] Organised blood transfusion began in England and Wales in 1921. The practice (unlike in the United States, where donors were paid until the 1970s) was

of donation by unpaid volunteers. By 1970 the 14 RTCs (organised into three geographical divisions as from 1978) and the South Glamorgan Health Authority were responsible for the collection of blood from voluntary donors, the processing and testing of blood donations and the supply of blood to hospitals within their area, and on some occasions to other hospitals and bodies outside their region. Each RTC was managed by its own independent medically qualified regional transfusion director, but, although there were some central co-ordinating arrangements, there was no centralised administration until 1988, when the National Directorate of the National Blood Transfusion Service (NBTS) was formed, and Dr Harold Gunson was appointed as director. As set out in [3] above, this was replaced as from 1 April 1993 by the NBA, with full central authority, and Dr Gunson became national medical director, in which post he remained until his retirement in July 1994, since when he has been a part-time consultant to the NBA.

[7] Blood is traditionally donated two to three times per year, by voluntary donors. It is collected by encouraging the donor to bleed into a collection bag, where the blood is mixed with an anti-coagulant. Each donor's blood will be kept separate, and separately identifiable, though it may be retained and used as whole blood, to be transfused to those suffering serious life-threatening haemorrhages, or may be separated out into constituent parts, such as red cell concentrates, white cell concentrates, platelet concentrates, fresh frozen plasma or other blood products. Depending on how much blood or blood products a patient subsequently needs, he may derive such blood or blood products from a number of different donors. Blood is given to a patient in units, that is bags, each from a single donor. Rarely, a single unit is supplied to a patient, but for serious operations or illnesses many units, from different donors, may be necessary. Autologous transfusion, that is the use of a patient's own blood, which is a rare alternative method, though originally canvassed, did not materially feature in the trial.

HEPATITIS

[8] Hepatitis simply means 'inflammation of the liver'. It can result from a number of different causes, including self-inflicted substance abuse. It has been known since the 1940s that hepatitis can be transmitted by transfusions of blood and plasma. It quickly became apparent that there was a distinction between what was then called infectious hepatitis (now known as Hepatitis A) and serum hepatitis (now known as Hepatitis B). The Hepatitis A virus was identified by Feinstone and others in 1973, and is transmitted almost entirely from the oral and faecal routes, rather than by the transfusion of serum and plasma. The Hepatitis B virus (found in the serum of an Australian Aboriginal and called the 'Australia antigen') was identified by Blumberg and others in 1964. Tests to screen out Hepatitis B in blood were pioneered in 1971, and were introduced for all blood in the United Kingdom from December 1972. The combination of the exclusion of paid donors and of blood donors tested positive for Hepatitis B led in the United States to a substantial reduction in Post-Transfusion Hepatitis (PTH). However, by 1975 an agent other than Hepatitis A or B was recognised to be causing PTH, and it was found by Dr Harvey Alter (for many years the doyen of research in this field, based in the United States), of the National Institutes of Health in Maryland (NIH), that by 1985 PTH still occurred in 7% to 12% of blood transfusion recipients in the United States. The condition caused by this unknown agent was,

a as Dr Gunson put it, 'for the want of a better term', described by Dr Alter and others as Non-A Non-B Hepatitis (NANBH). The virus which caused NANBH was eventually first identified within the research department of a US company called Chiron Corp (Chiron) by Houghton and others, in spring 1988, and was announced by a news release by that company on 10 May 1988 which stated:

b 'Scientists at Chiron Corporation have identified, cloned and expressed proteins from a long-sought blood-borne hepatitis non-A, non-B virus and have developed a prototype immunoassay that may lead to a screening test for hepatitis non-A, non-B antibodies.'

c The virus was hurriedly itself christened, perhaps inevitably, as Hepatitis C. Its convenient shortening is Hep C. However, it has also been regularly known as HCV in the medical and blood professions, and the antibody to it, and hence the immunoassay subsequently developed, known as anti-HCV, and indeed Hepatitis B as HBV. This shorthand seems to me to be totally unnecessary and is responsible for a great deal of distress, embarrassment and indeed potentially for economic loss, because of the consequent association with the quite
d unconnected condition of HIV—the human immunodeficiency virus related to AIDS. The resultant confusion of sufferers themselves, of their relatives and friends, even of doctors and dentists, certainly of employers and insurance companies, has been natural and quite unnecessary. Though it is to be hoped that attitudes towards HIV sufferers change, and that a treatment for HIV is developed
e and expanded, nevertheless so far as Hepatitis C sufferers are concerned it is important to distinguish between the conditions. So far as concerns the source of infection by Hepatitis C, it can, on the evidence I have heard, almost never be transmitted sexually. In so far as its consequences are concerned, although it is and can be a serious condition, leading in rare cases to eventual death, many sufferers from Hepatitis C have few or no clinical symptoms, life expectancy is
f often unaffected and little if any change in lifestyle results, unlike the present position in relation to HIV sufferers. If this case and the publication of this judgment do any good at all to anyone, the one achievement that can be hoped for is the total and permanent abandonment of the shorthand of HCV, anti-HCV and indeed HBV.

g TESTING IN RESPECT OF NANBH/HEPATITIS C

Surrogate tests

[9] As appears above, there was neither identification of the NANBH virus nor, consequently, development of any screening test or assay so as to eliminate
h such virus from blood donations prior to their use, in the years up to 1988. There was, however, as will appear in more detail below, considerable research and academic discussion in the medical journals about the problem of PTH, particularly in the United States, which was still suffering from the aftermath of paid donors, and at all times appears to have had a much higher incidence of PTH
j than Europe. There was discussion as to whether to introduce in the United States what became known as 'surrogate tests'; but after lengthy and detailed studies carried out and reported by two prestigious groups, the Transfusion Transmitted Virus Study ('TTVS') and the NIH Study (the latter including Dr Alter), published in 1981 and subsequent years, and, after considerable discussion in committees and in the medical journals, no surrogate tests were

introduced. The two tests that were being looked at by the two bodies were the ALT test and the anti-HBc test. These were as follows. (i) *ALT*. This test measures the level of an enzyme, ALT (Alanine Aminotransferase), in the blood. This was a test regularly used by hepatologists in the diagnosis and treatment of liver diseases. Raised ALT in the blood could suggest abnormality of liver function: it could indicate the presence of hepatitis; it could on the other hand, even where substantially raised, be an indicator of other liver conditions or simply of high alcohol intake and/or obesity. An ALT test therefore did not test for the presence of hepatitis or the NANBH virus; and a 'positive' test (about the marker for which there was in any event no unanimity, because different 'cut-offs' were adopted in different laboratories and in different countries) thus did not signify the presence of hepatitis, but was only a possible indicator of it. Hence a 'surrogate' test. (ii) *Anti-HBc*. A virus or antigen can have an envelope containing a core. Thus there is reference to surface antigen and core antigen. A healthy body develops antibodies, which hopefully resist the antigens, by binding on them. Some tests identify the antigen (whether the surface or the core) and some the antibodies. The screening test introduced for Hepatitis B identified the Hep B surface antigen (HBsAg). An additional test was also developed, but not used as the screening test for Hep B, which could identify, not the Hep B core antigen (HBcAg), but the antibody to the Hep B core antigen (anti-HBc). Such a test therefore, which was only identifying the antibody to Hep B, could plainly not identify (what had in any event not been itself discovered) the NANBH antigen or indeed antibody. However, it was contended that it could provide what was called a 'lifestyle marker'. Those who had had, but had recovered from, Hepatitis B in the past (and thus would no longer test positive for the Hep B antigen) would or could retain in their blood traces of the Hep B antibody. It could thus be identified by the use of the anti-HBc test whether someone had had Hepatitis B, and it was suggested that a donor with past exposure to Hepatitis B would be more likely to have been exposed also to the NANBH agent, eg by intravenous drug use. This was the other suggested 'surrogate test'.

[10] As will appear in more detail below, the United States did not introduce either of these surrogate tests after the detailed studies referred to above: ALT testing (but not anti-HBc) was introduced in Germany as early as 1965 and in Italy in 1970, but neither in the United Kingdom nor in any other country, so far as is known to the parties in this case, was either test then introduced. The United States, however, introduced both tests starting from September 1986. As will appear, albeit that discussion continued, those responsible for blood transfusion in the United Kingdom did not support, and did not introduce, the surrogate tests, notwithstanding their adoption in the United States, and, once Chiron had pioneered the assay in respect of Hepatitis C, they concentrated upon whether and when to introduce that test.

[11] *Anti-Hep C screening*. After the identification of the Hepatitis C virus, development speedily continued, as indeed was indicated in the Chiron news release, of an assay: well in the lead was a US company called Ortho Diagnostic Inc (Ortho) (Chiron's licensee) followed some time later by another US company, Abbott Laboratories Inc (Abbott) and, less successfully and later still, by others. Known as anti-HCV, but, for the reasons I have given, to be resolutely called, at any rate by me, anti-Hep C, this assay did not detect the antigen, but was a test for the antibody to the Hepatitis C virus (a test to identify the antigen took very much longer to develop, by means of polymerase chain reaction (PCR)—later

a 'NAT' (nucleic acid testing)—and is not relevant to the timescale which I am now considering). The anti-Hep C assay was an enzyme-linked immunoabsorbent assay (ELISA). The details of the Ortho Elisa were disclosed in April 1989 and were fully canvassed at a well-attended symposium organised by Ortho in Rome on 14–15 September 1989, when it was given backing by, among others, Dr Alter. Dr Gunson came away impressed, and reported back to the two high-powered

b committees on which he sat, the United Kingdom Advisory Committee on Virological Safety of Blood (ACVSB), and the United Kingdom Advisory Committee on Transfusion Transmitted Diseases (ACTTD), of which latter he was the chairman. The factual history will appear below in greater detail. At this stage it is sufficient to set out as follows. (i) At this time the Ortho Elisa had only just been developed. It was a 'first generation' test and there were concerns about its

c sensitivity (not catching all it should) and its specificity (catching those it should not). There was no supplementary or confirmatory test yet developed to verify or cross-check its findings and increase the specificity of the process. (ii) No export licence was obtained for export of the assay from the USA until the end of November 1989, and the approval by the US Food and Drugs Administration

d (FDA) for its use within the USA was not granted until 2 May 1990. (iii) Recommendations to proceed with the introduction of the anti-Hep C testing were made by the relevant United Kingdom committee, the ACVSB, in July and November 1990, subject to the holding of various trials. Ministerial approval was given on 21 January 1991 and a programme of implementation was then commenced for all RTCs. The tests (by now second generation tests, and

e with a supplementary test available for confirmatory purposes in place) were introduced throughout England and Wales on 1 September 1991. However, as set out above, the defendants have accepted that the relevant date for these proceedings is 1 April 1991 and most claimants who were infected on or after that date have received an admission of 90% liability. Since the introduction of the

f tests on 1 September 1991, the problem of PTH in the United Kingdom has been all but eliminated.

THE CLAIMS

g [12] The claims in this trial have been that, pursuant to the CPA, those who received blood or blood products infected by Hepatitis C subsequent to 1 March 1988, when the Act came into effect, are entitled to recover damages: that is notwithstanding that: (i) the Hepatitis C virus itself had not been discovered or identified at the date when the claims commence on 1 March 1988; (ii) no screening test to discover the presence of such virus in a donor's blood was even known of, certainly not available, until Ortho's assay, first publicised in

h spring/summer 1989; and (iii) it is not sought to be alleged (at least not in this trial) that the United Kingdom blood authorities for whom the defendants are responsible were negligent in not introducing the screening tests until they did on 1 September 1991 (or now, as a result of the agreed concession, 1 April 1991) nor that they were negligent in not having introduced surrogate tests. The case

j which is put is that they are liable irrespective of the absence of any fault, under the directive and the CPA.

THE DIRECTIVE

[13] The directive, resolved by the Council on 25 July 1985, had taken a long time in coming. In the first instance this was because discussion of it, which had

begun in 1969/1970 in the light of the Thalidomide scandal, was held up largely due to the impending arrival of a number of new members of the Community, including the United Kingdom; but then because of the very lengthy processes of discussion and negotiation, and of intergovernmental and parliamentary discussion, which then took place. A number of matters appear to be common ground between the parties to these proceedings: (i) that its purpose was to increase consumer protection; (ii) that it introduced an obligation on producers which was irrespective of fault, by way of objective or strict liability, but not absolute liability; (iii) that its aim was to render compensation of the injured consumer easier, by removing the concept of negligence as an element of liability and thus of the proof of liability; and (iv) that it left an escape clause (in those Community jurisdictions, like the United Kingdom, where such provision was desired) for products otherwise found pursuant to the directive to be defective, if the producer could bring himself within what was, in the course of the 'travaux préparatoires', described as a 'development risks' defence.

[14] The parties before me agreed to number what are in the published directive an otherwise unnumbered set of 19 recitals. The significant ones for the purpose of these proceedings have been as follows:

[1] Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

[2] Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production;

[3] Whereas liability without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products ...

[6] Whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

[7] Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances ...

[11] Whereas products age in the course of time, higher safety standards are developed and the state of science and technology progresses; whereas, therefore, it would not be reasonable to make the producer liable for an unlimited period for the effectiveness of his product; whereas, therefore, liability should expire after a reasonable length of time, without prejudice to claims pending at law ...

a [13] Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the
b sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible ...

c [16] Whereas, for similar reasons, the possibility offered to a producer to free himself from liability if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered may be felt in certain
d Member States to restrict unduly the protection of the consumer; whereas it should therefore be possible for a Member State to maintain in its legislation or to provide by new legislation that this exonerating circumstance is not admitted; whereas, in the case of new legislation, making use of this derogation should, however, be subject to a Community stand-still procedure, in order to raise, if possible, the level of protection in a uniform manner throughout the Community.'

e [15] It is not in dispute between the parties that the directive can and must be construed by reference to its recitals and indeed to its legislative purpose, insofar as it can be gleaned otherwise than from the recitals. The following points are also not in dispute and are in any event clear: (i) that it is proper to look at travaux préparatoires to glean such purpose, but with caution, always chary of early discussions or disputations which may have been overtaken by later events, or of documents which may always have been internal or confidential and not reflected in the decisions; (ii) that it is important to bear in mind in construing a
f directive that there may be an 'autonomous' or Community meaning or construction for legislation intending to harmonise and to be of effect in diverse jurisdictions within the Community; and that some guidance can be obtained from other languages in which the directive was published, all of which are of equal weight, the more so if some appear clear and congruent; and to some
g extent also from the way in which a directive has been implemented or applied in other Community countries.

[16] The relevant articles are as follows:

Article 1

The producer shall be liable for damage caused by a defect in his product ...

Article 4

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage ...

Article 6

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
j (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Article 7

The producer shall not be liable as a result of this Directive if he proves: (a) that he did not put the product into circulation; or (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or ... (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ...

Article 8

1. Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.

2 The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.

Article 9

For the purpose of Article 1, "damage" means: (a) damage caused by death or by personal injury ...

Article 12

The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability ...

Article 15

1. Each Member State may ... (b) by way of derogation from Article 7(e) maintain or ... provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.'

THE CPA

[17] When the United Kingdom implemented the directive, it did so by way of the CPA, which came into force on 15 May 1987, but with effect from 1 March 1988. There have been few decisions under the CPA. I have been referred only to two—one unreported in the Court of Appeal, *Abouzaid v Mothercare (UK) Ltd* [2000] CA Transcript 2279 ('the Cosytoes case') and one a decision of Ian Kennedy J, which has been reported (*Richardson v LRC Products Ltd* [2000] Lloyd's Rep Med 280: I shall refer to them both. However, in neither case was there the need nor the opportunity for the kind of detailed consideration of the CPA, and in particular of all the issues raised by arts 6 and 7(e) of the directive (respectively ss 3 and 4(1)(e) of the CPA), that there has been in this case. Apart from the evidence and its analysis, and from the separate consideration of the lead cases, I have had the great benefit of detailed submissions in writing, and some ten days of exegesis and argument orally in opening and closing by leading counsel, just on the law, including authorities and academic writings from France, Germany, Spain, Portugal, Sweden, Denmark, Belgium, Italy, Holland, Australia and the United States, as well as the United Kingdom and the Court of Justice. In the light

a of the concession in this case that blood is a product within the directive, and the nature of the issues for determination and the possible consequent knock-on effect of this judgment (subject always to any appeal to higher courts in this country or on reference to Europe), I note without surprise that Professor Stapleton, probably the most eminent and certainly the most prolific of the common law writers on the topic of product liability, refers to the fact that this case is pending in her introduction to the recent volume in the Butterworths Common Law Series *The Law of Product Liability* (2nd edn, 2000) edited by Professor Howells.

b [18] The most authoritative consideration of the CPA has of course been in the case of *European Commission v UK*, to which I have referred in [2] above, and that was consideration in principle, not by reference to the facts of any case, and directed specifically to art 7(e) (and s 4(1)(e)). As I have set out in [2], the Commission contended that the section did not properly or lawfully reflect the article as it should. As will be seen below, it adopts different wording from the article, and this may result from the United Kingdom Government's own unilateral declaration that it made at the time of the adoption of the directive, namely—

c 'this provision should be interpreted in the sense that the producer shall not be liable if he proves that, given the state of scientific knowledge at the time the product was put into circulation, no producer of a product of that kind could have been expected to have perceived that it was defective in its design.'

d This falls to be compared with the text of the article, which I have set out in [16] above. Section 4(1) of the CPA as enacted is as follows (I italicise the significant differences from the article):

e 'In any civil proceedings ... against any person ... in respect of a defect in a product it shall be a defence for him to show ... (e) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control ...'

f [19] Whatever the content of a unilateral declaration may be, a Community government is obliged in law to enact the directive, and the Commission contended before the Court of Justice that the United Kingdom Government had not done so. The Court of Justice concluded that, notwithstanding that there was a difference of wording, it could not be satisfied that it was intended by the United Kingdom to interpret its statute differently from the directive, nor was the United Kingdom entitled to do so. The Advocate General (Tesauro) stated in his opinion ([1997] All ER (EC) 481 at 490–491 (para 25)):

g 'I consider that I am unable to share the Commission's proposition that there is an irremediable conflict between it and the national provision at issue. Indeed, there is no denying that the wording of s 4(1)(e) of the [CPA] contains an element of potential ambiguity: in so far as it refers to what might be expected of the producer, it could be interpreted more broadly than it should. Notwithstanding this, I do not consider that the reference to the "ability of the producer", despite its general nature, may or even must

(necessarily) authorise interpretations contrary to the rationale and the aims of the directive.'

[20] After its own analysis of art 7(e), the Court of Justice concluded (at 495–496):

'32. The Commission takes the view that inasmuch as s 4(1)(e) of the [CPA] refers to what may be expected of a producer of products of the same description as the product in question, its wording clearly conflicts with art 7(e) of the directive in that it permits account to be taken of the subjective knowledge of a producer taking reasonable care, having regard to the standard precautions taken in the industrial sector in question.

33. That argument must be rejected in so far as it selectively stresses particular terms used in s 4(1)(e) without demonstrating that the general legal context of the provision at issue fails effectively to secure full application of the directive. Taking that context into account, the Commission has failed to make out its claim that the result intended by art 7(e) of the directive would clearly not be achieved in the domestic legal order.

34. First, s 4(1)(e) ... places the burden of proof on the producer wishing to rely on the defence, as art 7 of the directive requires.

35. Second, s 4(1)(e) places no restriction on the state and degree of scientific and technical knowledge at the material time which is to be taken into account.

36. Third, its wording as such does not suggest, as the Commission alleges, that the availability of the defence depends on the subjective knowledge of a producer taking reasonable care in the light of the standard precautions taken in the industrial sector in question.

37. Fourth, the court has consistently held that the scope of national laws ... must be assessed in the light of the interpretation given to them by national courts ... Yet in this case the Commission has not referred in support of its application to any national judicial decision, which, in its view, interprets the domestic provision at issue inconsistent with the directive.

38. Lastly, there is nothing in the material produced to the court to suggest that courts in the United Kingdom, if called upon to interpret s 4(1)(e), would not do so in the light of the wording and the purpose of the directive so as to achieve the result which it has in view and thereby comply with the third paragraph of art 189 of the Treaty ... Moreover, s (1)(1) of the [CPA] expressly imposes such an obligation on the national courts.

39. It follows that the Commission has failed to make out its allegation that, having regard to its general legal context and especially s 1(1) of the Act, s 4(1)(e) clearly conflicts with art 7(e) of the directive. As a result, the application must be dismissed.'

[21] Although the United Kingdom Government has not amended s 4(1)(e) of the CPA so as to bring it in line with the wording of the directive, there is thus binding authority of the Court of Justice that it must be so construed. Hence, although I shall in certain respects require to consider sections of the CPA, when dealing with the issues raised before me of causation and/or quantum of loss, to which I shall refer, the major discussions in this case, and all the areas of most live dispute, have concentrated entirely upon the wording of arts 6 and 7(e) of the

- a directive, and not upon the equivalent sections of the CPA, to which I shall make little or no further reference.

[22] In those circumstances there is no need for me to set out in full s 3 of the CPA which implements art 6, although it may be worth pointing out that the words in art 6(1)(a) 'the presentation of the product' are helpfully expanded and clarified in the CPA in the following way—the manner in which, and purposes b for which, the product has been marketed, its getup, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product' (s 3(2)(a); and that the words with which s 3(2) ends are perhaps a cogent way of expressing art 6(2) which I have set out above, and in particular the reference in c the article to 'a better product [being] subsequently put into circulation' namely: 'Nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.'

- [23] I shall set out below, when they fall for consideration, the two other sections of the CPA to which reference was made in the course of the trial, with d respect to the issue which I have described as causation and/or quantification of loss, namely ss 2(1) and 5(1).

THE STRUCTURE OF THIS JUDGMENT

- [24] I propose to adopt the following structure in this judgment. I shall begin e with the most significant legal questions, arising out of the construction of the directive. I should at this point make it clear that because I have heard all the facts of the case upon which either side might wish to rely upon any of the issues, I shall make the necessary findings, irrespective of my conclusions in law. This is because both parties wish to take advantage of the very full consideration which there has been so that, if there were appeals or references leading to different f conclusions of law in due course, there would be the factual material for the substitution of a different result. In particular, as will appear, if the claimants be right about their construction of the directive, then little if any of the evidence that I have heard relating to the factual history with regard to Hepatitis C and screening would be admissible or relevant. I shall, however, resist the g temptation, nor am I in any event permitted by the approach of the parties, if I were to resolve such point of law in favour of the claimants, not to proceed to resolve the factual issues which would then have become irrelevant. Equally, at any rate until there was the 90% concession, which has meant that liability to some claimants is no longer in issue, it might have been that if I had found for the defendants on liability I would not have needed to go on to decide what I would h have awarded to the claimants, had they been successful: but again, for similar reasons, this is not a course that I have adopted. Accordingly, whatever my decisions on the various issues, I have proceeded to decide the further issues, whether or not they continue to arise.

- j THE SIX ISSUES

[25] This raises the question of whether the defendants are liable to the claimants, without consideration of the history of testing. The claimants allege that, upon the basis of a proper construction of the directive and the agreed factual common ground, the blood was defective under art 6 and the defendants have no escape within art 7(e), without need for further consideration of the facts

(Issue I). This was described in the course of the hearing as the 'Forrester case' or the 'Brown short case' (which descriptions derogate from the role of Mr Brooke QC for the claimants who ably married together all the claimants' arguments).

[26] *Factual case*: legitimate expectation (Issue II). Whether or not I find the defendants so liable, for the reasons I have set out above, I must proceed to resolve the factual questions which the claimants assert to be unnecessary—the 'Brown case'. The claimants assert, if they need to, that, in the light of the factual history relied upon by the defendants, the blood was defective within art 6. I shall also make sufficient findings to resolve any factual issues under art 7(e), as to which see [28] below.

[27] I must then resolve the issue of the nature and measure of damages under art 6 in the event that the defendants were found liable (and in any event, for the reasons given above): (i) on the basis of my conclusions on Issue I (Issue IIIa) and (ii) on the basis of my conclusions on Issue II (Issue IIIb).

[28] I must decide whether the defendants escape any such liability under art 7(e): (i) in the light of my conclusions on the construction of art 7(e) on Issue I (Issue IVa) and/or (ii) in the light of my conclusions on Issue II (Issue IVb).

[29] I shall turn then to the six lead cases. Subject always to the outcome of Issue I, I may have made, in my consideration in respect of Issue II, findings as to the date when tests could legitimately have been expected to be implemented which might mean that, depending upon their date of infection, only certain claimants succeed, ie those infected after such and such a date, while others do not. That apart, I have heard a good deal of evidence about Hepatitis C and its prognosis and consequences generally, and in addition all the evidence relating to the individual circumstances of the six lead claimants (two of whom, as previously discussed, will in any event receive compensation in accordance with my conclusions on quantum, by virtue of the 90% concession agreement).

[30] I shall, again even if I shall have found that some or all of the claimants fail (apart from those covered by the concession): (i) make findings on the generic issues raised relating to quantum arising out of and by reference to the particular circumstances of the six lead claimants, including such matters as recoverability or otherwise of damages in respect of alleged social or insurance or employment stigma resulting from their Hepatitis condition, past or present (Issue V); and (ii) assess damages, in the case of five of the lead claimants by way of provisional damages, on the basis of what have now, after considerable discussion and argument, become agreed triggers for any potential future entitlement to additional damages pursuant to s 32A of the Supreme Court Act 1981, and in the case of one of them, Mr W, at his request, final damages (Issue VI).

ARTICLE 6

The common ground

[31] I turn then to consideration of art 6. There is a foundation of common ground. (i) Article 6 defines 'defective', and hence a defect. A harmful characteristic in a product, which has led to injury or damage, may or may not be a defect as so defined, and thus within the meaning of the directive. It is common ground that the liability is 'defect-based' and not 'fault-based', ie that a producer's liability is irrespective of fault (Recitals 2, 6). (ii) The purpose of the directive is to achieve a higher and consistent level of consumer protection throughout the Community and render recovery of compensation easier, and uncomplicated by

a the need for proof of negligence. Both these propositions are expressed by Christopher Newdick in two published articles, first in the Law Quarterly Review 'The Future of Negligence in Product Liability' [1987] 103 LQR 288:

b '... liability for defective products is no longer to be dependent on fault, but rather on the mere fact of defectiveness. The broad reasons of policy for the change continue to be articulated by the injuries suffered by the thalidomide children. By the attention it devotes to consideration of the alleged fault of the defendant, the law of Negligence is unable to consider the interests of the person for whom the action has been brought.'

c and also in 'The Development Risk Defence of the Consumer Protection Act 1987' [1988] CLJ 455 where, before going on to deal with art 7(e) as a possible exception, he states:

d 'The ... Directive ... introduces a new regime of strict product liability to the member states of the Community. Those injured by products may recover by showing that the product is "defective", i.e., that it "does not provide the safety which a person is entitled to expect ..." The advantage of this approach for the individual is that liability turns on the existence of a defect alone. Unlike the law of Negligence, no question of foresight of the danger, or of the precautions taken to avoid it, arises for consideration. Strict product liability depends on the condition of the product, not the fault of its maker or supplier.'

e (iii) The onus of proof is upon the claimants to prove the product to be defective. (iv) The question to be resolved is the safety or the degree or level of safety or safeness which persons generally are entitled to expect. The test is not that of an absolute level of safety, nor an absolute liability for any injury caused by the harmful characteristic. (v) In the assessment of that question the expectation is that of persons generally, or the public at large. (vi) The safety is not what is actually expected by the public at large, but what they are *entitled* to expect. At one stage Mr Forrester QC contended that the process was to discover what the expectation was, and then see if it was legitimate; but, not least for the reasons set out in the next following subparagraph, he no longer actively pursued that contention. The common ground is that the question is what the legitimate expectation is of persons generally, ie what is legitimately to be expected, arrived at objectively. 'Legitimate expectation', rather than 'entitled expectation', appeared to all of us to be a more happy formulation (and is analogous to the formulation in other languages in which the directive is published); the use of that expression is not intended to import any administrative law concepts. (vii) The court decides what the public is entitled to expect: Dr Harald Bartl in *Produkthaftung nach neuem EG-Recht* (1989) described the judge (as translated from the German) as 'an informed representative of the public at large'. Mr Brown did not like this, and preferred to suggest simply that the judge is determining what level of safety the public is entitled to expect, but I do not consider the two descriptions inconsistent. Such objectively assessed legitimate expectation may accord with actual expectation; but it may be *more* than the public actually expects, thus imposing a higher standard of safety, or it may be *less* than the public actually expects. Alternatively the public may have no *actual* expectation—e.g. in relation to a new product—the word coined in argument for such an imaginary product was a 'scrid'. (viii) There are some products, which have harmful

characteristics in whole or in part, about which no complaint can be made. The examples that were used of products which have obviously dangerous characteristics by virtue of their very nature or intended use, were, on the one hand knives, guns and poisons and on the other hand alcohol, tobacco, perhaps foie gras. The existence of such products was recognised in an exchange of question and answer by Mrs Flesch MEP to the European Commission, answered by Viscount Davignon on behalf of the Commission in June 1980. The question read in material part as follows:

'This provision ought apparently to be interpreted in the sense that nobody can legitimately expect from a product which by its very nature carries a risk and which has been presented as such (instructions for use, labelling, publicity, etc.) a degree of safety which this product does not and cannot possess, with the result that this product would not therefore be defective within the meaning of the future directive.'

The answer was:

'The Commission agreed with the Honourable Member that nobody can expect from a product a degree of safety from risks which are, because of its particular nature, inherent in that product and generally known, e.g., the risk of damage to health caused by alcoholic beverages. Such a product is not defective within the meaning of ... the ... Directive.'

This does not of course amount to an exemption for such a product from the article, but simply an explanation of how the article operates. Such obvious danger or risk of injury is, not very felicitously, described by a Danish writer, Borge Dahl, as 'system' damage. Professor Howells in *The Law of Product Liability* at para 1.19 refers to this as a description of:

'The risks which are inherent within a product which it is nevertheless considered justifiable to market. Examples include the risk of being cut by a sharp knife and the risk of illness associated with such otherwise pleasure giving products [as] alcohol and tobacco ... The emphasis on the autonomy of the individual and his free choice to expose himself to risks has generally relieved the producer of ... liability. However this free choice must be an informed choice and so there has been a need to define which types of system damage users can be expected to be aware of from their general life experience (i.e., that knives can be sharp) and those that they have to be warned about (i.e., risks associated with drinking and smoking).'

Drugs with advertised side-effects may fall within this category. The defendants point out that, with other such products also, the known dangerous characteristics need not be the desired ones—eg carcinogenicity in tobacco. (ix) Article 6(2) means that such test must be applied as at the date when the product is put into circulation, ie tested against the safety then to be expected. It is apparent that a product may be compared with other products said to be safer, but will not be condemned simply because another safer product is subsequently put into circulation. (x) There is also important factual common ground. It has, as set out in [8] above, been known, at least since the 1970s, by blood producers and the medical profession, primarily blood specialists, hepatologists and epidemiologists, that there was a problem of infection by Hep C (formerly NANBH) in transfused blood, and that a percentage of such blood—in the United

- a Kingdom thought to be between 1% and 3%—was infected with NANBH/Hep C. The claimants say that such knowledge by the medical profession and blood producers is on the one hand irrelevant to art 6, and to the public's expectation, and legitimate expectation, and on the other rules out the producers from the protection of art 7(e). The defendants say that such risks so known, which they allege to be impossible to avoid or prevent, affect the legitimate expectation of the public, such as to exclude art 6, and, because they were unavoidable, qualify them, if necessary, for art 7(e).
- b

The differences between the parties

- [32] Having set out what is common ground, I now summarise briefly the difference between the two parties, some of which is already apparent from my setting in context of the factual common ground. (i) As to art 6, the claimants assert that, with the need for proof of negligence eliminated, consideration of the conduct of the producer, or of a reasonable or legitimately expectable producer, is inadmissible or irrelevant. Therefore questions of avoidability cannot and do not arise: what the defendants could or should have done differently; whether there were any steps or precautions reasonably available; and whether it was impossible to take any steps by way of prevention or avoidance, or impracticable or economically unreasonable. Such are not 'circumstances' falling to be considered within art 6. In so far as the risk was known to blood producers and the medical profession, it was not known to the public at large (save for those few patients who might ask their doctor, or read the occasional article about blood in a newspaper) and no risk that any percentage of transfused blood would be infected was accepted by them. (ii) The defendants assert that the risk was known to those who mattered, namely the medical profession, through whom blood was supplied. Avoiding the risk was impossible and unattainable, and it is not and cannot be legitimate to expect the unattainable. Avoidability or unavoidability is a circumstance to be taken into account within art 6. The public did not and/or was not entitled to expect 100% clean blood. The most they could legitimately expect was that all legitimately expectable (reasonably available) precautions—or in this case tests—had been taken or carried out. The claimants must therefore prove that they were legitimately entitled to expect more, and/or must disprove the unavoidability of the harmful characteristic. There would need to be an investigation as to whether it was impossible to avoid the risk and/or whether the producers had taken all legitimately expectable steps. In so far as there was thus an investigation analogous to, or involving similar facts to, an investigation into negligence, it was not an investigation of negligence by the individual producer and was necessary and, because it was not an investigation of fault, permissible. If, notwithstanding the known and unavoidable risk, the blood was nevertheless defective within art 6, then it is all the more necessary to construe art 7(e) so as to avail those who could not, in the then state of scientific and technical knowledge, identify the defect in a particular product so as to prevent its supply. (iii) The claimants respond that art 7(e) does not apply to risks which are known before the supply of the product, whether or not the defect can be identified in the particular product; and there are a number of other issues between the parties in respect of art 7(e) to which I shall return later.
- c
- d
- e
- f
- g
- h
- j

All circumstances

[33] Article 6 must then be considered against the background of this summary of the issues. In the establishment of the level of safety, art 6 provides

that the court (on behalf of the public at large) takes into account *all circumstances*, including the following. (i) *Presentation*, ie the way in which the product is presented, eg warnings and price. As set out above, the expanded wording of s 3(2)(a) of the CPA is helpful. (ii) The *use* to which the product could reasonably be expected to be put, eg: (a) if the product is not a familiar or usual one, such as a scrid, it will be necessary to find out what its expected or foreseeable use is; (b) if it is expected and required to be dangerous in respect of its expected use, eg a gun, then complaint cannot be made of that dangerousness; but complaint could still be made of a different dangerousness, such as if it exploded on the trigger being pulled; and (c) if it is not expected to be dangerous in respect of its expected use, but the use to which it is put is unexpected, then it may not be defective. (iii) The *time* when the product is circulated, for example when the product is out of date or stale.

[34] The question arises as to the status of the *circumstances* enumerated in art 6. Are they exclusive? Neither side, rightly, now suggests that they are. Indeed Mr Forrester, who had, at an interlocutory hearing, seemingly run a contention to that effect, no longer pursued this, and indeed suggested that some *circumstances* not specifically mentioned in the article, such as the circumstances of the supply of the product, may be relevant. That the *circumstances* are not exclusive obviously seems right. Are they then unlimited? There are various possibilities. (i) That they are to be construed ejusdem generis. This is asserted by Professor Taschner, the leading European expert on the directive, in his 1990 book *Produkthaftungsgesetz und EG-Produkthaftungsrichtlinie* p 297; but, despite diligent research, the claimants' team was unable to find any support for the proposition that such a rule of construction could be exemplified in European law. (ii) That they are to be construed as the most significant examples of the *circumstances*. There was some support for this proposition, both by way of some exemplars in European legislation—from which it could be suggested that European draftsmen had considered that the matters actually set out as examples were the ones most worthy of mention—and also by reference to the French language version of art 6, which used the word, before the list of the circumstances, 'notamment', and the German, which used 'insbesondere', both of which I take to mean 'in particular' or 'especially'—although other language versions use phraseology more similar to the English 'including'. (iii) That they are to be construed as unlimited. Even Mr Underhill, I think, did not so contend, but accepted that the *circumstances* would have to be 'relevant' circumstances. Mr Forrester of course submits that *circumstances* which are inconsistent with the purpose of the directive would not be 'relevant'. He also refers to Professor Rolland of Halle University, who, in his 1990 book *Produkthaftungsrecht* p 131 cites Professor Taschner in concluding (translated from the German) that, in relation to the art 6 circumstances, 'only such considerations are relevant which do not alter the meaning of the safety expectations of the public at large, which are assessed on the basis of objective criteria, but not the subjective necessities of the producer, and also not those of the user of the product'.

[35] The dispute therefore is as to what further, if anything, falls to be considered within 'all circumstances'. There is no dispute between the parties, as set out in para 31(i) and (ii) above, that consideration of the fault of the producer is excluded; but does consideration of 'all circumstances' include consideration of the conduct to be expected from the producer, the level of safety to be expected from a producer of that product? The parties agree that the starting point is the

- a particular product with the harmful characteristic, and if its inherent nature and intended use (e.g. poison) are dangerous, then there may not need to be any further consideration, provided that the injury resulted from that known danger. However, if the product was not intended to be dangerous, that is the harmful characteristic was not intended, by virtue of the intended use of the product, then there must be consideration of whether it was safe and the level of safety to be legitimately expected. At this stage, the defendants assert that part of the investigation consists of what steps could have been taken by a producer to avoid that harmful characteristic. The defendants assert that conduct is to be considered not by reference to identifying the individual producer's negligence, but by identifying and specifying the safety precautions that the public would or could reasonably expect from a producer of the product. The exercise is referred to as a balancing act; the more difficult it is to make safe, and the more beneficial the product, the less is expected and vice versa, an issue being whether a producer has complied with the safety precautions reasonably to be expected. This is contended by the defendants to be appropriately analogous to the 'risk/utility' consideration familiar from United States law, particularly as summarised in the US Second Restatement on Torts (1965). However—(i) the claimants point out that, although the Advocate General in *European Commission v UK* Case C-300/95 [1997] All ER (EC) 481 at 488 (para 17) records that the Commission's original proposal in 1976 drew its inspiration from the US model, it is clear from the travaux préparatoires that when submissions were made that a United States style formulation should be adopted, it was not: the rejected suggestions including (from a body called UNICE in 1980) that 'the fact that a product conforms with generally accepted standards should be prima facie evidence that the product is not defective' and, from the American Chamber of Commerce in Belgium in the same year, that the proposed article 'should be amended to include specific language concerning unavoidably unsafe but useful products ...
- f In drafting this amendment regard should be paid to the wording of Comment K to Section 402a of [the Second Restatement]'. (ii) Although the concept of 'unavoidably unsafe' has meant that producers have been found not liable in many states of the United States in respect of infected blood (see e.g. *Brody v Overlook Hospital* (1974) 317 A (2d) 392 (subsequently affirmed by the Supreme Court of New Jersey (1975) 332 A (2d) 596), the US Second Restatement has led to, or allowed for, a result, at least in Illinois, whereby there was strict liability imposed on the supplier of blood unavoidably infected with hepatitis (*Cunningham v McNeal Memorial Hospital* (1970) 47 Ill (2d) 443, Supreme Court of Illinois): which decision was dealt with statutorily, as a matter of public policy, by the giving of immunity to blood banks—a so-called 'blood-shield statute', passed in most states of the United States. (iii) The defendants themselves accept that the risk/utility model adopted in the United States cannot be applied in its entirety, because of the express exclusion, so far as the directive is concerned, of any question of liability for negligence. Nevertheless the defendants assert that there is a 'basket' of considerations: the likelihood of injury resulting and the seriousness of it if it results, the cost and the quality of the product, the efficacy of the product (with and without safety precautions), none of which would necessarily be contentious from the claimants' point of view. For if it were to be asserted by a producer that a product was very cheap, and thus might have been expected to have been less safe, that might, on the claimants' case, be part of the *presentation*, if it were simply a question of an alleged lowering of expectations by virtue of the

cheapness; while on the defendants' case the questions would arise in their own right as to what could have been practicable (or not) by way of safety precautions, and/or then perhaps as to the cost of such precautions, and perhaps the effect on the profitability of a producer. What would, on any basis, be contentious would be the further contents of the defendants' basket, namely the avoidability or unavailability of the danger, and the availability or unavailability of alternatives. The contentions proceed as follows. *The defendants* assert that, in looking at the product, it is essential to consider, in deciding what level of safety could reasonably have been expected, what more if anything could have been done: what precautions or tests could be used/should have been used/were available to be used/can legitimately be expected to have been used. If, the defendants contend, the producer did not use obviously available safety processes or precautions, then that itself must be a factor to be taken into account against him, just as it would be in his favour if all available safety precautions were adopted. They accept that the investigation of what level of safety the public is entitled to expect may involve consideration of factual issues which would also be relevant in a negligence inquiry, but they say that this would be a matter of overlap rather than duplication, and inevitable and acceptable. *The claimants*, however, assert that, given that it is common ground that the article imposes liability irrespective of fault, the exercise of considering what could or should have been done by the producer is an impermissible and irrelevant exercise, which lets questions of fault back in by the back door. They say that the consideration of what safety precautions should have been expected to have been adopted simply amounts to the introduction of a standard of legitimate expectability, rather than a standard of reasonableness, against which the conduct of a producer must be set: while the defendants may be asserting that they accept that the consideration of the conduct of the individual producer is not relevant, nevertheless by the very consideration of what steps could legitimately have been expected to have been taken (against which what did occur inevitably has to be set) the same result is achieved. The claimants contend that any consideration of the method or processes of production, including the safety precautions taken or not taken, is irrelevant. They assert that it is necessary only to look at the product itself (including comparison with similar or identical products on the market), which would involve its expected or intended use, without considering what more could have been done (and how easy or difficult or cheap or expensive it would have been to have done it). The safeness even of a scrid must be considered by reference to examination of such a product and its intended or foreseeable use, *not* its method of manufacture. *The defendants* counter that it would be impossible to carry out any comparative exercise without understanding what steps were taken, and why certain steps could or could not have been taken. If such comparison is with a later and safer product, the producer would then rely on art 6(2), to assert that the greater safety offered by a subsequent model was not to be held against him, pursuant to art 6(2): to which a claimant could inevitably seek to respond that, although the safer product was five years later, the producer could have taken the same steps five years earlier.

Non-standard products

[36] In any event, however, the claimants make a separate case in relation to the blood products here in issue: namely that they are what is called in the United States 'rogue products' or 'lemons', and in Germany 'Ausreisser'—escapees or

- a 'off the road' products. These are products which are isolated or rare specimens which are different from the other products of a similar series, different from the products as intended or desired by the producer. In the course of Mr Forrester's submissions, other more attractive or suitable descriptions were canvassed, and I have firmly settled on what I clearly prefer, namely the 'non-standard' product. Thus a *standard* product is one which is and performs as the producer intends. A
- b *non-standard* product is one which is different, obviously because it is deficient or inferior in terms of safety, from the standard product: and where it is the harmful characteristic or characteristics present in the non-standard product, but not in the standard product, which has or have caused the material injury or damage. Some Community jurisdictions in implementing the directive have specifically provided that there will be liability for 'non-standard' products, ie that such will
- c automatically be defective within art 6: Italy and Spain have done so by express legislation, and Dr Weber, in *Produkthaftung im Belgischen Recht* (1988) at pp 219–220, considers that that is now the position in Belgium also as a result of the implementation of the directive.

- [37] Were the infected bags of blood in this case non-standard products? The
- d claimants say Yes—99 out of 100 are safe and uninfected as intended. The defendants say No—all blood, derived as it is from a natural raw material, albeit then processed, is inherently risky. But the claimants assert that persons generally are entitled to expect that all blood and blood products used for medical treatment are safe, and that they will not receive the unsafe one in 100. The claimants say that this will only not be the case if the public does know and expect
- e that blood, like cigarettes or alcohol, is or may be defective, not because the public's expectation is limited to an expectation that legitimately expectable safety precautions will have been taken.

- [38] In a jurisdiction where, unlike Spain and Italy, and perhaps Belgium, no legislative distinction has been drawn between standard and non-standard
- f products, the distinction, even if I were to conclude that the blood bags in this case are non-standard products, would not be absolute. Non-standard products would not be automatically defective. A product may be unsafe because it differs from the standard product, or because the standard product itself is unsafe, or at risk of being unsafe. It may, however, be easier to prove defectiveness if the product differs from the standard product.
- g

Boxes

- [39] United States tort law has developed a difference between manufacturing defects, design defects and instruction defects (the last category being irrelevant for our purposes). This was worked through in case law, though it did not appear
- h in the Second Restatement, published in 1965, but it has been expressly incorporated into the Third Restatement, published in 1998 (s 2(a)(b)(c): Categories of Product Defects). There is almost a separate jurisprudence for manufacturing defects as opposed to design defects. A manufacturing defect is defined as being 'when the product departs from its intended design even though all possible care
- j was exercised in the preparation and marketing of the product' and a design defect as—

'when the foreseeable risks of harm imposed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of

distribution, and the omission of the alternative design renders the product not reasonably safe.'

The claimants say that, in terms of that dichotomy, the infected blood here is a manufacturing defect—an error in production has led to a one-off. The defendants say that, if a defect at all, it is a design defect, because the process as designed leads inevitably to the occasional failure as a result of an inherent defect in the raw material. In this context, so far as the academics are concerned, the claimants appear to have the better of it. Professor Sole Feliu in his book *El Concepto de Defecto del Producto en la Responsabilidad Civil del Fabricante* (1997) p 525, when addressing the question of whether blood with hepatitis is to be considered a design or manufacturing defect, following the view of American Professors Phillips and Pryor (*Products Liability* (1993) vol 1, p 392), concludes (as translated from the Spanish) 'since the defects occur only occasionally and since there is no design whatsoever, and since the blood as such is processed and used for the transfusion, these are rather manufacturing defects'. Professor Howells (*The Law of Product Liability*, para 1.14) considers that 'manufacturing defects are caused by an error in the production process or by the use of defective raw materials'. However, notwithstanding that there was some use of these American terms in the travaux préparatoires, there is no place for them in the directive. After some discussion in the course of the hearing, I am satisfied, and indeed neither counsel contended to the contrary, that no assistance can be gained from what Mr Underhill called the 'boxing', or categorisation, of defects in this regard for the purpose of construction of the directive, or the determination of any of the issues before me, for the following reasons among others: (i) as referred to above, there are no such boxes or categories in the directive, unlike the Third Restatement; (ii) in order to define whether the defects are manufacturing or design defects, in most cases it would be inevitable that there would require to be consideration of the precise processes adopted in production, which both sides accept to be inappropriate; and (iii) consequently, whatever may be the position in US jurisprudence, art 6 directs consideration of whether the *product* is defective, and as to what legitimate expectation is as to the safety of the product. Whether it is appropriate to define the one infected bag of blood in 100 as a manufacturing defect, or as an inevitable result of a chosen design process which cannot guarantee uniformity of product, the issue is still the same, namely whether the safety was provided which the public was entitled to expect in respect of that product.

[40] The significance to my mind only arose at all in our discussions because, by virtue of the fact that many European experts in product liability, both academics and practitioners, have been steeped in the US jurisprudence, 'rogue products', or rather what I now call 'non-standard products', have been almost automatically defined by them as manufacturing defects. Given that there is a dispute between the parties in this case as to what is meant by a manufacturing defect, it seems to me sensible to concentrate simply on the concept of a standard or non-standard product. As will appear, this does appear to me to make easier the understanding of those few European decisions which there have been arising out of the directive. In the criminal field, the United Kingdom courts have responded stringently to manufacturing errors: this appears clearly from the House of Lords decision in *Smedleys Ltd v Breed* [1974] 2 All ER 21, [1974] AC 839, where, notwithstanding non-negligent quality control, there was strict liability at

a criminal law where a caterpillar identical in colour, size, density and weight to the peas in a tin survived the process in one out of three million tins: but that too would be a non-standard product.

[41] If the distinction is between a standard and non-standard product, the critique of a non-standard product will be the same, namely by virtue of its difference from a standard product, whether it is treated as a one-off manufacturing defect or as a design defect resulting from a way in which the producer's system was designed, which led to all the producer's product being subject to the same risk. The approach to whether non-standard and standard products are defective may, however, be different, primarily because non-standard products fall to be compared principally with the standard product, while standard products, if compared at all, will be compared with other products on the market.

The status of the defendants

[42] One final point with which I should deal is the fact that the defendants are required to produce the product, in this case blood, pursuant to the obligations of the NBTs, and thus, it is said, had no alternative but to supply it to hospitals and patients, as a service to society. The defendants submit that this is a factor to be taken into account in the 'basket', not least because, unlike commercial producers, they have no option to withdraw it from the market rather than incur liabilities. Quite apart from the claimants' overall objection to the basket if it brings in a concept anything close to a *risk/utility* test, the claimants contend that, if art 7(d) does not apply ('that the defect is due to compliance of the product with mandatory regulations issued by the public authorities'), as it is not suggested to do, then there is no automatic reason why the public's expectation of safety should be lowered, *unless* such product is known to be defective, or at risk of being defective. Further there is, in any event, no necessary reason why a public authority or a non-profit making organisation should be in any different position if the product is unsafe (which proposition accords with the opinion of the Advocate General (Colomer) in *Henning Vedfeldt v Arhus Amstokommune* Case C-203/99 (14 December 2000, unreported) at para 27 (the 'Danish Kidney case'), which has not yet been considered by the Court of Justice^f). There is of course no 'blood-shield' statute in the United Kingdom.

Travaux préparatoires

[43] There is nothing much to assist in the travaux préparatoires, save for: (i) the rejection of the express US approach and *risk-utility* analysis (see [35] above); (ii) the fact that the strength of the contentions in support of a defence of state of the art, and of protection for producers in the context of inevitable risks, was directed first to the introduction into the drafts, and then the expansion and exposition, of art 7(e). It might well be said that if those lobbying for extra protection for the producer had considered that there was already substantial protection under art 6 itself (which is not mentioned in this context in the documents in evidence) they might not have needed to fight so hard to introduce and retain art 7(e). This probably inadmissible approach is better expressed simply as the fact that in the documents before me (and that in itself is an important caveat) there is no discussion of whether the availability (or not) or adoption (or not) of safety

^f Editor's note: the Court of Justice delivered judgment in this case on 10 May 2001.

precautions by a producer is relevant, or a *circumstance*, in the context of art 6 (nor of course is such listed at any time among the *circumstances* which are set out in the article, 'notamment' or otherwise). a

Court decisions

[44] I turn to consider the few court decisions in Europe in which the directive, or these issues under the directive, have been considered or touched upon. As indicated above, these have not been many, notwithstanding the fact that the directive and implementing legislation within the Community countries (save in France, which delayed its implementation, although its own local laws were and remained in some respects more stringent) have been in force for 10 to 15 years. Leaving aside any English decisions, to which the ordinary rules of precedent would apply, so far as relevant, I would of course pay particular attention to any European decisions, not because they are binding upon me, but because not only does respect have to be paid, on the usual principles of comity, to reasoned decisions of competent foreign courts considering the same or similar issues, whatever the nature of the legislation, but particularly so where Community courts are applying the directive. In such a case, even though Community courts are entitled to come to different views, particularly on the facts, by reference to national and local conditions, and even though the Court of Justice can resolve and give a final opinion upon issues where different views have been taken in different Community countries on the same legislation, nevertheless harmony is desirable, particularly where it can be said that an autonomous or Community approach or meaning is required. (See most recently the Advocate General's opinion in the 'Danish Kidney case' at para 30.) b
c
d
e

(i) *United Kingdom*. On the art 6 issues which I have to decide, *Richardson's* case is unclear. Ian Kennedy J concluded in relation to a condom, the teat end of which became detached during sexual intercourse, resulting in the pregnancy of the claimant, that 'naturally enough the users' expectation is that a condom will not fail'. But he does not then appear to have gone on to consider the actual question, being whether they were entitled so to expect. He appears to have concluded that he could not identify a harmful characteristic, either occurring in the factory (art 7(b)) or at all. Whether that resulted from too much concentration during the trial by both parties on the method of manufacture, or whether there was an implicit finding that the fracture was caused by misuse by the claimants, is not clear, but in any event he concluded, without consideration of the issue of legitimate expectation, that the claimants' claim failed. In the '*Cosytoes case*', the claimant was successful, where an elastic strap for attaching a buckle to a baby's sleeping bag sprang back, causing the buckle to hit the baby's brother in the eye. So far as concerns the claim under the CPA, and hence for our purposes under art 6, the claim succeeded. Chadwick LJ (at para 44) emphasised that fault of the producer is irrelevant: f
g
h

'It is irrelevant whether the hazard which causes the damage has come, or ought reasonably to have come, to the attention of the producer before the accident occurs. To hold otherwise is to my mind to seek to reintroduce concepts familiar in the concept of a claim in negligence at common law into a statutory regime which has been enacted in order to give effect to the ... directive.' j

a But he does not appear to address in terms whether the conduct of *any* producer would be relevant. Pill LJ left the position unclear (at para 27) when he concluded 'Members of the public were entitled to expect better from the appellant': but Chadwick LJ (at para 45) does address himself towards the level of safety to be expected 'in relation to child care products'. In neither of these two cases, however, does it appear that there was any or any full argument on the points
b now in issue.

(ii) *Germany*. In what has been called the 'German Bottle case' (9 May 1995) NJW 1995, 2162), the Bundesgerichtshof (BGH), the German Federal Supreme Court, gave judgment on 9 May 1995, allowing an appeal by a claimant injured as a result of an exploding mineral water bottle, resulting from a very fine hairline crack, not discovered notwithstanding what was found to be a technical and
c supervisory procedure in the defendant's factory in accordance with the very latest state of technology (including seven different inspections). Although the BGH dealt at some length with the questions under art 7(e), to which I shall refer below, it had no difficulty, after what was obviously detailed consideration, in concluding that the harmful characteristic was a defect within art 6 (or the
d German statute implementing it). The BGH concluded (translated from the German):

'The Court of Appeal [was] correct in law to assume that pursuant to [Article 6] a product is defective if it does not guarantee the degree of safety which may be expected when taking all circumstances into account. The Court of Appeal also [assumed] correctly that a consumer expects a mineral
e water bottle to have no obvious or even microscopic damage which might lead it to explode. The fact that it is not technically possible to detect and repair such defects in the bottle does not alter the consumer's expectations.'

The defendants accept that the crack in that case was plainly a manufacturing defect, capable of being described, as the BGH expressly did, as a rogue product
f ('Ausreisser') and do not contend that the decision of the BGH was wrong. They submit, however, that this logic does not apply to a bag of blood, which they submit to share the same characteristics as all blood, namely in that all blood bears—or bore—the 1% risk of being infected. (The BGH also rejected the producer's arguments under art 7(e), to which I shall return.)

(iii) *Holland*. The County Court of Amsterdam (not an appellate court) gave a judgment on 3 February 1999 in the case of *Scholten v Foundation Sanquin of Blood Supply* (unreported). In this case the claimant received blood infected with HIV, after the introduction of HIV screening tests in that country, because of the (infinitesimal) risk in that case from blood which had been so screened but must
g have been given by a donor who had only just contracted HIV, such that his infection could not be detected by a test during what has been called 'the window period'. The court appears to have looked at the facts in that case with some care. The claimant was pointing out that the foundation's leaflet suggested that the chance of being infected with HIV was so small that one should consider that one
h would not be infected. The defendants pointed out that the media had paid a great deal of attention to the fact that blood products always carried a risk of
j transmitting infections, and the defendants contended that (para 6, as translated from the Dutch)—

'the foundation carefully carried out investigations of the blood and followed the correct and relevant guidance, so that one is not able to expect

a greater safety of the blood product than that which can be offered by the proper compliance with the relevant regulations.'

The court concluded, in finding for the claimant in respect of art 6 (or the Dutch implementing equivalent), as follows:

'The court agreed with Scholten that, taking into account the vital importance of blood products and that in principle there is no alternative, the general public expects and is entitled to expect that blood products in the Netherlands have been 100% HIV free for some time. The fact that there is a small chance that HIV could be transmitted via a blood transfusion, which the foundation estimates at one in a million, is in the opinion of the court not general knowledge. It cannot therefore be said that the public does not or cannot be expected to have this expectation. The fact that the foundation acted in accordance with the relevant guidance, and that the use of an HIV-1 RNA test at the time could not have detected the HIV virus does not have any bearing on this.'

The defendants contend that this decision of the County Court of Amsterdam, which is obviously not in any way binding upon me, was wrong: but further or in the alternative they contend that the decision which the court then went on to make which resulted in Scholten's claim failing by reference to art 7(e) (to which I shall return below) was right.

(iv) *France*. There are no decisions directly under the directive in France, first because in any event the directive was not implemented until 1998, and secondly because, as referred to above, the French national laws of product liability are in some respects more favourable to claimants. In those circumstances, although I have been referred to decisions severally in the Conseil d'Etat (1995), the Lyon Administrative Court of Appeal (1997) and the Cour de Cassation (1998) (in the last of which the court said that they were interpreting the relevant articles of the Code Civil in the light of the directive), in which claimants succeeded in product liability claims in respect of infected blood, it is not helpful to consider them in any detail.

Academic literature

[45] As I have indicated above, my attention has been drawn to a large number of learned and perceptive academic writings, much of which has been relevant to the issue before me, but upon which of course I must make up my own mind. I shall summarise what seem to me to be the most relevant. (i) Professor Henderson (of Boston University), writing of the US law in (1973) 73 Columbia LR 1531ff ('Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication'), doubts in US terms the role for a judge in adjudicating design decisions. However, this seems to me not inconsistent with—and may support—the conclusion that the only question should be whether the product—as designed—is unsafe, given its use and presentation and the injuries that have occurred—and not whether any other design could have been adopted to improve the safeness of the product. (ii) Simon Whittaker (now of St John's College, Oxford) in the early days of consideration of the directive, and before the CPA, raised, in an article in (1985) 5 Yearbook of European Law 233ff ('The EEC Directive on Product Liability'), the question as to whether safety standards arise for consideration within art 6, and concludes that they

- a perhaps do; but he rewrites the directive to represent that it is asking whether the product was 'reasonably safe', rather than using the words of legitimate expectation. It is in that context that he considers that it may 'look as though there is no practical difference between liability in the tort of negligence and liability under the Directive' (at 246). He postulates the possibility, at 257, of evidence of compliance with safety standards being 'admissible but not conclusive'
- b under art 6, while asserting that such 'would not avail the defendant of a defence under Article 7(e)'. On that basis, it seems to me illogical if the escape route provided should be narrower than that which it is suggested may be a main defence: for a producer would not need reliance on art 7(e) if he had already succeeded on art 6. I return to this further below. (iii) Christopher Newdick, to whom I have referred above, of the University of Reading, appears to support the
- c claimants' case in articles in (1987) 103 LQR 288 and [1988] CLJ 455; in the former (at 296–297) where he concludes:

'To excuse all ... production defects ... on the ground that they were undiscoverable would be to emaciate the potential of the directive. In this respect there may be sufficient grounds for strict liability to be applied in the

d absence of cogent reasons of policy to the contrary.'

- and in the latter (at 455) in the passage which I have already quoted in [31] above. (iv) Professor Stoppa of Rome University appears to do so also, in an article on the CPA ('The Concept of Defectiveness in the Consumer Protection Act 1987: a critical analysis') in (1992) 12 Legal Studies 210, where he states (at p 212)
- e (following Professor Alistair Clark of Strathclyde University, at p 168 of his book *Product Liability* (1989)): 'The solution most consistent with the spirit of the Directive would seem to suggest that all products which are unsafe because of a flaw in the production process be considered defective, unless there exist statutory provisions to the contrary.' Stoppa, however, appears to suggest that
- f the position may be different in relation to what he is encouraged by US jurisprudence to consider as a design defect (pp 214–217). Thus he writes:

'... in relation to sophisticated or innovative design cases, it could be argued that actual consumer expectations, which could be non-existent, are not at issue, in that the Act refers to the safety which persons generally are

g "entitled" to expect. But what are persons generally entitled to expect? It would probably be a fair assumption to say that consumers are entitled to expect, generally speaking, that all products be designed carefully and intelligently in the light of all foreseeable circumstances, with a view to manufacturing a product which is as safe as possible. Yet, the questionability

h of such a standard, or of a similarly worded one, is self-evident ... Indeed, it is submitted, a dual approach might also prove a workable solution under the [CPA]. In many design defect simple cases, as where the failure of the product [ensues] from its normal and intended use, the consumer expectations test seems to be an appropriate test. A product which causes

j injury when put to its core uses clearly disappoints consumer expectations and liability should be imposed accordingly. On the other hand, in more complex cases, where a consumer expectations test is but a semantic veneer concealing each court's own subjective assessment, a more structured balancing process of some kind seems necessary. In these cases, a risk-utility analysis would seem to be permitted by the wording of the [CPA], according

to which, for the purpose of determining what ordinary consumers are entitled to expect, "all the circumstances" should be taken into account.' a

(v) Christopher Hodges of Cameron McKenna, in his book *Product Liability: European Laws and Practice* (1993) does not appear to support Professor Stoppa's approach in relation to design defects. At para 3.019 he states:

'Strict liability is likely to have a significant impact on design defect claims. A claimant no longer has the difficult task of proving faulty conduct by a manufacturer ... The emphasis of the directive is shifted to a judgment about the safety to be expected of the product itself ... Liability is now imposed if something is unacceptably dangerous without it being anyone's fault.' b

His subsequent para 3.023 appears not to contradict this, but simply to amount to advice to manufacturers and designers with a view to avoiding a defective design. (vi) Professor Stapleton, to whom I have referred above, now of Australian National University, asserts that the directive does not in practice achieve strict liability. She said so in her book *Product Liability* (1994) at p 236: c

'Despite the "strict liability" rhetoric in its Preamble the directive rarely imposes more than a negligence regime on manufacturers. The origin of this surprising and not obvious result is worth pursuing in detail because of the widespread assumption in business and the legal profession that the directive imposes strict liability on manufacturers.' d

and again at pp 271–272. At the passage at p 236, she refers to the view of the then Lord of Appeal, Lord Griffiths (in extra-judicial capacity), together with two members of the staff of the Law Commission, prior to the implementation of the directive in the United Kingdom by the CPA, in an article in (1988) 62 Tulane LR 353ff. The latter there opine (at p 382) that 'some element of balancing is necessary to any proper analysis of the concept of a defective product', recite the various elements which American courts include in the *risk-utility* analysis (including (footnote 122) 'the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility') and conclude that 'it does not seem likely that English judges would overtly adopt [a risk-utility analysis], albeit they would as an educated response to the facts of a particular case undertake a balancing exercise of an analogous kind'. Professor Stapleton simply concludes at p 236 of her book, by reference to Lord Griffiths' suggestion: e

'... in other words the core of the "defect" enquiry will substantially parallel the issue which underlies the negligence standard ... Practitioner handbooks fleshing out the standard in the directive will therefore look remarkably like current handbooks on the substance of the duty in negligence. The only really important question to which manufacturers will need an answer concerns the strictness of the behavioural standard'. f g h

(vii) Such a handbook in German, however, by Count von Westphalen of Bielefeld University, *Produkthaftungshandbuch* (1990), at paras 23–24 states as follows, in relation to the German implementation of art 6 (as translated from the German): j

'Since product liability ... is liability irrespective of fault ... the criterion of Zumutbarkeit [translated as "reasonableness" and by Mr Forrester as "what

- a the producer could be expected to do”] is irrelevant. In contrast to product liability in tort ... the producer cannot rely on the fact that he could not be expected to produce a safe alternative construction, possible according to the state of science and technology. The same applies if the producer wanted to rely on the fact that the market did not accept a more expensive but safer product, or that his competitors do not respect the required, higher safety standard either. In extreme cases, the producer must stop producing the insufficiently safe product. This makes it clear that the cost-benefit analysis plays no role in determining defectiveness of a product.’
- b

Summary

- c [46] I summarise the position. (i) The first question of law which I have to resolve in the light of my construction of arts 6 and 7(e) is whether I need to consider and determine the issues raised by the evidence, which I have in fact heard over more than 20 days (including consideration of documents), from the claimants and the defendants, at the defendants’ instance, on the ‘Brown case’; namely as to whether in fact the defendants did everything that could be
- d legitimately expected of them (what might be called their ‘Zumutbarkeit’ evidence). If I consider that I do not in law need to do so, then I resolve the question of defectiveness without such evidence (the ‘Forrester case’). If I conclude that in law the evidence is admissible (but, as it happens, in any event, for the reason set out in [24] above, of possible appeals or references) then I must proceed to decide whether the claimants have shown that the defendants failed
- e to do what was legitimately expected of them (the ‘Brown case’). If I find that the product was defective on the ‘Forrester case’, the defect is, on any basis, infection by Hepatitis C. If, however, I find it defective on the ‘Brown case’, on the basis that the defendants failed to test or screen early enough, then the claimants would say the defect is the same, but the defendants would then say that the
- f defect is the ‘unscreenedness’ of the blood. This dispute as to the precise description of the defect is only relevant for the purposes of the issues of causation and/or quantification of loss, to which I come below, and I shall return to it and resolve it only in that context. (ii) The onus of proof on art 6 is on the claimants. The defendants submit that if the claimants were right about art 6, because ‘unavoidability’ would not then assist them to avoid liability, art 7(e) should certainly then be so construed as to exclude them from liability; and
- g conversely if art 7(e) is too limited to enable them to be exonerated, all the more should art 6 be construed in their favour. I turn therefore to consider art 7(e) before I reach my conclusions.

h ARTICLE 7(e)

[47] I repeat, for the sake of convenience at this stage, art 7(e):

- ‘The producer shall not be liable as a result of this Directive if he proves ... (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ...’
- j

[48] This defence, for such it is, being an escape clause for the producer, the onus being upon the producer, has been called by the claimants (as it is in most academic literature) the *development risks* defence, which is how it was usually described during the working through of the directive, as is apparent from the

travaux préparatoires; and by the defendants the 'discoverability' defence, both because that concept is certainly an express and significant part of the defence, whatever it relates to, as will be seen, but also because it aids, as the defendants see it, their construction of the article. I propose, neutrally, simply to call it the 'art 7(e) defence'. Once again there is a great deal of common ground, not least because in relation to this article there is in certain respects binding authority and guidance from the Court of Justice (*European Commission v UK*).

[49] Such common ground is as follows. (i) The *state of scientific and technical knowledge* referred to is the most advanced available (to anyone, not simply to the producer in question), but it must be 'accessible'. In response to a more extreme position being taken by the Commission, the Advocate General answered as follows, in his opinion in *European Commission v UK* Case C-300/95 [1997] All ER (EC) 481 at 490 (paras 22–24), which, although not expressly approved in the judgment of the Court of Justice, is taken to be the state of the law:

'22. ... Where in the whole gamut of scientific opinion at a particular time there is also one isolated opinion (which, as the history of science shows, might become with the passage of time *opinio communis*) as to the potentially defective and/or hazardous nature of the product, the manufacturer is no longer faced with an unforeseeable risk, since, as such, it is outside the scope of the rules imposed by the directive.

23. The aspect which I have just been discussing is closely linked with the question of the availability of scientific and technical knowledge in the sense of the accessibility of the sum of knowledge at a given time to interested persons. It is undeniable that the circulation of information is affected by objective factors, such as, for example, its place of origin, the language in which it is given and the circulation of the journals in which it is published. To be plain, there exist quite major differences in point of the speed in which it gets into circulation and the scale of its dissemination between a study of a researcher in a university in the United States published in an international English-language international journal and, to take an example given by the Commission, similar research carried out by an academic in Manchuria published in a local scientific journal in Chinese, which does not go outside the boundaries of the region.

24. In such a situation, it would be unrealistic and, I would say, unreasonable to take the view that the study published in Chinese has the same chances as the other of being known to a European product manufacturer. So, I do not consider that in such a case a producer could be held liable on the ground that at the time at which he put the product into circulation the brilliant Asian researcher had discovered the defect in it. More generally, the "state of knowledge" must be construed so as to include all data in the information circuit of the scientific community as a whole, bearing in mind, however, on the basis of a reasonableness test the actual opportunities for the information to circulate.'

It is not entirely clear what in practice is meant by the 'Manchuria exception'. I put to counsel, in the course of argument, that if in fact the product in question were a product for which Manchuria was renowned, perhaps yoghurt or fabric, then Manchuria itself would be a bad example: if, however, it were a product of particularly high technology then it might well be wholly unlikely that Manchuria would have thought something up. It seems to me that the right

- a approach is to look at 'accessibility' and to regard as *Manchuria* perhaps an unpublished document or unpublished research not available to the general public, retained within the laboratory or research department of a particular company. Fortunately the issue does not arise in this case. (ii) The article is not concerned with the conduct or knowledge of individual producers. As the court made clear (at 495 (para 29)):
- b '... the producer of a defective product must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered.'
- c It is clear from the passage which I have already quoted, in [20] above, at 495 (para 36) of the court's judgment that 'the availability of the defence [does not depend] on the subjective knowledge of a producer taking reasonable care in the light of the standard precautions taken in the industrial sector in question'.
- d (iii) The relevant time to assess the state of such *scientific and technical knowledge* is the time when the product was put into circulation. (iv) Whether or not the defect for the purposes of art 6 should be defined as 'unscreenedness' as discussed in para 46(i) above, there is no dispute that the defect for the purposes of art 7(e) is its infection by Hepatitis C (and of course the claimants rely on this, when this dispute becomes relevant, as a further argument, based on consistency in the construction of the directive, why the defendants' such definition of defect in
- e art 6 is wrong).

The issues between the parties

- [50] Must the producer prove that the defect had not been and could not be discovered in the product in question, as the defendants contend, or must the
- f producer prove that the defect had not been and could not be discovered generally, ie in the population of products? If it be the latter, it is common ground here that the existence of the defect in blood generally, ie of the infection of blood in some cases by Hepatitis virus notwithstanding screening, was known, and indeed known to the defendants. The question is thus whether, in order to take
- g advantage of the escape clause, the producer must show that no objectively assessable scientific or technical information existed anywhere in the world which had identified, and thus put producers potentially on notice of, the problem; or whether it is enough for the producer to show that, although the existence of the defect in such product was or should have been known, there was no objectively accessible information available anywhere in the world which
- h would have enabled a producer to discover the existence of that known defect in the particular product in question. The crux of the dispute therefore is as follows. (i) The claimants say that once the defect in blood is known about, as it was, it is a known risk. A known but unavoidable risk does not qualify for art 7(e). It may
- j qualify for art 6, not because it was unavoidable (see their contentions set out in [35] above) but if it could be shown that, because the risk is known, it was accepted, and lowered public expectations—like poison and alcohol. But otherwise once it is *known*, then the product cannot be supplied, or is supplied at the producer's risk and has no protection from art 7(e). Hence an art 7(e) defence is, as was intended, a development risks defence; for if it is not known that a particular product, perhaps a pioneering such product (such as a scrid), has or can

have a harmful characteristic, whether by virtue of its inherent nature, its raw materials, its design or its method of manufacture, and then the defect materialises, or is published about, for the first time, it has *prior to that time* been a true development risk, and protection is available under art 7(e). However, once the risk is known, *then* if the product is supplied, and if the defect recurs, by then it is a known risk, and, even if undiscoverable in a particular example of the product, there is no escape. There is only one stage of consideration, and if there be 'non-Manchurianly accessible' knowledge about the product's susceptibility to a defect, be it a manufacturing or design defect, there is no availability of art 7(e). As it is common ground in this case that there was such knowledge, the defendants cannot avail themselves of art 7(e). (ii) The *defendants* say that if a risk is unavoidable, it falls within art 6 (see their contentions in [35] above) but, if not, then it can still qualify for protection under art 7(e), if non-Manchurianly accessible information cannot enable a producer to discover the defect *in the particular product*. There may be no 'stage one'—i.e knowledge of the risk—but, even if there is, there is a 'stage two'—namely consideration as to whether any accessible knowledge could have availed the producer to take any steps which he did not take. The defendants say there were none such here, or at any rate that such a conclusion could only be reached after resolution of the 'Brown case'.

[51] Nothing much can be gained by simply looking at the words of art 7(e). The claimants assert that to establish the defendants' construction the words 'in the product [in question]' needs to be inserted after the words 'the existence of the defect', while their construction does not need any additional words. The defendants assert that the words 'existence of the defect' are more apt to apply to the existence of a particular defect in a particular product, and for the claimants' construction to serve there should have been the use of the word 'risk' such as '[risk of] the existence of the defect to be discovered'. Neither argument is to my mind determinative or would stand in the way of either construction. The following points should be recorded. (i) The claimants rely heavily upon purposive construction, that is that the directive, and this article must be construed in order to further the purpose of the directive, namely consumer protection and ease of recovery of compensation. (ii) The defendants counter that this is an express escape clause, specifically so as to allow a level of protection for producers who are non-negligent. There is provision for a member state to exclude art 7(e) from its legislation if (Recital 16) it was—'felt ... to restrict unduly the protection of the consumer', so this is what the clause was aimed at: and they refer also to Recital 7, whereby a 'fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances'. (iii) The claimants contend that it is clearly apparent from *European Commission v UK* (to which I shall refer further below) that art 7(e) is intended to be construed restrictively: and in any event there is as much a concept of Community law as of the common law that a proviso, exception or escape clause should be construed restrictively. (iv) The defendants rely on the fact that in art 7(b), another of the exonerating circumstances, namely whereby a producer can show that the defect did not exist when the product left his factory etc, the defect being there referred to must be a defect in the product in question, rather than in the population of products. They assert that, at least by reference to English rules of construction, such a usage in a neighbouring sub-clause throws light on the meaning of art 7(e). (v) The knowledge in art 7(e) must be such as

- a to 'enable' the existence of the defect to be discovered. The claimants submit (and refer to other languages of the directive to support the proposition) that this simply means 'permit' or 'give the opportunity for' this to occur: and that this is less consistent with knowledge leading to the discovery of the defect in a particular product than with knowledge enabling the existence of the defect to be discovered generally, so that the risk of its being in the particular product is thus
- b known of, as opposed to being an unknown development risk for which the producer could be excused. The claimants also rely on the fact that the passive voice is used: 'to enable the existence of the defect *to be* discovered' generally, rather than the issue being whether it enables 'the producer to discover' the defect in a particular product.

c *Travaux préparatoires*

- [52] When the Commission first proposed a directive, its suggestion was for the complete reverse of how it eventuated, namely that there should be an express *inclusion* of development risks, that is it should be made clear that the producer should be made expressly liable even for the 'inconnu'. The proposed
- d article (then art 1) then provided that—

- 'the producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect. The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific and technological development at the
- e time when he put the article into circulation.'

- There is no addressing there of the question as to whether the defect was discoverable in the particular product, but the reference appears clearly to be to there being no knowledge of the defect at all. The contest thereafter by those seeking to introduce some protection for producers was first for the successful
- f deletion of the express inclusion of liability for the unknown defect, and then, as set out in [43] above, the introduction of what eventually became art 7(e). There was, so far as I have seen from what has been put before me, no consideration specifically of whether the availability of knowledge in art 7(e) related to the discoverability of the defect in the particular product. But at almost every stage the reference is to the 'development risks' defence: 'Inclusion of development
- g risks could have an inhibiting effect on innovation, because the cost of insuring such unforeseeable risks is likely to be quite high' (opinion of the Economic Social Committee, 7 May 1979). 'If liability for damage occasioned by development risks was excluded ... the effect would be to require the consumer to bear the risk of the unknown' (explanatory memorandum by the Commission dated
- h 26 September 1979); and other such references.

Court decisions

- [53] Clearly the most significant of these is the decision of the Court of Justice of *European Commission v UK*, although, as discussed above, it was not in terms
- j addressing the particular issue here.

(i) *European Commission v UK*. While clarifying that the knowledge to be imputed to a producer must be accessible, ie not restricted within Manchuria, the Court of Justice none the less plainly intended to limit the escape clause. The fuller consideration was in the Advocate General's opinion. So far as there could be said to be passages relevant to the issues now before me, consideration

centred, in the course of argument, upon para 20, the material part of which reads as follows ([1997] All ER (EC) 481 at 489):

‘20. It should first be observed that, since [Article 7(e)] refers solely to the “scientific and technical knowledge” at the time the product was marketed, it is not concerned with the practices and safety standards in use in the industrial sector in which the producer is operating. In other words, it has no bearing on the exclusion of the manufacturer from liability that no one in that particular class of manufacturer takes the measures necessary to eliminate the defect or prevent it from arising, if such measures are capable of being adopted on the basis of the available knowledge.’

It has first of all to be emphasised that the context in which the Advocate General was setting out his opinion was one in which the form adopted by the United Kingdom Government in implementing art 7(e), ie s 4(1)(e) of the CPA, seemed clearly to suggest a much more subjective and more negligence-orientated defence than was provided for in art 7(e); and the Advocate General, and in due course the court, while content to give the United Kingdom Government the benefit of the doubt as to its intentions in implementation, was anxious to stamp upon such a prospect. The aim of the Advocate General’s para 20 was obviously to emphasise that it could not excuse a manufacturer from liability if he complied with the safety measures (or lack of them) prevalent in the relevant industry. At first blush, the passage from para 20 which I have quoted could be construed to mean ‘it has no bearing on the exclusion of the manufacturer from liability that no one in that particular class of manufacturer takes the measures necessary to eliminate the defect or prevent it from arising provided that such measures are capable of being adopted’. If this were right then it could be argued that it is a matter of significance as to whether there *could* be such measures, and if there are not, ie if the defect is unavoidable, then the producer might escape liability. However, I do not consider that that is the right construction of this paragraph. (a) I have taken note of the fact that the opinion was given by Advocate General Tesouro in Italian, and I have been shown the Italian version, where the subjunctive is used (‘se ... siano’) in respect of the last clause, so that in fact the translation should read ‘if such measures were to be capable of being adopted’. With or without that clarification, however, I am satisfied that what the Advocate General is in fact saying, by way of summation in this sentence beginning with the words ‘in other words’, is that ‘it has no bearing on the exclusion of the manufacturer from liability that no one takes the measures ... even if there were any such measures available’. I also do not see any significance, such as Mr Underhill suggests there to be, in the reference to ‘elimination’ of the defect, particularly when the alternative of preventing it from arising is also used: if a problem is known, as a result of non-Manchurianly accessible information, then one would expect the one or the other, elimination or prevention, and what is *not* being referred to is ‘measures to inspect, or discover the defect in, the particular product’. (b) Paragraph 22 of the opinion is, however, of assistance. The Advocate General there states (at 490) that—

‘the producer has to bear the foreseeable risks, against which he can protect himself by taking *either* preventive measures by stepping up experimentation and research investment *or* measures to cover himself by taking out civil liability insurance against any damage caused by defects in the product.’ (My emphasis.)

- a The Advocate General is there concentrating on foreseeability of risks rather than the discoverability of particular defects, and the measures which the producer can take are not limited to greater efforts to discover the defect in the particular product. Thus, whether or not he can take preventive measures, the producer can still be liable (and protect himself by insurance). In the paragraph of its judgment (26) in which para 20 of the opinion is referred to, there is not specific approval by the court of the whole of it (nor any mention of para 22), but reference is once again made then and throughout to 'knowledge', and not to the ability, as a result of the knowledge, to discover the defect in a particular product.

- b (ii) *The United Kingdom*. In *Richardson's* case, Ian Kennedy J, albeit having dismissed the claimants' claim, continued (obiter) to consider the art 7(e) defence and would have rejected it. He states ([2000] Lloyd's Rep Med 280 at 285) in a passage which, albeit obiter, is obviously relied upon by the claimants: 'This provision is, to my mind, not apt to protect a defendant in the case of a defect of a known character merely because there is no test which is able to reveal its existence in every case.'

- c (iii) *Germany*. The BGH in the 'German Bottle case' concludes (and is referred to by the recent Commission Green Paper dated 28 July 1999 at p 23 as having concluded) that art 7(e) applies only to design defects, and not manufacturing defects. Interestingly, this is what the unilateral declaration by the United Kingdom at the time of the passage of the directive had originally suggested (I have quoted it in [18] above). But, as made clear at [39]–[41] above, in my judgment there is no need nor call for differentiation between manufacturing and design defects in the construction of the directive, and the BGH appears to have been working on the assumption, not an uncommon one, as discussed, that rogue or non-standard products are always manufacturing defects. It is not perhaps surprising that Professor Stapleton in her recent article in the Washburn Law Journal ([2000] Wash LJ 3R/BL) at 381 described as *extraordinary* that 'the [BGH] merely asserted that the development risk defence in the ... Directive does not apply to manufacturing errors'. But I do not consider either that the question of 'boxing' was central to the decision of the BGH, or that that is all that the BGH decided, on a careful reading of the judgment. I have already set out, in [44](ii) above, that, in relation to the claim in respect of the exploding mineral water bottle, the court rejected the defence under art 6. It is right to say that the BGH categorised the undiscoverable crack in the bottle as a rare and inevitable production defect, but they did so, with reference to the word 'Ausreisser', as a rogue product or non-standard product, as it seems to me, irrespective of the categorisation as a production defect; and the relevant conclusion, as I see it, was that set out at II(bb) in the judgment (as translated from the German) namely—

- d 'such rare and inevitable [production] defects ("Ausreisser") are not defects for the purposes of Article 7(e) of the ... Directive ... *simply because they are inevitable despite all reasonable precautions*. The purpose of the [Directive] is merely to exclude liability for so called development risks.' (My emphasis.)

- e This proposition plainly supports the claimants. The BGH continues (again in translation) 'Liability should only be excluded when the potential danger of the product could not be detected because the possibility to detect it did not (yet) exist at the time of marketing'. As 'the potential danger of re-usable bottles filled with carbonated drinks has been known for a long time' the art 7(e) defence was not available. In those circumstances the perhaps unnecessary repetition by the

BGH of the words 'unavoidable production risks do not constitute development risks' seems to me to be set into context. What the BGH was primarily saying is that if the risks are known, unavoidability of the defect in the particular product is no answer. a

(iv) *Holland*. In *Scholten's* case, after resolving the art 6 defence in favour of the claimant, the County Court of Amsterdam reached a conclusion supportive of the defendants on art 7(e). The court's conclusion on art 7(e) at pp 7–8 (as translated from the Dutch) is based upon the submission by the Foundation that it was not liable because it was impossible to detect the infection of the blood with HIV in the window phase, and that the new PCR test was technically not yet fully developed to achieve such detection; it stated: b

'Given the state of scientific and technical knowledge at the time of the blood donation and the transfusion to Scholten, this leads to the conclusion that it was, practically speaking, not possible to use the [PCR] test as a screening test in order to detect HIV contamination in blood products. This could therefore not have been expected of the foundation.' c

The claimants, while supporting the court's decision on art 6, do not agree with its decision on art 7(e), and the defendants' position is the reverse. It does seem to me, however, on consideration of the judgment alone that: (a) reference by the court in that passage to 'expectation' seems to me inapt. The expectation test is relevant only to art 6, which had been resolved in favour of the claimant; and (b) it is not clear whether the point in issue before me, and resolved against the producer in the 'German Bottle case', was argued. d

(v) *Australia*. I touch briefly upon this jurisdiction. The wording of s 75AK(1)(c) of the Trade Practices Act 1974, which is to the same effect as art 7(e), is slightly different. In relevant part, the section reads as follows: e

'(1) In a liability action, it is a defence if it is established that: (a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time; or ... (c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered.' f

Such wording allows more clearly for the defendants' submission being made before me, namely that the issue is discovery of the defect in the 'action goods', ie the product in question, to be put forward. Even on that form of words, however, it seems to me that the claimants' construction, namely that the reference to the defect was generic, could be argued. But we are not faced with the Australian statute. The reason why reference was made to Australia is the existence of a decision of the Federal Court of Australia, *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 177 ALR 18 (Lee, Lindgren, Kiefel JJ), which was referred to by Mr Underhill. In that case the court concluded that the judge below was right to construe the question as being whether the state of scientific or technical knowledge was such as to enable the presence of Hepatitis A virus to be discovered in the particular oysters being sold, notwithstanding that it was or appears to have been common ground that the risk of hepatitis in oysters generally was known. The judge found that there was no way of discovering the defect in the particular oysters, and consequently dismissed the claim. Clearly this is an example of an apparently strict liability statute resulting in the consumer failing. However, in so far as I am to draw any further help than that from the g
h
j

- a case, I am not convinced, because (a) the wording is different, as I have pointed out (b) on a reading of the judgment it does not in fact appear to me that the issue before me, and before the BGH, was being canvassed by counsel: the issue appears to have been whether discovery in the individual product could *only* be done by a physical verification of each and every oyster, and it seems to have been assumed (it may well be rightly, on the basis of the Australian statute) that it was indeed discovery in the individual product which was necessary, which would beg our question.

Academic literature

- c [54] I turn again to consider the learned, persuasive and interesting contributions of various distinguished academics which have been put before me. (i) Newdick's article in [1988] CLJ 455 was written before the rejection by the Court of Justice in *European Commission v UK* of the United Kingdom Government's arguments (apart from those on accessibility, which he powerfully supports). He appears to have thought that those arguments might be right, although, in the event of course, apart from accessibility, they were not accepted. d But that apart, his conclusion (at 472) after setting out the arguments appears to support the claimants:

- e 'The argument against such a view is that the defence is not available once the possibility of the defect has been appreciated. If it were otherwise, this reforming Act would simply repeat in statutory form that which is thought to be inadequate in Negligence. Though the defence may inevitably protect the case of the entirely unforeseeable defect, it ought not to be extended further to cover problems of quality control. Rather than defending f producers who knowingly, but without negligence, put into circulation defective products, a no-fault regime would commit itself to imposing liability ... The [argument] is further assisted by comparing the position of those with rights in contract. There, liability has never depended on the fault of the manufacturer or supplier. Once the buyer has shown goods to be defective, strict liability arises for their consequences. In the absence of clear words to the contrary, [a] no less generous approach should be adopted on g behalf of the consumer by the no-fault regime of product liability.'

- h (ii) Professor Clark in his 1989 book *Product Liability* at pp 166–168 appears to come to a similar conclusion in relation to known but undiscoverable risks, that is 'a risk that is known or suspected to be present in the product, but, effectively, both the presence of the danger in particular samples of the product and the means of elimination of the danger are undiscoverable'. (iii) Professor Freiherr von Marschall of Friedrich Wilhelms University, Bonn, citing Professor Taschner, states in his 1991 article 'Deutschland: Bedenken zum Produkthaftungsgesetz' (PH 15/91 at 169) (as translated from the German) that:

- j 'Contrary to an occasionally voiced view, it is irrelevant whether the producer in question was in a position to recognise the defectiveness in his product. The decisive question is whether, on the basis of scientific and technical knowledge which was accessible at the time the product was put on the market, it was objectively possible to recognise the defectiveness, i.e., its potential danger.'

(iv) Professor Stoppa, in his 1992 article ((1992) 12 Legal Studies 210 at pp 212–213), concludes that ‘the defence should only be available in the case of entirely unknown and unforeseeable risks and should not allow the manufacturer to avoid liability in respect of defects which are known to be potentially present, but are still ineliminable’. (v) Howells *The Law of Product Liability* at para 4-242, in a short and unexpanded footnote briefly supports the claimants’ proposition: ‘Both the directive and the [CPA] refer to the defect, but in fact what is crucial is knowledge of risks which lead one as part of the overall assessment of the product to determine that it is defective.’ (vi) Whittaker in his 1985 article states ((1985) 5 Yearbook of European Law 233 at 257–258):

‘A situation covered by “present knowledge” would be where a drug could not be tested for a certain effect, because there was no reason to believe that it *could* have such an effect. Similarly, a producer would not be liable for impurities in his product, such as a virus in blood products, which could not be detected at the time of putting it into circulation.’ (Author’s emphasis.)

This passage is, however, unclear to me. Although, on the face of it, his statement about a virus in blood products is unconditional, nevertheless he does not seem to address the point in terms as to whether (by analogy with his drugs example) art 7(e) will only be available if ‘there was no reason to believe that’ the virus *could* be in the blood. (vii) The most favourable to the defendants appears to be Professor Stapleton in ch 10 of her 1993 book, at p 237. She there states, as part of her proposition, that the directive ‘rarely imposes more than a negligence regime on manufacturers’ (p 236), that ‘the defence ... seems to shield a defendant in situations in which the risks of a product are well known at the relevant time (such as the risk of Hepatitis infection in donated blood)’, although I do not follow the rest of her sentence where she continues ‘but where, given available substitutes, it is regarded as not defective at the relevant time’. I do not follow this, first because I do not see how there being an available substitute is relevant in the case of blood, and, secondly, if in fact the product is not regarded as defective at the relevant time, then the claim will not have passed the threshold of art 6, and art 7(e) does not arise, as she herself points out later in the paragraph. By her acceptance, and assertion, that the words ‘to enable the existence of the defect to be discovered’ were not intended to imply ‘to be discovered by him’ (p 238) and that ‘the Article 7(e) defence only requires a defect to be discoverable by someone’ (p 238), she seems perhaps to negate a suggestion that the test is whether a defect could have been discovered in the particular product (produced by the producer). Yet her consideration of the Australian case of *Graham Barclay Oysters* (then only reported in the court below) in her 2000 article at p 382 suggests that she construes the Australian statute no differently from the directive (and she is of course an Australian professor) and is therefore influenced by the result of that case in her construction of the directive.

CONCLUSIONS ON ARTICLE 6

[55] I do not consider it to be arguable that the consumer had an actual expectation that blood being supplied to him was not 100% clean, nor do I conclude that he had knowledge that it was, or was likely to be, infected with Hepatitis C. It is not seriously argued by the defendants, notwithstanding some few newspaper cuttings which were referred to, that there was any public understanding or acceptance of the infection of transfused blood by Hepatitis C.

a Doctors and surgeons knew, but did not tell their patients unless asked, and were very rarely asked. It was certainly, in my judgment, not known and accepted by society that there was such a risk, which was thus not 'sozialadäquat' (socially acceptable), as Professor Taschner and Count von Westphalen would describe such risks: Taschner and Riesch *Produkthaftungsgesetz und EG Produkthaftungsrichtlinie* (1990) at p 291 and von Westphalen *Produkthaftungshandbuch* at 27. Thus blood was
 b not, in my judgment, the kind of product referred to in the Flesch/Davenant question and answer in the European Parliament ie 'a product which by its very nature carries a risk and which has been presented as such (instructions for use, labelling, publicity, etc.)', 'risks which are ... inherent in [a] product and generally known': nor as referred to by Professor Howells at para 1.17 as being risks which
 c 'consumers can be taken to have chosen to expose themselves to in order to benefit from the product'.

[56] I do not consider that the legitimate expectation of the public at large is that legitimately expectable tests will have been carried out or precautions adopted. Their legitimate expectation is as to the safeness of the product (or not). The court will act as what Dr Bartl called the *appointed representative of the public*
 d *at large*, but in my judgment it is impossible to inject into the consumer's legitimate expectation matters which would not by any stretch of the imagination be in his actual expectation. He will assume perhaps that there are tests, but his expectations will be as to the safeness of the blood. In my judgment it is as inappropriate to propose that the public should not 'expect the unattainable'—in the sense of tests or precautions which are impossible—at least
 e unless it is informed as to what is unattainable or impossible, as it is to reformulate the expectation as one that the producer will not have been negligent or will have taken all reasonable steps.

[57] In this context I turn to consider what is intended to be included within 'all circumstances' in art 6. I am satisfied that this means all *relevant* circumstances.
 f It is quite plain to me that (albeit that Professor Stapleton has been pessimistic about its success) the directive was intended to eliminate proof of fault or negligence. I am satisfied that this was not simply a legal consequence, but that it was also intended to make it easier for claimants to prove their case, such that not only would a consumer not have to prove that the producer did not take reasonable steps, or all reasonable steps, to comply with his duty of care, but also
 g that the producer did not take all legitimately expectable steps either. In this regard I note para 16 of the Advocate General's opinion in *European Commission v UK* [1997] All ER (EC) 481 at 487 where, in setting out the background to the directive, he pointed out that:

h 'Albeit injured by a defective product, consumers were in fact and too often deprived of an effective remedy, since it proved very difficult procedurally to prove negligence on the part of the producer, that is to say, that he failed to take all appropriate steps to avoid the defect arising.'

[58] The Court of Justice in its judgment perhaps refers implicitly to this when
 j it states (at 494 (para 24)): 'In order for a producer to incur liability for defective products under art 4 of the directive, the victim must prove the damage, the defect and the causal relationship between defect and damage, but not that the producer was at fault.' It seems to me clear that, even without the full panoply of allegations of negligence, the adoption of tests of avoidability or of legitimately expectable safety precautions must inevitably involve a substantial investigation.

What safety precautions or tests were available or reasonably available? Were they tests that would have been excessively expensive? Tests which would have been more expensive than justified the extra safety achieved? Are economic or political circumstances or restrictions to be taken into account in legitimate expectability? Once it is asserted that it is legitimately expectable that a certain safety precaution should have been taken, then the producer must surely be able to explain why such was not possible or why he did not do it; in which case it will then be explored as to whether such tests would or could have been carried out, or were or would have been too expensive or impracticable to carry out. If risk and benefit should be considered, then it might be said that, the more beneficial the product, the lower the tolerable level of safety; but this could not be arrived at without consideration as to whether, beneficial or not, there would have nevertheless been a safer way of setting about production or design. As Mr Brown pointed out, even if an alleged impracticability is put forward by a producer, it would still be possible to go back further, and see why it was impracticable, and whether earlier or different research and expenditure could not have resolved the problem.

[59] Mr Underhill submitted that he accepted that liability was irrespective of fault and that investigation of negligence was inappropriate, and that that was not the exercise he submitted the court was involved in. No criticisms were being made of the defendants on the basis that they were negligent. The investigation that was being carried out was not, as it would have been in a negligence action, as to what steps actually taken by these defendants were negligent, so that their individual acts and omissions were not being investigated. However, many of Mr Underhill's submissions were indistinguishable from those that he would have made had a breach of a duty of care—albeit one with a high standard of care, so that breach of it might not carry any stigma or criticism—been alleged against him. Did the defendants act reasonably in doing, or not doing, may often have been carefully replaced by 'can it be legitimately expected that ...?': but often the language of reasonableness—or Zumutbarkeit—crept in. I quote from his closing submissions:

'The exercise necessarily involves concepts such as proportionality and reasonableness which are encountered in the law of negligence, and in particular in relation to the *standard* of care in a duty-situation. But it remains a fundamentally different exercise, addressed to a different question. The claimant does not have to be concerned with the producer's conduct at all. He does not have to adduce, or rebut, evidence about *how* the process or choice which led to the product having the characteristic complaint. He has only to persuade the court that a product with that characteristic fell below the level of safety that persons generally are entitled to expect as the Community standard. English law traditionally distinguishes between different degrees of reasonableness (typically characterised as "ordinary reasonableness" and "*Wednesbury* reasonableness") (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). Such distinction should not be pressed too far in the exercise of judgment required by the directive. But it will be entirely legitimate for a court in deciding the correct standard in a given case to recognise that views may legitimately differ as to exactly where the line is to be drawn and there may be a range of reasonable responses (both as to substance and as to the timing of the introduction of any safety feature).'

a [60] Even from this carefully argued passage it can in my judgment be seen that there is no sufficient distinction between what Mr Underhill accepts is impermissible and what he is inviting the court to do. As Mr Brown pointed out, certain of Mr Underhill's formulations differ hardly at all from that enunciated by Lord Reid as being the issue in negligence in *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] 1 All ER 385 at 399, [1956] AC 552 at 574, namely:

b '... it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh on the one hand the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and on the other hand the difficulty and expense and any other disadvantage of taking the precaution.'

c [61] What is more, I have the inestimable advantage of not addressing this hypothetically, for the proof is in the pudding. In the 20 days or so evidence that I have heard, it is clear to me that I am being invited to conclude what the legitimately expectable (reasonable) producer would have been legitimately
d expected to do (should have done) in relation to the safety of blood between 1988 and 1991: then I am being invited to set against what happened (no surrogate tests and no screening until September 1991) the legitimately expected scenario, albeit that would be the same, as the defendants would assert, or would be different and earlier, as the claimants would assert. As was inevitable, the carefully constructed distinctions occasionally blurred in the course of a long trial and lengthy
e submissions, such that for example Mr Underhill would perfectly understandably submit (day 7, p 105 of the transcript): 'I think it would be unusual to have a situation in which you held that everything we had done was reasonable, but nevertheless the public was entitled to expect a different outcome.' Having heard the evidence of Zumutbarkeit over some 20 days, I pay tribute to the fact that
f both parties were careful never to address head on the issue of negligence, the claimants noteworthily eschewing any such suggestion, and I am well aware that the investigation would have been wider and longer if it had expressly been based in negligence.

g [62] As will be clear when I consider Issue II below, it is by no means easy to settle on a test for what is to be legitimately expected in the way of safety precautions, or extra or alternative safety precautions, assuming that to be appropriate. Must they be taken if they are available, or reasonably available, or not if there are two 'schools of thought', or only if as Mr Underhill put it, it was 'plainly the right thing for a blood transfusion service to do'? It has been quite clear to me that the claimants have had, on the trial of the facts before me, to
h prove, on the 'Brown case', that the defendants ought to have acted differently from the way they did: not on a day by day, or month by month basis, assessing their individual conduct, but simply on the basis that tests ought to have been introduced differently and earlier. I am satisfied that Mr Forrester was right to refer to Senator Huey Long's duck: namely 'If it looks like fault, and it quacks like
j fault then [to all intents and purposes] it is fault.'

[63] I conclude therefore that *avoidability* is not one of the *circumstances* to be taken into account within art 6. I am satisfied that it is not a *relevant* circumstance, because it is outwith the purpose of the directive, and indeed that, had it been intended that it would be included as a derogation from, or at any rate a palliation of, its purpose, then it would certainly have been mentioned; for it would have

been an important circumstance, and I am clear that, irrespective of the absence of any word such as 'notamment' in the English-language version of the directive, it was intended that the most significant circumstances were those listed.

[64] This brings me to a consideration of art 7(e) in the context of consideration of art 6. Article 7(e) provides a very restricted escape route, and producers are, as emphasised in *European Commission v UK*, unable to take advantage of it, unless they come within its very restricted conditions, whereby a producer who has taken all possible precautions (certainly all legitimately expectable precautions, if the terms of art 6, as construed by Mr Underhill, are to be cross-referred) *remains* liable unless that producer can show that 'the state of scientific and technical knowledge [anywhere and anyone's in the world, provided reasonably accessible] was not such as to enable the existence of the defect to be discovered'. The significance seems to be as follows. Article 7(e) is the escape route (if available at all) for the producer who has done all he could reasonably be expected to do (and more); and yet that route is emphatically very restricted, because of the purpose and effect of the directive (see particularly [1997] All ER (EC) 481 at 494-495, 495, 496 (paras 26, 36 and 38)). This must suggest a similarly restricted view of art 6, indeed one that is even more restricted, given the availability of the (restricted) art 7(e) escape route. If that were not the case, then if the art 7(e) defence were *excluded*, an option permitted (and indeed taken up, in the case of Luxembourg and Finland) for those member states who wish to delete this 'exonerating circumstance' as 'unduly restricting the protection of the consumer' (Recital 16 and art 15), then, on the defendants' case, an even less restrictive 'exonerating circumstance', and one available even in the case of risks known to the producer, would *remain* in art 6; and indeed one where the onus does not even rest on the defendant, but firmly on the claimant.

[65] Further, in my judgment, the infected bags of blood were non-standard products. I have already recorded that it does not seem to me to matter whether they would be categorised in US tort law as manufacturing or design defects. They were in any event different from the norm which the producer intended for use by the public. (i) I do not accept that all the blood products were equally defective because all of them carried the risk. That is a very philosophical approach. It is one which would, as Mr Forrester pointed out, be equally apt to a situation in which one tyre in one million was defective because of an inherent occasional blip in the strength of the rubber's raw material. The answer is that the test relates to the *use* of the blood bag. For, and as a result of, the intended use, 99 out of 100 bags would cause no injury and would not be infected, unlike the 100th. (ii) Even in the case of standard products such as drugs, side-effects are to my mind only capable of being 'socially acceptable' if they are made known. Mr Underhill submitted in his closing submissions that blood products—

'are drugs; they are given only by doctors; they are given typically in life-or-death situations; they are a natural product derived from the blood of another person and *known* therefore *inevitably* to carry the risk of transmitting pathogenic agents from the donor. The known risk of the presence of a virus in a BP does not represent a falling below intended manufacturing or production standards: it is inherent in the nature of the product.'

But I am satisfied, as I have stated above, that the problem was not *known* to the consumer. However, in any event, I do not accept that the consumer expected,

a or was entitled to expect, that his bag of blood was defective even if (which I have concluded was not the case) he had any knowledge of any problem. I do not consider, as Mr Forrester put it, that he was expecting or entitled to expect a form of Russian roulette. That would only arise if, contrary to my conclusion, the public took that as socially acceptable (sozialadäquat). For such knowledge and acceptance there would need to be at the very least publicity and probably express warnings, and even that might not, in the light of the no-waiver provision in art 12 set out above, be sufficient.

[66] Accordingly I am quite clear that the infected blood products in this case were non-standard products (whether on the basis of being manufacturing or design defects does not appear to me to matter). Where, as here, there is a harmful characteristic in a *non-standard* product, a decision that it is defective is likely to be straightforward, and I can make my decision accordingly. However, the consequence of my conclusion is that 'avoidability' is also not in the basket of *circumstances*, even in respect of a harmful characteristic in a *standard* product. So I shall set out what I consider to be the structure for consideration under art 6. It must be emphasised that safety and intended, or foreseeable, use are the lynchpins: and, leading on from these, what legitimate expectations there are of safety in relation to foreseeable use. (i) I see no difficulty, on that basis, in an analysis which is akin to contract or warranty. Recital 6 ('the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large are entitled to expect') does not in my judgment counter-indicate an approach analogous to contract, but is concerned to emphasise that it is safety which is paramount. (ii) In the circumstances, there may in a simple case be a straightforward answer to the art 6 question, and the facts may be sufficiently clear. But an expert may be needed (and they were instructed in *Richardson's* case, the 'Cosytoes case' and the 'German Bottle case'). For art 6 purposes, the function of such expert would be, in my judgment, to describe the composition or construction of the product and its effect and consequence in use: not to consider what could or should have been done, whether in respect of its design or manufacture, to avoid the problem (that may be relevant in relation to art 7(e), if that arises). (iii) In the following analysis I ignore questions that may obviously arise, either by way of 'exoneration' in respect of other heads of art 7 or in respect of misuse or contributory negligence (art 8, set out in [16] above).

[67] The first step must be to identify the harmful characteristic which caused the injury (art 4). In order to establish that there is a defect in art 6, the next step will be to conclude whether the product is standard or non-standard. This will be done (in the absence of admission by the producer) most easily by comparing the offending product with other products of the same type or series produced by that producer. If the respect in which it differs from the series includes the harmful characteristic, then it is, for the purpose of art 6, non-standard. If it does not differ, or if the respect in which it differs does not include the harmful characteristic, but all the other products, albeit different, share the harmful characteristic, then it is to be treated as a standard product.

Non-standard products

[68] The *circumstances* specified in art 6 may obviously be relevant—the product may be a second—as well as the circumstances of the supply. But it seems to me that the primary issue in relation to a non-standard product may be

whether the public at large accepted the non-standard nature of the product—ie they accept that a proportion of the products is defective (as I have concluded they do not in this case). That, as discussed, is not of course the end of it, because the question is of *legitimate* expectation, and the court may conclude that the expectation of the public is too high or too low. But manifestly questions such as warnings and presentations will be in the forefront. However, I conclude that the following are not relevant: (i) avoidability of the harmful characteristic—ie impossibility or unavailability in relation to precautionary measures; (ii) the impracticality, cost or difficulty of taking such measures; and (iii) the benefit to society or utility of the product (except in the context of whether—with *full information and proper knowledge*—the public does and ought to accept the risk).

[69] Lord Griffiths et al in their 1988 article appear to accept (62 Tulane LR 353 at 382) that an *overt* approach by English judges to consider these latter factors would not be likely, but I do not conclude that they enter into the exercise at all. This is obviously a tough decision for any common lawyer to make. But I am entirely clear that this was the purpose of the directive, and that without the exclusion of such matters (subject only to the limited defence of art 7(e)) it would not only be toothless but pointless.

[70] The submissions of Mr Underhill threw up an anomaly. As part of his submission that unavailability is material, he contended that there may be a situation in which a claimant might wish to suggest that a harmful product, supplied with a warning, could yet have been manufactured or designed in other ways in order to *avoid* the harmful characteristic of which the warning was given. Mr Forrester eschews this opportunity on behalf of consumers. It seems to me that is right. The issue of *avoidability* is as immaterial at the instance of the consumer as it is of the producer (though of course the consumer could always put forward an alternative claim in negligence if he wished to shoulder the burden both of proof and evidential investigation). The problem is most unlikely to arise in any event in relation to a non-standard product, where the other, standard, products will in any event be pointed to, and the warning would itself have to point out the risk of deviation from the norm. However, in relation to a standard product, the problem may again not arise if there is an alternative product without the defect, with which the product with the warning can then be compared, and the question of acceptance of the risk or legitimate expectation of safety can be assessed, once again without going into any questions of avoidability. However, even where no such comparability is available, it seems to me clear that, whether or not there could have been some other way of manufacturing or designing the product, the social acceptability of the actual product, as it in fact was, must be tested against the background of the warnings that were in fact given. Warnings can never in any event amount to a waiver, because of art 12.

Standard products

[71] If a standard product is unsafe, it is likely to be so as a result of alleged error in design, or at any rate as a result of an allegedly flawed system. The harmful characteristic must be identified, if necessary with the assistance of experts. The question of presentation/time/circumstances of supply/social acceptability etc will arise as above. The sole question will be safety for the foreseeable use. If there are any comparable products on the market, then it will obviously be relevant to compare the offending product with those other

- a products, so as to identify, compare and contrast the relevant features. There will obviously need to be a full understanding of how the product works—particularly if it is a new product, such as a scrid, so as to assess its safety for such use. Price is obviously a significant factor in legitimate expectation, and may well be material in the comparative process. But again it seems to me there is no room in the basket for: (i) what the producer could have done differently; and (ii) whether the producer could or could not have done the same as the others did.

- b [72] Once again there are areas of anomaly. The first is the same as I have discussed in respect of non-standard products, where the *claimant* might have wished to allege unavailability. The second area arises out of art 6(2), which I repeat for convenience: 'A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.' In the comparative process, the claimant may point to a product which is safer, but which the producer shows to be produced five years later. Particularly if no other contemporary product had these features, this is likely to be capable of being established, and insofar as such product has improved safety features which have only evolved later in time, they should be ignored, as a result of art 6(2). The claimant might, however, want to allege that the later safety features *could* have been developed earlier by the producer. That would obviously amount to the *claimant* running the evidence of 'should have done', to which the producer would no doubt respond 'could not have done'. This would, however, once again go to the issue of *avoidability*, which I have concluded to be outside the ambit of art 6, and so once again if the claimant really wanted to do so he could run the point, but only in negligence.

- e [73] I can accept that resolution of the problem of the defective standard product will be more complex than in the case of a non-standard product. This trial has been in respect of what I am satisfied to be a non-standard product, and I see, after a three-month hearing, no difficulty in eliminating evidence of avoidability from art 6. It may be that, if I am right in my analysis, and if it is followed in other cases, problems may arise in the consideration of a standard product on such basis, but I do not consider any such problems will be insurmountable if safety, use and the identified *circumstances* are kept in the forefront of consideration. Negligence, fault and the conduct of the producer or designer can be left to the (limited) ambit of art 7(e), to which I now turn.

CONCLUSIONS ON ARTICLE 7(e)

- h [74] As to construction: (i) I note (without resolving the question) the force of the argument that the *defect* in art 7(b) falls to be construed as the defect in the particular product; but I do not consider that to be determinative of the construction of art 7(e), and indeed I am firmly of the view that such is not the case in art 7(e); (ii) the analysis of art 7(e), with the guidance of *European Commission v UK*, seems to me to be entirely clear. If there is a known risk, ie the existence of the defect is known or should have been known in the light of non-Manchurianly accessible information, then the producer continues to produce and supply at his own risk. It would, in my judgment, be inconsistent with the purpose of the directive if a producer, in the case of a known risk, continues to supply products simply because, and despite the fact that, he is unable to identify in which if any of his products that defect will occur or recur, or, more relevantly in a case such as this, where the producer is obliged to supply, continues to supply without accepting the responsibility for any injuries

resulting, by insurance or otherwise; and (iii) the *existence of the defect* is in my judgment clearly generic. Once the *existence of the defect* is known, then there is then the *risk* of that defect materialising in any particular product. a

[75] The purpose of the directive, from which art 7(e) should obviously not derogate more than is necessary (see Recital 16) is to prevent injury, and facilitate compensation for injury. The defendants submit that this means that art 7(e) must be construed so as to give the opportunity to the producer to do all he can in order to avoid injury: thus concentrating on what can be done in relation to the particular product. The claimants submit that this will rather be achieved by imposing obligation in respect of a known risk irrespective of the chances of finding the defect in the particular product, and I agree. b

[76] The purpose of art 7(e) was plainly not to discourage innovation, and to exclude development risks from the directive, and it succeeds in its objective, subject to the very considerable restrictions that are clarified by *European Commission v UK*: namely that the risk ceases to be a development risk and becomes a known risk not if and when the producer in question (or, as the CPA inappropriately sought to enact in s 4(1)(e) 'a producer of products of the same description as the product in question') had the requisite knowledge, but if and when such knowledge were accessible anywhere in the world outside Manchuria. Hence it protects the producer in respect of the unknown (inconnu). But the consequence of acceptance of the defendants' submissions would be that protection would also be given in respect of the known. c

[77] The effect is, it seems to me, not, as the BGH has been interpreted as concluding (or perhaps as it did conclude, but if it did then I would respectfully differ) that non-standard products are incapable of coming within art 7(e). Non-standard products may qualify *once*—ie if the problem which leads to an occasional defective product is (unlike the present case) not known: this may perhaps be more unusual than in relation to a problem with a standard product, but does not seem to me to be an impossible scenario. However, once the problem is *known* by virtue of accessible information, then the non-standard product can no longer qualify for protection under art 7(e). d

THE RESULT IN LAW ON ISSUE I

[78] *Unknown risks* are unlikely to qualify by way of defence within art 6. They may, however, qualify for art 7(e). *Known risks* do not qualify within art 7(e), even if unavoidable in the particular product. They may qualify within art 6 if fully known and socially acceptable. e

[79] The blood products in this case were non-standard products, and were unsafe by virtue of the harmful characteristics which they had and which the standard products did not have. f

[80] They were not ipso facto defective (an expression used from time to time by the claimants) but were defective because I am satisfied that the public at large was entitled to expect that the blood transfused to them would be free from infection. There were no warnings and no material publicity, certainly none officially initiated by or for the benefit of the defendants, and the knowledge of the medical profession, not materially or at all shared with the consumer, is of no relevance. It is not material to consider whether any steps or any further steps could have been taken to avoid or palliate the risk that the blood would be infected. g

a [81] I am satisfied that my conclusions, if not all of my reasoning, are consistent with the decision of the BGH, and with the views of the majority if not all of the academic writers. Insofar as they are inconsistent with the views of Professor Stapleton as to the effect of the directive, I rather consider that I have confounded her pessimism than disappointed her expectations.

b *The consequence*

[82] In those circumstances the claimants recover against the defendants because their claim succeeds within art 4, the blood bags being concluded to be defective within art 6, and art 7(e) does not avail.

c [83] But I must, as set out above, proceed in any event to consider the Zumutbarkeit or avoidability arguments (Issue II), which I have found to be immaterial and unnecessary. The main issue is whether the public at large would legitimately expect that different steps would have been taken by way of safety precautions and in particular that: (i) the anti-Hep C assay would be introduced earlier than it was and/or as early as January 1990, as the claimants assert; and (ii) surrogate tests would be introduced in the United Kingdom by March 1988 and would continue until at least April 1991: continuing alongside the assay if and in so far as the assay were itself introduced prior to that date.

d [84] In the light of my construction of art 7(e), and the conclusion that the risk of Hepatitis C infection was known, the art 7(e) defence does not arise. However, I must on a similar basis also nevertheless address art 7(e), and decide, in the light of the same evidence, Issue IV, namely whether the defendants can prove that they would not have been enabled to discover the existence of the infection in the particular product by virtue of the scientific and technical knowledge at the time, ie the assay, as the claimants would assert as from 1 December 1989 (when Japan had introduced it), or surrogate testing as from 1 March 1988.

e
f ISSUE II

[85] In order to resolve the issues of fact, I have heard a number of impressive, experienced and conscientious witnesses and read, with the assiduous guidance of counsel, a very substantial number of articles, reviews, papers, surveys and reports in learned medical journals and from high-powered and distinguished medical conferences and symposia, in the fields of blood transfusion medicine, hepatology, virology, microbiology and epidemiology.

g [86] I set out first the defendants' witnesses, as, by agreement, the defendants led their evidence first, as they were most easily able to lay the factual position before the court.

h *The defendants' factual witnesses*

j [87] Dr Harold Gunson CBE, to whom I have referred to above, as can be seen by reference to his career, is certainly the most experienced expert in blood transfusion in the United Kingdom, but perhaps also in Europe. Dr John Barbara has been the lead scientist in Transfusion Microbiology at the North London Blood Transfusion Centre, and Microbiology Consultant to the NBA, and has recently been appointed Principal of the National Transfusion Microbiology National Laboratories and a member of the Advisory Panel on Blood Transfusion Medicine of the World Health Organisation (WHO). He too is a man of the greatest distinction and experience in the field of transfusion medicine. They were the main witnesses of fact called by the defendants, although it was difficult

to distinguish them from expert witnesses, save that Dr Barbara did not seek to disguise his own well-publicised position of lack of support for the introduction in the United Kingdom of routine surrogate testing. As will appear below, Dr Gunson gave measured evidence of great authority, and was able, to the admiration of, I suspect, both claimants and defendants, to admit, in retrospect, to his concern that in the event routine screening for Hepatitis C was not introduced in the United Kingdom until September 1991. The publications of these two distinguished doctors are numerous. Apart from his 70 other publications in this field since 1955, Dr Gunson was co-author of *Fifty Years of Blood Transfusion* (1996). Dr Barbara has authored or co-authored some 500 relevant publications since 1973.

[88] The other live factual witness was Dr Garwood, now the national processing, testing and issue director of the NBA, who was called to give evidence of the requirements and problems of the BTS in the implementation of the new assay. Statements were also read, under the Civil Evidence Act, which were made by three witnesses whose statements were originally served on behalf of the claimants, but, after a decision not to call them, were adopted by the defendants. These were Dr Reesink, Associate Professor in Hepatology in Amsterdam, and an experienced Dutch blood transfusionist, dealing with the history of Hepatitis C screening in the Netherlands, and two witnesses, Professor Stirrat and Mr Wright, respectively clinician and consultant surgeon, whose evidence dealt, as did that of another witness, whose statement was also read, Dr Wolff, a consultant anaesthetist, with the extent of the knowledge of surgeons and practitioners about the risks of transfusions, to which I have made general reference above.

The defendants' expert witnesses

[89] I deal at this stage in my judgment only with those experts who gave evidence on the generic issues, as opposed to the lead cases. Professor Zuckerman is the doyen of UK microbiologists and virologists. He is Professor Emeritus of Medical Microbiology at the University of London and Honorary Consultant in Medical Microbiology and Clinical Virology at the Royal Free, Hampstead, NHS Trust and the National Blood Authority. He has been a member of the WHO Expert Advisory Panel on Viral Diseases since 1974 and is Director of the WHO Collaborating Centre for Research on Viral Diseases. He was Principal and Dean of the Royal Free University College Medical School of University College, London, effectively from 1989 to 1999, and an adviser to the Department of Health continuously for 30 years on matters concerning hepatitis and microbiology. His expertise in the field of viral hepatitis is further apparent from his having been the author of some 18 textbooks and over 1,000 publications in learned journals. Although called as an expert witness, he, like Dr Gunson and Dr Barbara, was intimately involved at committees and working groups, symposia and conferences and in the presentation of papers, concerning the topic of screening for hepatitis at the material time. He, like Dr Barbara, has not been a supporter of the introduction in the United Kingdom of surrogate testing. I heard also from Professor Högman, retired Director of the Department of Clinical Immunology Transfusion Medicine at University Hospital, Uppsala, in Sweden, as to the history of screening in Sweden.

[90] In addition, I heard from two further expert witnesses live, whose evidence was hardly at all in the event contested by the claimants, who indeed

- a adopted much of what they had to say. Dr Peter Simmonds, who is Reader in Virology at the University of Edinburgh, has, like the others to whom I have referred, an extraordinary publication list, of some two hundred learned publications in this field. A particular expertise which he brought to the trial was to explain the nature of genotypes, for the development of learning about which, and research into which, he has, as I understand it, been substantially responsible.
- b There are now known to be at least six major genotypes, or sub-species, of Hepatitis C. The differences between these genotypes depend upon variations in their epitopes, which I understand to be stretches of amino acids with different sequences. From the result of this research it can now be appreciated that there are certain differences in effect, discoverability and indeed, as will be seen later, treatability (genotypes 2 and 3 responding better) in relation to these different
- c genotypes, depending upon which genotype of the virus it is by which the blood in question, and hence the recipient of it, is infected. It is now clear that the most frequent genotype of Hepatitis C virus, at any rate found in the United Kingdom, (about 40% of all, according to the guidance paper issued in 2000 by the NHS National Institute for Clinical Excellence (the 'NICE guidance')) is genotype 1: coincidentally as it happens, none of the six lead case claimants has that genotype (although the majority of the cohort of claimants, I am informed, does). As a result of genotype testing carried out for the purposes of this litigation in respect of the various claimants, it has been identified that there are examples among them not only of genotype 1, but also of genotype 2 (itself subtyped into 2a and 2b), 3 (also subtyped 3a and 3b), 4 and I believe also 5. Genotype 1 was, as will be
- e seen, the subspecies of the virus most easily discoverable by the first generation screening test: indeed it was not controversial between the parties that the finding of research carried out by Dr Simmonds and a Dr McOmish was that the first generation test picked up about 90% of donations infected by genotype 1, but only some 30% of those infected by the other genotypes.

- f [91] The other expert witness called by the defendants was Mr Andre Charlett, who is also the distinguished author of a substantial number of publications: he is an experienced medical statistician, employed by the Public Health Authority Service. He gave substantially unchallenged evidence which indeed met with approval by Professor MacRae, the claimants' statistical expert,
- g by taking the court through a number of the relevant published articles relating to research into, and surveys of, the results of first generation screening and of surrogate tests ALT and anti-HBc. He explained and exemplified, by reference to those results, the adjusted efficacy of various tests. This is a method of assessment of the tests, by reference to their specificity, and after the making of certain established adjustments, so as to calculate statistically how successful the tests would be in identifying the blood that is infected with virus. Hence, in the context of this case, adjusted efficacy of 75% would mean that for every 100 donations of blood infected with Hepatitis C screened by a test, the test would identify 75 of them: ie had the test been operated, 75 out of 100 infected
- h donations would have been screened out and would not have infected recipients. Mr Charlett identified certain biases and caveats, none of which were controversial, in the assessment of such efficacy by reference to published studies; and, subject to making generous allowance for those factors, and for the fact that the science of statistics can never be more than a helpful guide, both parties and I have relied upon his figures.
- j

[92] In addition to these live witnesses, the helpful and enlightening evidence of Dr Hay, a consultant haematologist, and Dr Heptonstall, a consultant microbiologist, was agreed and read, as was that of Dr Taylor, a consultant in transfusion medicine (to whom I refer briefly below).

The claimants' factual witnesses

[93] Professor Dusheiko was described as a factual witness, but, to all intents and purposes, as he did not play a personal role in any of the events to which primary attention has been directed (save that he attended at the Ortho symposium in Rome, as did Dr Gunson and Dr Barbara), he was really an expert witness. His expertise also is very substantial. He is professor of medicine and honorary consultant of the University of London, based at the Royal Free Hospital, an expert hepatologist, and the author of lectures and papers presented at a substantial number of national and international meetings and of more than 200 learned publications in the field.

[94] The evidence of three other factual witnesses was agreed and read. Dr Ward had made a statement about the practice and procedure of the development and regulation of drugs manufactured by pharmaceutical companies, which was only of marginal relevance by way of background: the evidence of Dr Kay, to which Dr Taylor, to whom I have referred above, replied on the same issue, related to the marginal topic, not in the event developed, as I have indicated, of autologous transmission: the evidence of Mr Hardiman, Marketing Director of Ortho for Northern Europe, was produced during the hearing, and agreed, explaining so far as he could the procedures of the United States Food and Drug Administration (FDA) in so far as they related to the grant of an Export Licence and a Full Product Licence, thus giving the court some understanding, by way of very general background, to the grant of such licences in respect of the Ortho assay in this case.

The claimants' expert witnesses

[95] Dr Caspari, another distinguished expert in transfusion medicine, was employed between 1986 and 1991 by the German Red Cross Blood Transfusion Service, in Lower Saxony, and is now Research Fellow at the Department of Transfusion Medicine in Greiswald in Germany. He has also published widely on blood transfusion and hepatitis. He was able to tell the court about the position in Germany, where, although it has never adopted the anti-HBc test, which he personally has not supported, there has been compulsory routine ALT testing of blood since 1965, of whose benefits he spoke highly: Germany introduced anti-Hep C screening, alongside ALT testing, by the beginning of July 1990. The claimants also called Professor MacRae, Professor of Medical Statistics at the European Institute of Health and Medical Sciences at the University of Surrey, and again a very substantial author in his field, who explained and developed a number of statistical issues.

The oral evidence

[96] This has not seemed to me to be a case in which I have needed, or was indeed qualified, to disbelieve or reject any evidence given by these highly experienced and knowledgeable witnesses. What I have endeavoured to do, with the aid of counsel, and, in the fulfilment of my task as I have concluded it to be in law, is to arrive at my conclusions by assessing that evidence, making allowances

- a as I have considered necessary for any over-enthusiasms and also both matching the oral evidence with, and fitting it into, the substantial literature by them and by others which I have endeavoured, again with the very considerable assistance of counsel, to assimilate.

The literature

- b [97] For the purpose of the generic issues, there has been, as I have previously indicated, a massive slimming-down exercise by both legal teams to arrive at a comprehensible and manageable amount of documentation. Publications in this field over the last 30 years about Hepatitis, and in particular NANBH or Hepatitis C, have, I am told, run into four, or even five, figures. After considerable additions, and deletions, during the course of the trial we have ended with four
- c (very fully filled) core files of learned publications: in addition, some fairly frequent reference has been made to a number of minutes of, and papers from, conferences, working groups and committees and other relevant documentation in another 16 files or so. Much time has been spent during the hearing in which I have been taken through these publications and documents first by counsel, and
- d then, as appropriate, by the witnesses, in order that I should become sufficiently educated to understand the issues. In the end, much of what I have learned, all of which I believe has been necessary, has not had to be spelt out in this judgment. However, I am satisfied that it was essential for me to seek to understand as much as possible of the very complex matters underlying the decisions I have to reach, in order for me to be in a position to grapple with my
- e conclusions. With the assistance of counsel and the witnesses, I have not had to read in detail every publication, but I feel that I have had a very considerable education, and one sufficient for my task.

- [98] As for those publications, many of them were, as would be expected, written by the distinguished witnesses themselves. In addition I have already
- f mentioned Dr Harvey Alter from the United States, and his influential writings have been heavily represented. I have had the benefit of publications, elucidated before me, by other highly qualified and experienced authors of learned books and articles from around the world. Apart from those whom I have mentioned, they included publications from the United Kingdom (including those by
- g Dr, now Professor, Contreras, and Drs Cash, Dow, Follett, Garson, Gillon, Kitchen, McClelland, Mitchell, Polokaff and Collins and Bassendine), the United States (Drs Aach, Miriam Alter (no relation), Bayer, Dienstag, Donahue, Holland, Houghton, Stevens, Seeff and Ms Koziol): and from Australia (Drs Cossart, Morgan, Young), Canada (Drs Blajchman, Steinbrecher), Finland (Drs Eberling, Leikola), France (Drs Aymard, Chataing, Janot, Jullien, Richard), Germany
- h (Drs Kühnl, Müller, Suggs), Italy (Dr Tremolada), Netherlands (Drs Katchaki, Van der Poel), New Zealand (Dr Woodfield), Spain (Drs Esteban, Hoyos), and Sweden (Dr Widell).

The background facts

- j [99] A number of facts should be set out which I believe to be common ground, or which in any event I find to be the case. (i) The brief history of NANBH has been set out in [8] above. It is clear that, from the introduction of screening of Hepatitis B at the beginning of the beginning of the 1970s, NANBH was responsible for most if not all of the infection of blood by hepatitis, and it is common ground that in the 1970s and 1980s the infection by NANBH was the

major complication in blood transfusion. (ii) There is still no immunisation discovered for Hepatitis C: it is not yet possible to grow the virus in tissue, and, since the virus is highly resistant to antibodies, the present prospects for an effective vaccine are not bright. In the 1980s it was believed, as Professor Zuckerman confirmed in evidence, that no one ever recovered from it. It is now known that there can be recovery, and treatments have been pioneered in the 1990s, to which reference will be made later. As will appear in more detail below, apart from those who spontaneously clear or are (now) successfully treated, a substantial number suffers chronic liver disease, of which a considerable proportion progresses to cirrhosis. (iii) In the 1970s and 1980s, the vast majority of NANBH sufferers were not diagnosed as a result of clinical symptoms made known to hepatologists or practitioners, but as a result of discovery by testing in laboratories. The most frequent if not only symptom or indicator of NANBH was raised ALT in the blood. It is common ground that there was substantial under-reporting of the condition (and this was known at the time). (iv) Even on the basis of what was reported, the prevalence (that is prevalence of the virus amongst the donor population) and the incidence (that is the incidence of the infection among recipients) were higher in the United States (assessed by Dr Alter in the 1970s at between 7–12%) and, particularly, Japan, which had an even higher incidence, than in the United Kingdom and Europe. The United States' position improved during the 1980s for a number of reasons: the abolition of paid donors; the introduction of screening tests for HIV, which excluded a number of donors who would also have been at risk of NANBH; more effective monitoring and self-exclusion of drug users etc. The incidence in the United Kingdom, which Dr Gunson believed to be the case at the material time in 1986 and following, and which was generally accepted and was reported by him to the Council of Europe, was 3%. (In fact when screening was introduced, and more accurate assessment was thus able to be made, the incidence became or was—and still remains—between 0.05 and 1%.) There are approximately 2.5m donations per year (each donor donating approximately twice per year).

The approach to be adopted

[100] If, contrary to my conclusions of law set out above, the question of avoidability is a *circumstance*, then it must be introduced into what Mr Underhill has called the basket. Although the evidence has largely concentrated on the factual issue of avoidability, it is obviously essential that, after I make the necessary findings of fact on that issue, it must be fitted together with all the other matters or *circumstances* and weighed together in the basket. I shall set out what seem to me to be the material factors. (i) *The position of recipients/consumers*. As has eloquently been put by Mr Brown, they go to hospital for treatment, or resuscitation, but leave the hospital, albeit cured or improved in respect of their original condition, now significantly disabled as a result of the very treatment they received, leading (unless they be one of the few very lucky ones) to a life with a permanent need for medical oversight and at least a risk of serious deterioration and resultant death. (ii) *The position of donors*. They are volunteers, who altruistically donate blood. Their interests must certainly be carefully fostered, not only in order not to put off them and other potential donors, and thus put the blood supply at risk, but also because of the duty on the BTS to look after them: if for example they are simply told that their blood has been rejected, they may be frightened or distressed, or may be stigmatised by the possible

- a presence of some uncertain and undiagnosed infection. (iii) *The possible shortened lifespan of the recipients*. Set against the risk of infection (3% incidence as then believed) is the statistic (which was not controverted) that, with regard to those who received transfusions, either 50% of the patients, or patients who received 50% of the blood (which it was unclear to Dr Gunson, although it was recorded as being the former in his October 1986 paper to the United Kingdom Working Party on Transfusion-Associated Hepatitis (WPTAH), which he set up) die in any event of their original condition within one year of the transfusion. (iv) *The interests of patients generally*: to secure the blood supply, so that there is no risk of there being no reserves of blood available in an emergency. (v) *The defendants' own determination to give priority to NANBH/Hep C*, particularly given that it was, as set out, a major complication for them. By a letter dated 7 February 1979 the senior medical officer of the Medical Research Council (MRC) confirmed that the chief scientist of the Department of Health and Social Security had informed the MRC that NANBH was being given high priority by the department. The department confirmed to Dr Gunson on 8 March 1989, when it set up the ACVSB, that the United Kingdom Health Ministers believed that it was of the utmost importance that the United Kingdom Blood Transfusion Services acted in unison on the subject, and Dr Gunson in response confirmed that he too thought the committee very important and had thus set up his own committee, the ACTTD. (vi) *The fact that no warnings* were given to the public or to patients or recipients about the risk from the receipt of transfused blood or in particular about the risk in question. I have already referred to the fact that I am satisfied that neither the defendants nor the government nor the Press, in so far as either of the latter were relevant, gave any or any sufficient warning to the public of the risks: and that although medical practitioners knew of them, and would advise patients if asked, they were rarely asked, and unless asked, did not inform. (vii) In fact, a substantial number of *donors who had used drugs* and who were thus the most likely to be carriers of NANBH did escape the net of self-exclusion and give blood: many of these might have experimented briefly with drug use many years before and forgotten or put it from their mind. Dr Barbara estimated that 10% of those who gave blood should not have been giving blood. Dr Gunson accepted that intravenous drug users had become donors, and Professor Zuckerman accepted that the problem that amongst those giving blood were those who had been drug users in the past was known at the time. In subsequent research carried out after the introduction of screening, it was found that, in that cohort, 50% of infected blood donations had been given by those who subsequently accepted that they had been at one time or another intravenous drug users. According to the NICE guidance, the prevalence of Hepatitis C among intravenous drug users is said to be up to 50%. (viii) The last ingredient must, on these assumptions, be *avoidability*: which has a number of sub-categories. (a) What is the risk?—seen as 3% incidence at the time. (b) How foreseeable?—known. (c) What is the priority for avoidance?—see sub-para (v) above. And then the factors to be addressed by reference to the evidence. (d) What is the seriousness of the consequence to the claimants if the steps are not taken? (e) What is the seriousness of the consequence to others if the steps are taken? (f) As to the precautions themselves—in this case the tests: (i) what steps are said to be available; (ii) how reliable are they; (iii) how efficacious (sensitivity: specificity: adjusted efficacy); (iv) how expensive are they to implement/continue; and (v) what are the logistics for implementing them? (g) What is the proper

analysis that should be adopted to conclude whether tests/precautions are available? I turn to this.

The proper analysis

[101] The starting point is of course the difficulty that I inevitably have in finding a distinction between negligence and the question of *avoidability*: even if I be wrong in my conclusion that the very consideration of conduct, or of what could or should have been done, is a subversion of the object of the directive, nevertheless to tread the tightrope which Mr Underhill has laid out for me is not easy. Subject to that, a number of tests have been suggested, largely by Mr Underhill, or in the course of my exchanges with him, as he is the proponent of the issue to which the 'Brown case' is put forward by the claimants as their answer. Not least of course of the problems is that, in addressing the legitimate expectation of the public in respect of the taking of precautions or the holding of tests, I have already indicated that it is clear that the public itself would have had no such expectation, might not have known of the need for any test, or, if they did, would simply have assumed that all steps had been taken, so that the matter is left to me as objective assessor.

[102] It is clear to me that the analysis does *not* involve the following. (i) As indeed Mr Underhill has always made clear, the process does not involve a detailed analysis of each act or omission of the defendants. (ii) Equally however, I am satisfied that this is not an exercise by way of '*Wednesbury* unreasonableness', or considering whether the defendants came to a reasonable conclusion, or made reasonable management decisions, or examined, or came to proper conclusions in the light of, available expert opinion. (iii) Whereas the conduct of other similar authorities in other countries may be of some relevance, it plainly cannot be determinative, or an inhibition upon the conclusion I otherwise reach. (iv) There is no question of a conclusion that the public is legitimately entitled to every marginal improvement.

[103] I do on the other hand take into account, as an important part of the factual context and *circumstances* within which I reach the decision, the attitude and objectives of the defendants, and the priority of NANBH to which I have referred. In this regard Mr Brown referred to Dr Gunson's paper to the Council of Europe in May 1987, reporting conclusions of a distinguished working group of the Committee of Experts on Blood Transfusion and Immunohaematology on which he served, in which the following statement (among others) was recorded: 'If a stance is taken that blood should have maximum safety, then the tests [in this case surrogate tests] would be introduced but the benefits derived from testing would not be uniform throughout every country.'

[104] There was some considerable discussion as to whether indeed it was the stance or objective of the defendants that blood should have 'maximum safety', and indeed as to what that meant or would mean in any event. In the *Guidance for the Blood Transfusion Services in the United Kingdom 1989* at para 1.10 it was recorded, in the context of the United Kingdom BTS achieving and maintaining 'the highest standard of operations', that there should be 'some uniformity ... in the determination of those procedures that will ensure maximum safety of blood', and Dr Gunson confirmed that this concept was not newly introduced in 1989, but had antedated it, as far as he was concerned. A significant example can perhaps be given by reference to a study which he initiated in 1988, and which reported in draft in October 1989, intended to study raised ALT in recipients of

- a blood at three RTCs (which has become known as the 'Multi-Centre Study'). The draft report submitted to the ACVSB in October 1989 concluded as follows: 'In the meantime, the desirability of ALT testing or otherwise remains an issue of health economics.' Dr Gunson's response to this, when asked about it by Mr Brown in cross-examination, was: 'As I said to you earlier, Mr Brown, I was never one for going on health economics. I would like to know the cost of what we are doing, but not necessarily the benefit related to it, because I felt that, if you had to do it, you had to bear the cost.' In its final form in March 1990, the report concluded 'The subject of cost-effectiveness has recently been reviewed, but if the desire to ensure a "minimum risk" product overrides the economical and logistic considerations, ALT testing then becomes a serious contender' (as a matter of fact by this time the question of introduction of ALT was being regarded as academic, because main concentration was now being dedicated towards the question of introduction of routine anti-Hep C screening). Dr Gunson preferred the concept of 'minimum risk' to 'maximum safety'. However, this became clarified when he was shown, or reminded of, a preliminary discussion paper for the ACTTD prepared by Dr Barbara and Dr Contreras dated 23 January 1992, which read: 'The attitude towards transfusion safety has veered away from the concept of "maximum benefit/minimal cost" towards the notion that if a procedure is shown to prevent transfusion-transmitted infection and disease is available, it should be introduced.' He responded as follows to Mr Brown's question about this: 'Q. Were you aware of that shift in culture or do you think that that had always been the position? A. I think it was probably always the position.'

- [105] A number of formulations have been put forward. (i) Mr Brown was firm in his assertion of the inappropriateness of the test in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582, whereby, in a case of professional negligence, a professional acting in accordance with a practice accepted as proper by a responsible body of professional opinion is not negligent 'merely because there is a body of opinion that takes a contrary view' ([1957] 2 All ER 118 at 122, [1957] 1 WLR 582 at 587–588 per McNair J) (the 'Bolam test'); and Mr Underhill dissociated himself from the case that the *Bolam* test was apposite to the directive. However, it seems clear to me that that was indeed the kind of formulation that he was articulating when he set out the following in his summary of his case, which I invited at an early stage of the hearing from both sides: '[Persons generally] would only be "entitled to expect" such screening if it was plainly the right thing for a blood transfusion service to do.' Another formulation by Mr Underhill was that the public was 'not entitled to expect safety precautions where there is a matter of such doubt and debate'. At another stage Mr Underhill put it that if some people think a precaution is advantageous and others think it disadvantageous—

- j 'entitlement to expect must arise from, if not a universal view, a better view that a precaution should be adopted ... Where there is quite vehement controversy internationally as to whether there is a good idea or a bad idea, it is a heavy thing to say the public was entitled to expect this to be happening when, if the public had informed itself, it would know that controversy was raging across the world as to whether or not it was a good thing to do or a bad thing to do.'

(ii) Another formulation by Mr Underhill was that, in order for it to be legitimately expected that a safety precaution would be taken, a 'really substantial benefit [must be] demonstrated'. (iii) Mr Brown, with an eye on the 1989 guidance, and the evidence to which I have referred in [104] above, formulated a proposition that 'the public was entitled to expect (at least in the absence of compelling/high quality/local evidence) that, consistent with the objective of ensuring maximum safety, such tests would be introduced'. He explained this by indicating that there would have to be 'really clear evidence the other way'. This of course is almost the mirror image of the first of Mr Underhill's formulations, which I have recited at (i) above.

[106] The broadbrush question of course is what tests or precautions it is reasonable or appropriate or legitimate to expect that a defendant producer should have adopted. In the light of art 6, and the obvious emphasis on a weighing exercise, *taking into account all the circumstances*, I interpret the position as being that the judge (whether as the representative of the public or otherwise) simply weighs up the advantages and disadvantages, the pros and cons, without the benefit of hindsight, and reaches his own decision, neither reviewing the producer's decision, nor declaring that the producer's decision was negligent. Accepting, but somewhat adapting, another of Mr Brown's formulations, I would declare myself as prepared, while walking Mr Underhill's tightrope, to adopt a formulation as follows. If a precaution shown to prevent, or make a material reduction in, the transfer of transmitted infection through infected blood is available, it should be taken, unless the disadvantages outweigh the advantages.

[107] I shall now accordingly, informed by the evidence, consider the pros and cons on that basis. As indicated, there are two issues, first as to whether surrogate screening should have been introduced (when it never was) and secondly whether the anti-Hep C assay should have been introduced by way of routine screening before it was on 1 September 1991, or (as now conceded as part of the settlement agreement, to be the relevant date for consideration) 1 April 1991. I shall thus reach my decision on the basis of my conclusions as to 'legitimate expectation', as required by the need to resolve Issue II irrespective of the outcome of Issue I: but nothing that I shall say or decide can, or does, reflect in any way on the personal dedication, professionalism, integrity and conscientiousness of those in the NBTS, the ACVSB and the ACTTD who were involved in their own weighing exercise at that time.

SURROGATE TESTS

[108] I refer to the explanation of the two surrogate tests, which I have set out at [9](i) and (ii) above. By way of further introduction to the issue of surrogate tests, the following should be explained. (i) As will be seen, the question of surrogate screening really came to the fore in the early 1980s as a result of the debate in the United States, and particularly the thorough studies published, originally in 1981, by the NIH and the TTVS, to which I have referred. The case for the claimants is that the tests ought (and I shall use that verb, or alternatively the tense 'should', as shorthand for *legitimate expectation*) to have been introduced in the United Kingdom by 1 March 1988, when the CPA came into effect. This is the case which I shall primarily consider. It is clear that if the surrogate tests were not in place by that date, or shortly afterwards, it becomes progressively less arguable that they should have been introduced: as the discovery of the Hepatitis C virus is first of all announced (May 1988), then its scientific details

- a published (April 1989) and thereafter as from April 1989 the Ortho assay is publicised, evaluated and debated. The claimants do assert that, even if not introduced by March 1988, the surrogate tests should still have been introduced later, particularly if the introduction of the Ortho assay was to be delayed to as late as September 1991, but this is plainly a subsidiary issue. (ii) The USA introduced surrogate testing, as I have recounted, from September 1986, ALT
- b followed soon after by anti-HBc, and it introduced routine anti-Hep C screening on 2 May 1990. The surrogate tests continued alongside the assay until 1995. Whether or not there is a case that the surrogate tests, if they had been introduced in the United Kingdom, should thereafter have been discontinued, this issue does not arise for me, where consideration has in the event been limited to the period up to 1 April 1991, and on any view, if introduced, they would not
- c have been discontinued by that date. (iii) As will be seen, it was concluded by the US researchers, somewhat to their surprise, that the blood identified by the ALT test as having elevated ALT, and the blood identified by the anti-HBc test as containing Hepatitis B antibodies, did not materially overlap. This was, it would seem, one of the main reasons why in the event they introduced and retained
- d both tests. It seems to be accepted (as Dr Barbara explained) that where blood was positive on both tests, it was the more likely to have been genuinely infected with Hepatitis C. (iv) Routine ALT testing was, as I have described, in effect in Germany from 1965. The threshold for the test was higher in Germany than in the United States. The cut-off in the United States test to indicate when ALT was elevated was
- e 45 international units per litre (iu/l). Germany used a different system of measurement of international units. The cut-off there was also 45 iu/l, but that equated to 90 or 100 iu/l on the US scale. The cut-off for which the claimants contend, on the basis that surrogate testing should have been introduced in the United Kingdom, is that adopted by the USA, which was also the level which was adopted for the investigations carried out by the Multi-Centre Study in 1988–1989
- f referred to above. (v) Not many countries apart from the United States (both tests) and Germany (ALT only) introduced surrogate tests. The full picture is as follows:

g	Germany	1965	(ALT)
	Italy	1970	(ALT)
	USA	September 1986 onwards	(Both)
h	Luxembourg	October 1 1986 Mid 1987 (for new donors)	(ALT) (anti-HBc)
	France	15 April 1988 3 October 1988	(ALT) (anti-HBc)
	Switzerland	1 June 1988	(ALT)
j	Malta	Early 1989	(ALT)

There was some partial routine ALT testing in certain centres in Austria, Belgium and Spain, from about 1987, and Queensland (alone of the Australian states) introduced compulsory ALT testing in about April 1989. Dr Högman told the

Council of Europe in 1987 that Sweden was to introduce anti-HBc testing for first-time donors, but he explained in evidence that this was intended in fact as a supplementary Hepatitis B screening. No other countries, so far as is known, ever introduced either test. (vi) An important part of the background is the Council of Europe Working Group Paper to which I have referred, the conclusions of which were as follows:

‘1. The use of non-specific tests [the surrogate tests in question] for the purpose of reducing the incidence of transfusion associated NANB Hepatitis and [their] possible value as a public health measure remain a controversial issue.

2. If a stance is taken that blood should have maximum safety, then the tests would be introduced; but the benefits derived from this testing would not be uniform throughout every country. Also there is no guarantee, in a given country, that there will be a significant reduction in the transmission of NANB Hepatitis.

3. The introduction of non-specific tests could lead in some countries to a severe depletion of blood donors, which may compromise the blood supply; and this is a factor that must be taken into account.

4. When non-specific testing is introduced in a country, provision must be made for the interviewing, counselling, and further medical examination and treatment which may be required for donors found to have a raised ALT or who are anti-HBc positive.

5. The committee cannot give a general recommendation on the introduction routinely of non-specific tests for evidence of NANB infectivity of blood donors. Individual countries will have to assess the situation locally and decide upon the appropriate action to take.’

It is of course the assessment of whether the United Kingdom as an individual country ought to have introduced the surrogate tests that is before me. As for other international or transnational bodies, introduction of the test was, Professor Zuckerman told the court, never recommended by the World Health Organisation (WHO), nor was it recommended, as Professor Högman explained, by the Council of Nordic Transfusion Services.

[In [109]–[118] his Lordship considered the literature on surrogate testing and its effect. He then set out, in [119]–[140], the pros and cons of such testing. He continued:]

Conclusion on surrogate testing

[141] The pros and cons in respect of the introduction of surrogate testing must be assessed and weighed and then placed, together with the other *circumstances*, into Mr Underhill’s art 6 basket. I have not found this an easy task and it has required very careful deliberation. After such thought, I am left in no doubt that what I have in the preceding paragraphs categorised in almost every case as a ‘However’ outweighs or neutralises the contrary arguments that have been set against the arguments in favour, and I am clear that the scales have come down in favour of the introduction of these surrogate tests, and indeed of both kinds of surrogate test, both ALT and anti-HBc. The United States and France, the major countries who introduced surrogate tests at that time, introduced them both, and I am clear that, notwithstanding the lesser expert support for the latter test, once ALT testing is to be introduced, the addition of anti-HBc adds little by

a way of extra disadvantage, cost, blood loss or inconvenience, and may be of substantial advantage. It was, in my judgment, at least very likely to decrease the number of donors who were in any event unwanted, a factor which does not seem to have been discussed at any ACVSB or ACTTD or other meetings to which my attention has been drawn. Further, if the US research was right, the two tests did not, or not materially, overlap, and in any event the combined efficacy of the two together, on the basis of the predictive studies, was clearly greater, and there may additionally have been advantages, as discussed in [133](iii) above, in relation to counselling and diagnosis. It is both difficult, and, in my judgment, unnecessary, for me to decide a particular time for such introduction. I am, however, satisfied that it ought to have been at some stage after the introduction of the surrogate tests in the United States and the subsequent consideration given to them in the United Kingdom, and before, or at any rate by, 1 March 1988.

b

c

[142] No question therefore arises as to the subsidiary and alternative issue, whether surrogate tests, if not introduced by 1 March 1988, should have been introduced after that date. Certainly no different considerations would have applied if it were a matter of only a few months after that date, but, once it was apparent that a screening test had actually been pioneered, I would have thought it difficult to suggest that the United Kingdom ought then to have introduced the surrogate test, when the proper and inevitable concentration would have been at that stage had been upon when to implement the assay, to which I now turn.

d

e THE ASSAY

[143] I set out first a timetable of when various countries which we have considered in this trial commenced anti-Hep C screening:

f	November 1989	Japan
	February 1990	Australia
	March 1990	France (1 March); Luxembourg (new donors only, 1 March)
	April 1990	Finland (1 April - all donations: partially started 1 February)
g	May 1990	USA (2 May); Austria: Amsterdam (other Netherlands Centres later)
	June 1990	Canada; Germany (by 1 July)
h	July 1990	Belgium (1 July)
	August 1990	Switzerland (1 August)
	September 1990	Luxembourg (all donors)
j	October 1990	Italy (many centres); Spain (all by 12 October, some started earlier)
	1990/1991	Norway
	January 1991	Sweden (legal requirement published 24 January to start as soon as possible)

March 1991	Portugal (mandatory, some earlier); Cyprus; Greece; Hungary; Iceland; Malta (all 'not before' March)
April 1991	Netherlands (mandatory 1 April)
June 1991	Denmark
August 1991	Italy (balance)
September 1991	UK (1 September)
September/ October 1991	Ireland

[144] The table of dates does to a certain extent speak for itself. Certainly in relation to this issue, unlike the surrogate testing, Mr Underhill was not assisted by drawing comparisons or contrasts with other countries. As a result of the 90% concession agreement, the defendants do not seek to support a date later than 1 April 1991, which would notionally push the United Kingdom to further up the table.

[145] I shall now set out a narrative of the most material events of what did occur in the United Kingdom with regard to implementation of the assay. This is recounted only to show what did occur, and not as a preface to any criticism with regard to each individual step. Although Mr Brown did indulge occasionally in what he called 'poison and prejudice', he recognised the limits of the ambit which Mr Underhill has himself laid down by virtue of his submissions (which I have primarily found to be unsuccessful) as to what a court can and should consider with regard to steps which a producer could or should have taken. As discussed in [102] above, this would not involve, as would what Mr Underhill would call a negligence inquiry, or Mr Brown a full-blooded negligence inquiry, a detailed critique of every incident. What is to be done is, as against what did occur, to set out what I may be persuaded should have occurred, in the round. This involves my looking realistically as to how much time it is legitimately to be expected that the producer should have taken to introduce the precaution which he did rightly introduce, but, as the claimants allege, later than he ought to have done had he taken all legitimately expectable steps.

[146] So far as my approach is concerned in arriving at this picture in the round, I shall look at the steps which it is legitimately expectable that a producer in the position of the defendants would have taken, and the period of time which it is legitimately expectable they ought to have taken. If there were any particular outside circumstances either affecting the United Kingdom generally, ie such as the Gulf War, or locally, such as to make it evident that either nationally or in one particular area it would not at a material time have been possible to have taken a particular step, then that would and should be taken into account. But in the event neither such eventuality arises.

[In [147]–[169] his Lordship considered those issues against the factual background. He continued:]

Conclusion on routine screening

[170] Mr Brown's date, albeit originally allowing for the possibility of December 1989, settled down in the end as 1 January 1990. Mr Underhill's date

- a was 1 April 1991. The basic requirements to be fitted in are, I am satisfied, the carrying out of pilot studies and evaluations, the planning for counselling and implementation, and the execution of that implementation in respect of equipment, staff and building works. I am satisfied that it was not appropriate or necessary, or legitimately expectable, that the screening should wait until after FDA approval if, as I am satisfied should have occurred, sufficient evaluation had
- b taken place to allow for the United Kingdom's own decision to be made, like that of Australia and France and the other countries which started prior to FDA approval within the United States. I am also satisfied that it was not necessary to wait to implement until after the confirmatory test was in place, provided that, as Dr Gunson, and to a substantial extent Professor Zuckerman and indeed the members of the ACTTD allowed, it was known, as it was, that the RIBA test
- c would be available very shortly afterwards.

[171] I have already referred to Dr Gunson's evidence, subject to the question of a confirmatory assay as to 'certainly early in 1990', in retrospect. Later in cross-examination, he said to Mr Brown: 'Mr Brown, I have now said three times—I think I did say to His Lordship yesterday—that in retrospect we should

d have done it a different way.' Mr Underhill, of course, points out what is in any event particularly relevant in cases of negligence, namely that the use of hindsight is dangerous, and very often introduces too stringent a test. But my task, on Mr Underhill's case, examining all the *circumstances*, is to conclude, looking back on the full picture, what the public was entitled to expect, and I conclude that in fact, Dr Gunson, a supremely fair man, is in fact looking back with my spectacles.

- e [172] Bearing in mind all the *circumstances*, including the priority given to the elimination or reduction of PTH. (i) My primary conclusion is that routine screening ought to have been introduced by 1 March 1990. That in my judgment would have allowed sufficient time for pilot studies and evaluation, particularly if, as I conclude should have been the case, rather more work had been done prior
- f to Rome, but even if it had not been. If pilot studies had been more promptly carried out, even in the context of a wider evaluation, I am satisfied that a decision could have been taken which would have given at least three months lead time for implementation by the centres before the introduction of routine screening. This date would accord with Dr Gunson's 'certainly early in 1990'; would be slightly before the date of 'sometime after April 1990', which Dr Cash had
- g gambled on on 3 August 1989, in the course of his own evaluation of the assay; and would accord with the date of implementation of routine screening by France and for new donors in Luxembourg, and would post-date Japan, Australia and much of Finland. This would mean that the RIBA test would be known to be relatively imminent and would in fact have followed some two months later.
- h In that interim period, either there could have been deferment of donors, for what even Professor Zuckerman would have accepted to have been a short period of time, or for that short period of time an extra burden on the newly instituted counselling procedures. (ii) I have concluded that surrogate testing should have been in place by March 1988 and thus, like France, the United
- j Kingdom would have run the new routine screening alongside the surrogate tests from 1 March 1990 onwards. However, balancing the various *circumstances* and applying so far as I can Mr Underhill's test, which I have already found to be inappropriate in law on the proper construction of the directive, if, but only if, surrogate tests had been in place, then I might have been prepared to find that, in those circumstances only, the scales might have come down in favour of a delay

of the assay until May 1990 with the RIBA test actually in place. But I am satisfied that, with the position as it was, with no surrogate tests in place, and indeed with the deliberate decision made by the ACVSB in November 1989 to defer any further consideration of surrogate tests, while concentration was dedicated towards implementing routine screening, which did not in fact take place for another 22 months, routine screening ought to have been introduced at the earliest practicable time, which I have concluded to be 1 March 1990.

DEFECTIVE WITHIN ARTICLE 6

[173] In the light of these findings of fact, I can now decide whether the blood infected with Hepatitis C was defective, on the 'Brown case'. I take into account all the *circumstances* in the basket. (i) Those set out in [100] in sub-para (i) to (vi): as to sub-para (vii), I take into account the claimants' pleading, by a late re-amendment to their reply, for which I gave leave during the hearing without opposition from the defendants, being para 4(h)(i), of the specific *circumstance* that 'past intravenous drug users were continuing to donate blood, which was being processed and supplied to patients'. (ii) The fact that the precautions of the introduction of surrogate testing and earlier introduction of routine screening were not taken. I conclude that, taking into account *all circumstances*, such blood so infected on and after 1 March 1988 did not provide the safety which persons generally are entitled to expect.

NATURE AND MEASURE OF DAMAGES

[174] Now that I have found the defendants to be liable, I must address the basis upon which damages are recoverable under art 4 (and s 2 of the CPA). I deal first with two short points. (i) *Time scale*. I have found the defendants liable (generically) for supplying defective blood on the basis of the proper construction of the directive: alternatively, on the broader consideration of *circumstances*, I have in any event found the defendants liable in respect of the period from 1 March 1988 (surrogate testing and subsequently also routine screening). No question therefore arises as to differentiation between the claimants by reference to their date of infection. (ii) *What is the defect?* Although Mr Underhill pursued his submission, referred to in [46](i), that the defect in the blood was *unscreenedness*: (a) he conceded that he could not make such a submission if the claimants succeeded on the 'Forrester case', which would not depend upon whether there was or was not screening or testing. This has, of course, arisen; (b) with regard to the pursuit of his contention even with respect to the 'Brown case', he quickly recognised the difficulties pointed out both by the claimants and, indeed, in the course of argument, by me. First, if he be right, then the definition of 'defect' for the purposes of art 6 must be different from its definition for the purposes of art 7(e). In the latter article, *defect* plainly applies to the impugned condition—infection by Hepatitis C in this case—which either is, or is not, known or is, or is not, capable of discovery. It is not the 'existence of the unscreenedness' which is, or is not, to be discovered. Whereas it is always possible to argue that a word or words may have different meanings in different sections or sub-sections of the same statute or directive (and that may arise in relation to words in art 7(b) as discussed in a different context in [51](iv) and [74](i) above) that cannot in my judgment possibly arise in relation to words central to the directive. *Defect* is referred to in the operative arts 1 and 4, and defined in art 6, with relevant escape clauses in art 7, and must be consistent in its meaning. Secondly, as Mr Brown

- a pointed out, if *unscreenedness* be the defect, then *all* blood bags must be defective, when none is screened: only one in 100 blood bags would be defective *and* harmful. This creates a quite unnecessary additional tier of argument and proof. The only purpose for Mr Underhill to put forward the proposition of 'unscreenedness' was to assist him in the argument and presentation of his case that the defendants could not be liable for all the damage otherwise flowing from the infection (a contention to which I shall now come), by reference to a case that the claimants should only be entitled to recover damages insofar as they flow from the *unscreenedness* and not from the infection. The peg of *unscreenedness*, however, is too fragile to withstand the weight of such argument, and the argument must stand on its own or not at all. I am afraid that *unscreenedness* suffers from the defect of unpersuasiveness.
- c

ISSUE IIIa

- d [175] In the light of my conclusions on Issue I, the blood was defective by virtue of its infection with Hepatitis C, notwithstanding and in the light of all relevant *circumstances*. As Mr Brooke succinctly put it in argument, the *defect* was the virus in the blood and the *damage* was the virus in the patient. Mr Underhill does not contend, having lost on the 'Forrester case', for any other result, nor that his 'loss of a chance' case applies in this regard.

ISSUE IIIb: LOSS OF A CHANCE

- e [176] If I were wrong in my conclusions on Issue I, then the claimants have only succeeded on the 'Brown case', and Mr Underhill contends, as summarised above, that the defendants are not liable for all the consequences of the infection, but only for that damage which results from the failure to introduce surrogate testing and/or to implement routine screening earlier. Thus he asserts that it would be necessary to arrive at the percentage chance by reference to the findings of fact I have made, that the claimants would not have been infected by the virus if the defendants had taken further or different steps.
- f

- g [177] He puts his case as follows. (i) He prays in aid the speech of Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd*, *United Bank of Kuwait plc v Prudential Property Services Ltd*, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191 (BBL). He refers to the following passages in particular:

- h 'A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered ... How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute ... There is no reason in principle why the law should not penalise wrongful conduct by shifting on to the wrongdoer the whole risk of consequences which would not have happened but for the wrongful act ... But that is not the normal rule ... Normally the law limits liability to those consequences which are attributable to that which made the act wrongful.' (See [1996] 3 All ER 365 at 370–371, [1997] AC 191 at 211–213.)
- j

As the claimants here are only entitled to the loss which resulted from the failure to screen, and as they would or might have suffered from Hepatitis C in any event, their damages must be reduced accordingly. (ii) The proposition is by reference to, and in accord with, the speech of Lord Diplock in *Mallett v McMonagle* [1969] 2 All ER 178 at 191, [1970] AC 166 at 176:

‘... in assessing damages which depend on its view as to what ... would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.’

(iii) If on no other basis than justice or fairness, the defendants ought not to be liable for, and the claimants not entitled to recover, loss, which they would or might have suffered in any event. The example that was given by Mr Underhill was of a product, which was dangerous, but would not have been found to be defective within art 6 if a clear warning had been given by way of a label: and where the claimant, who is blind or illiterate, would not in any event have been able to read the label and thus would have suffered the same damage. It would, submits Mr Underhill, be wrong for such a claimant to recover for loss which would still have been suffered, even had the product carried the label, and would thus have been found, on the hypothesis postulated, not to be defective. (iv) So far as comparison is drawn with contract, the analogy is not with a product which is found to be not fit for its purpose, or not of merchantable quality, but one in relation to which there has been found to be a breach of a warranty that it had been screened.

[178] I prefer the submissions of the claimants, which I summarise and adapt below. (i) BBL is wholly inapt. This is not a case of breach of duty, but a claim for compensation in the context of strict liability for the supply of a defective product. Even if (for the purpose of the argument) *avoidability* and hence conduct is an issue, such conduct was not (on Mr Brown’s case nor, on the basis of his disavowal of investigation of fault, Mr Underhill’s) *wrongful*. (ii) The claim is based simply upon the product being defective. The conclusion is that it is defective. What made it defective is not in the end of relevance: it is simply that it does not *provide the safety which a person is entitled to expect*, just as if it were not of merchantable quality or were unfit for its purpose. (iii) The issue of conduct and *avoidability*, even if admissible (with the careful avoidance of such epithets as *wrongful*, *negligent* or *faulty*), is only part of what has to be included in the basket or weighed in the balance. In the hypothetical case of the blind or illiterate claimant, suggested by Mr Underhill, it was postulated that one factor, lack of warning, was or would have been determinative. That may or may not have been the case (warnings in the context of arts 6 and 12 will not be a straightforward matter), but the conclusion would nevertheless be that the product was defective. In any event, in this case, it is not the case that screening/ testing was the only factor in this case, as is clear from [173] above—indeed it was not even the only area of contested fact, for questions of seriousness, incidence, efficacy and the nature of donors have had to be considered. (iv) The structure of the directive and of the CPA is supportive of the claimants’ case, and of Mr Brooke’s aphorism set out in [175] above. As far as the directive is concerned, art 1 enunciates liability for damage caused by a defect; art 6 defines when the product is defective; art 4 requires ‘the injured person ... to prove the damage, the defect and the causal

a relationship between defect and damage'. The structure seems to me to admirably simple and not to encourage complicated compartmentalisation of the damage. So far as concerns the CPA, I indicated, in [23] above, that I would set out the two relevant sections:

b '2.—(1) Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage ...

5.—(1) Subject to the following provisions of this section ... "damage" means death or personal injury or any loss or damage to any property (including land).'

c The damage to be compensated to the claimant is the damage caused by a defect in a product, and not by any conduct, wrongful or otherwise, or breach of duty. (v) No issues of fairness or justice such as are contended for by Mr Underhill, for the purpose of his loss of chance argument, can be supported within the context of a directive such as this, at least without consideration of the objectives of the directive. If such are to be examined, it might be more appropriate to consider:

d (a) that the directive was intended to increase or improve the recovery of compensation for consumers; (b) that it was intended to remove rather than increase any onus of adducing evidence to prove fault on the part of the producer, which would not encourage a court to investigate yet more evidential questions relating to the conduct of the producer, such as what precise loss flowed from what aspect of such conduct and what did not; and (c) that fairness to the producer may be considered to be sufficiently provided for by the express exonerating circumstances of art 7, and the contributory negligence aspect of art 8.

f [179] These persuasive arguments are, in my judgment, sufficient to outweigh and answer the submissions of the defendants. The claimants had two further contentions, with which I do not feel it necessary to deal, in the light of my conclusion that the loss of a chance argument does not arise. (i) The claimants contend, in the light of s 5(1) of the CPA, which I have just set out, and in any event, that there can be no recovery under the directive for economic loss, except in so far as it is consequential to, or parasitic upon, damages for personal injury, and that a claim for loss of a chance is a claim for economic loss. (ii) They further submit that, where the claim is for personal injury, and by analogy with such claims as medical negligence, the issue of loss of a chance is not, in any event, available; but the issue must be one of causation, and thus either total success or total failure: they refer to *Hotson v East Berkshire Area Health Authority* [1987] 1 All ER 210 at 223, [1987] 2 All ER 909 at 913, 916, [1987] AC 750 esp at 769, 782, 785–786 per Croom-Johnson LJ, Lord Bridge and Lord Mackay respectively, and to *Judge v Huntingdon Health Authority* (1994) 27 BMLR 107.

h [180] I accordingly resolve Issues IIIa and IIIb in favour of the claimants: no reduction to their damages is to be made by reference to any loss of chance argument.

j
ISSUE IV: AVAILABILITY OF ARTICLE 7(e)

[181] I have already made clear, in [74]–[77] and [82] above, that in the light of my conclusions on the construction of art 7(e), the defence is not available to the defendants (Issue IVa). However, I must turn, as foreshadowed in [84] above, to decide the issue of the availability to the defendants of the art 7(e) defence on the

assumption that, contrary to my conclusions in law, the defendants' construction of art 7(e) prevails: namely as to whether, on the basis of my findings on Issue II, the *state of scientific and technical knowledge at the time when* (the defendants) *put the product into circulation was not such as to enable the existence of the* (infection in the particular bag of blood) *to be discovered* (Issue IVb). a

[182] The first question is what is meant by 'such as to enable the existence of the defect to be discovered' in the particular product, in the context of my findings as to surrogate testing and earlier screening. (i) As for routine screening, this was of course, as explained in [11] above, not a test which discovered the virus or antigen itself (this came only later with the expansion of the limited early technology of PCR testing, and the development of NAT), but identified the antibody to Hepatitis C. Unlike with Hepatitis B, where an antibody can continue in the blood long after the virus has disappeared, it is, or at any rate, was, before treatments were developed, not usual for Hepatitis C virus to clear from the blood or in any event from the body, so that the presence of Hepatitis C antibody is likely to carry with it a high degree of certainty of the presence of Hepatitis C virus. That may be his reason, but in any event Mr Underhill does not seek to take the point that to screen for and discover the antibody is not to discover the virus. (ii) So far as surrogate testing is concerned, he does however pursue what has been called a 'technical defence'. As is apparent from the detailed consideration in this judgment, neither the ALT test nor the anti-HBc test, being 'indirect', were intended to identify the Hepatitis C virus. They were used so as to identify blood which might be infected by the Hepatitis C virus, and which would, in any event, if it failed either of the two tests, be discarded and not supplied to recipients; whereby the risk of transmission of infection by Hepatitis C was reduced. Mr Underhill submits therefore that, assuming, as I have found, that surrogate tests should have been introduced, they were not such as to 'enable the existence of the defect to be discovered'. b c d e

[183] I conclude as to the 'technical' argument as follows. (i) The purpose of the art 7(e) defence, as interpreted by both sides, is to see whether the defect could be, as it was put by the Advocate General in *European Commission v UK Case C-300/95* [1997] All ER (EC) 481 at 489 (para 20) *eliminated or prevented from arising*. Certainly it is fundamental to Mr Underhill's submission (which for this purpose must be deemed to have succeeded) that it is the lack of opportunity to discover the defect in the particular product which is essential to art 7(e), so that diligent producers can be excused and encouraged. I conclude that the article should be construed purposively, that is in order to assist the purpose of the directive (and further that the ambit of the art 7(e) escape route or exception should be construed restrictively), such that the existence of the defect is *discovered* in the actual product if it is eliminated or removed or prevented from arising. Even if the nature of the defect is not specifically identified, the defect to my mind would be discovered if the precaution was taken which in fact eliminated the defect. (ii) Further, as set out in [51](v) above, it is to be recalled that *enable* is conveyed in other languages of the directive by words equivalent to *permit*. It seems to me that it can be said that surrogate testing would *permit* or *enable* the discovery of the defect, either because there is simply the assumption that blood is or may be infected by Hepatitis C as a result of a positive test, so that there is for these purposes a 'provisional' discovery of the defect, or that, more indirectly, it would *enable* or *permit* subsequent discovery of the virus if the blood f g h j

a were retained (as will very regularly have been the case) for subsequent research and later, perhaps more direct, testing. Accordingly I reject the 'technical' defence.

[184] The next question is to determine the time when the *accessibility of the state of scientific and technical knowledge* must be tested. (i) Surrogate testing was available prior to March 1988, and because that date is the first date for claims under the CPA, there is no need to look at any other date, and the information
b was plainly *accessible* as from that date. (ii) Screening. I have concluded that routine screening ought to have been introduced within the United Kingdom as from 1 March 1990. Information about such tests can however be said to have been
c *accessible*, on a non-Manchurian basis, since April 1989, when there was the publication referred to in [158](ii) above, or from the Paris or Rome symposia, or from the first introduction of such a test, namely in Japan in November 1989. I find it a difficult question as to which date to take. My conclusion has been that on a proper construction of art 7(e) it is *not* the precautions, which could have been taken to discover the defect in the particular product, which are relevant. I am satisfied that it is the *knowledge*, which thereafter puts the producer at risk if he then supplies. The fact that he only acquires, or could have acquired, the
d *knowledge* shortly before the supply of the product would not absolve him from liability, provided that the knowledge was accessible. If, on the other hand, the issue is the accessibility of *precautions* which might have discovered the existence of the defect in the particular product, which precautions were available in Japan or the United States, but which would inevitably take some time for him to implement, then it makes less sense for him to be immediately imputed with the
e knowledge of precautions about which he can then do nothing, and more sense to suggest that there must be some period of time for him to implement the precautions. It is clearly against that background that Mr Underhill made the submission that 'the virus only became discoverable as from the date at which it became reasonably practicable to introduce a routine screening test in the UK'. If
f I am compelled to accept the Underhill case, for the purposes of determination of Issue IV(b), then: (a) it makes much more sense to have an identical date in both art 6 and art 7(e), the date by which the defendants *should* have implemented the precaution; but (b) that means to my mind a clear undermining of the stringent approach to accessibility emphasised in *European Commission v UK*. Mr Underhill pointed to para 24 of the Advocate General's opinion ([1997] All ER (EC) 481 at 490), as if it supported the proposition that some time was to be allowed after
g acquisition of the knowledge—

'more generally, the "state of knowledge" must be construed so as to include all data in the information circuit of the scientific community as a whole, bearing in mind, however, on the basis of a reasonableness test, the
h actual opportunities for the information to circulate.'

but I am quite satisfied that that is referring to the *opportunities to circulate* in the sense that if the information is locked within Manchuria it has no such
j opportunities: and not to some implication of a reasonable period of time for dissemination of the information. I am quite clear that this very discussion emphasises why the claimants' construction of art 7(e), which I have accepted, is the right one. If, however, I must adopt the defendants' construction for the purposes of Issue IVb, then, with some misgiving, alleviated by the fact that if my first conclusion is right then no harm is done, I will adopt the same date for

art 7(e) as for art 6, namely 1 March 1990, as the date of what Mr Underhill calls *discoverability* with regard to the introduction of screening. a

[185] I turn then to the central question, namely whether the defendants can show (the onus of proof being upon them) that *the state of scientific and technical knowledge at the time was not such as to enable the existence of the defect to be discovered* in the particular product.

[186] I deal first with the period from 1 March 1988 to 1 March 1990. (i) If the surrogate tests had been in operation, what would the consequence have been? I have already concluded that at the material time the contemporaneous research showed an adjusted efficacy of 40% for both tests. If they had been introduced, what effect would they actually have had? I refer to [112] and [113], and to the favourable 'look-back' research that was carried out. Can I now conclude that the efficacy was in fact higher than 40%? I just do not feel that, on the basis of the selective academic literature I have seen, and particularly without the benefit of any further evidence from Mr Charlett (who of course in any event, was the *defendants'* witness), that I can be sure, on the balance of probabilities, that the adjusted efficacy of both surrogate tests together was higher than 40% during the material period, namely from 1 March 1988 until the notional commencement of routine testing by 1 March 1990. Mr Underhill's case on that basis is that he can satisfy the onus of showing that, even with the implementation of the then most up-to-date precautions available, namely both surrogate tests, since only 40% of blood infected with Hepatitis C would then have been caught, on the balance of probabilities infection in the blood supplied to the claimants would not have been detected. (ii) Mr Brown submits that I should not be restricted to the 40% who would have been picked up by the surrogate tests, but that I should add a further factor for unwanted donors who were giving blood (see [100](vii) above). However, whereas I can entirely see the relevance of this to the question as to whether the blood was defective within art 6 (see [173] above), I do not accept its relevance to this aspect of the case. Although of course the onus is on the *defendants*, not only was there no case pleaded by the claimants, but no case ever adequately or at all explored with the relevant witnesses, that there was any other step that the defendants could or should have taken in relation to the elimination of such donors, in addition to the implementation of the missing tests, and in the absence of any such suggestion, together with an assessment or estimate of what further proportion of infected blood might thus have been removed, I cannot simply add a notional figure to the 40%. (iii) Mr Brooke submits as a matter of law that I cannot accept the proposition that, because the predicted efficacy of the tests was only 40%, therefore the claimants' defective blood would not, on the balance of probabilities, have been discovered, but that the defendants must show, by reference to each bag of blood and each claimant, that in fact a test would not have detected the virus in their blood. He refers again to *Hotson v East Berkshire Area Health Authority* [1987] 1 All ER 210 at 223, [1987] AC 750 at 769 per Croom-Johnson LJ: b
c
d
e
f
g
h

'In his closing speech, the plaintiff's counsel said: "It is our submission ... *that the loss of a chance, even a less than 50% chance, is enough to found a claim for damages in tort ... damage is proved by proving on the balance of probabilities the loss of a 25% chance.*" Put simply that way, the proposition is unsustainable. If it is proved statistically that 25% of the population have a chance of recovery from a certain injury and 75% do not, it does not mean j

a that someone who suffers that injury and who does not recover from it has lost a 25% chance. He may have lost nothing at all. What he has to do is prove that he was one of the 25% and that his loss was caused by the defendant's negligence. To be a figure in a statistic does not by itself give him a cause of action.'

b It is my conclusion, however, that that logic, apply as it may do in the case of whether a claimant can establish a cause of action for loss of a chance (I have left that matter over for reasons appearing in [179] above), does not apply in a case such as this. In this case the defendants have to prove an escape route on the balance of probabilities. There does not seem to me to be a fundamental issue of jurisprudence at stake, but more a question of evidence. Am I satisfied that, in the absence of specific evidence about what in fact happened to the particular claimant's blood donor or donation, the defendants can still prove on the balance of probabilities that a test would have done no good, if, in fact, such tests do, more often than not, do no good? That is the conclusion I reach here (although, unless my earlier conclusions are wrong, the decision is of academic interest only); namely that the defendants would, on their construction of art 7(e), establish that in respect of the period between 1 March 1988 and 1 March 1990, the introduction in the United Kingdom of surrogate testing would not have led, on the balance of probabilities, to the discovery of infection in a particular donation, such that they would be entitled during that period to the protection of art 7(e).

e [187] I now apply the same approach to the period from 1 March 1990 onwards. (i) On the basis set out above, routine screening was accessible/discoverable from 1 March 1990. I am satisfied that, on the balance of probabilities, blood infected by genotype 1 would have been discovered by the first generation tests, because it is common ground that the efficacy of such tests in relation to genotype 1 was 90%. Thus on the balance of probabilities, the defendants' case under art 7(e) fails in regard to those infected by the genotype 1 virus, even on their own construction. (ii) With regard to genotypes 2 to 4, the screening on its own would only have had an efficacy of 32%, according to the unchallenged evidence from Dr Simmonds and from the research of Dr McOmish and himself. However, I have concluded that surrogate testing should have been implemented and would have continued alongside routine screening at least until 1 April 1991, now the relevant date. Again on the basis of the unchallenged evidence from the genotype experts, it is clear that the combined efficacy of screening and surrogate testing would be well over 50%. The figures from Dr McOmish appear to be 95% for genotype 1, 70% for genotype 2 and 86% for genotype 3, the other genotypes being more or less identical. In these circumstances in respect of the period from 1 March 1990 onwards, the defendants' case under art 7(e) would in any event fail.

ISSUE V: GENERIC ISSUES OF QUANTUM ARISING OUT OF THE LEAD CASES

j [188] I turn to the six lead cases. I deal first with general questions of quantum which are raised by them and which will also be relevant to the claims made under the CPA by other claimants within the group action.

Evidence

[189] The evidence given in respect of Issues I to IV was of course to a certain extent relevant to Issues V and VI, and in particular there was specific reference

back to the evidence given by Professor Dusheiko, which specifically straddled what might in general terms be called liability and quantum. In addition, however, there were of course particular witnesses dedicated to the six lead cases and to the general issues of quantum. (i) *Factual witnesses*. The six claimants in the lead cases each gave evidence, together with relevant members of their families. The defendants called no factual witnesses. So far as care was concerned, which related to the circumstances of Mr W and Mrs X, although detailed assistance was provided from Mrs Maggie Sargent RGN for the claimants and Richard Ryland of Care Providers Ltd for the defendants, in the event their evidence was co-ordinated and agreed, so that neither of them had to be called. Accountancy evidence in the case of Mrs X was provided by the late Alan Bragg FCA, whose evidence was read. (ii) *Medical expert witnesses*. As in relation to the evidence given on the liability issues, all the witnesses were extremely distinguished and experienced. For the claimants, in addition to Professor Dusheiko's evidence, there was evidence, both generically and in respect of the particular circumstances of the six claimants, from Dr Ryder, consultant physician in hepatology and gastro-enterology at the Queen's Medical Centre, University Hospital, Nottingham, with very considerable clinical experience, and more than twenty publications in the relevant area. Dr Dinshaw Master was called in relation to the psychiatric issues raised, to which I refer below. He is a consultant psychiatrist at Guy's Hospital, and senior lecturer at Guy's, King's and St Thomas' Schools of Medicine and Dentistry, and he too has published widely. Evidence of Professor Day, of the Freeman Hospital, Newcastle, which would have been called as to the cost of treatment, was agreed. His agreed evidence related to the cost of either six months (24 weeks) or 12 months (48 weeks) of treatment for Hepatitis C. As will appear below, the present recommended and most successful treatment is what is called 'combination therapy'. Originally there was 'monotherapy', by the use of Interferon alfa alone. This is an artificially-made clone of natural interferon, to fight viral infection, taken by self-injection. Combined with this, unless its use is contra-indicated in respect of a particular patient, has been for some time a viral inhibitor, taken by tablet, called Ribavirin, and the two together are called 'combination therapy'. Recently there has been a sophistication of the Interferon, by virtue of the use of what has been called 'pegylated Interferon', which involves a module made artificially more massive by the addition of polyethylene glycol molecules. Its effect is to slow down the rate at which interferon is filtered out of the body: there is one weekly self-injection instead of three. The cost of standard combination therapy was agreed, in accordance with Professor Day's evidence, at £6,006.10 for six months, and £11,458.20 for 12 months: and of pegylated combination therapy as, respectively, £6,631.10 and £12,708.20. Additionally Mr Terrence Hope, Consultant Neurosurgeon at University Hospital, Nottingham, was called to give evidence in the field of cerebro-vascular disease, which is his speciality, with regard to the specific circumstances of Mr W. For the defendants I heard the impressive evidence of Dr Alexander, who is lecturer in medicine at the University of Cambridge School of Clinical Medicine (Addenbrooke's NHS Trust), where he is honorary consultant physician/hepatologist, again with very considerable clinical experience: and he has more than 200 publications in the field between 1980 and 2000. Evidence of Dr Kelly, a consultant paediatric hepatologist from Birmingham Children's Hospital, was read. Lastly there was called by the defendants, on the psychiatric and related issues, Professor Simon Wessely,

a professor of epidemiological and liaison psychiatry at Guy's, King's, St Thomas' School of Medicine and Institute of Psychiatry, honorary consultant psychiatrist at Kings College and Maudsley Hospitals and director of the Chronic Fatigue Syndrome Research Unit: he has a veritable library of more than 300 publications to his name. (iii) *Other experts*. The claimants adduced the evidence of an employment expert, Clive Langman of Langman Human Resource Development Ltd, who prepared his evidence by reference to questionnaires sent to a large number of the claimants and to his own experience, whose statement was, in the event, read. Three witnesses were called in relation to insurance and financial services; two for the claimants, Miss Susan Daniels, of JTA Financial Services, an Independent Financial Adviser (IFA), specialising in obtaining insurance and other financial products particularly for those with medical problems, and Mr Eric Purdy, chief underwriter and underwriting manager at the M & G Group; and one for the defendants, Mr Roy Brimblecombe, of Aon Consulting Ltd, formerly executive director and chief actuary of the Eagle Star Insurance Group, and a former chairman of the Life Insurance Council of the Association of British Insurers and member of the board of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO) and chairman of its monitoring committee. During the course of the hearing, and again by dint of a good deal of work behind the scenes, the three co-operated in an extremely clear and lucid joint report, cross-referring to the original reports of all three of them and reaching joint conclusions: in the circumstances Mr Purdy did not need to give any evidence, but supplementary evidence was orally given by Miss Daniels and Mr Brimblecombe. (iv) *Literature*. Apart from publications and studies by the witnesses who were called, there was reference both to the four core files of medical literature used for the liability part of the hearing and to a fifth produced specifically for Issues V and VI. The most central publications were: (a) the NICE guidance referred to in [90] above; (b) the consensus statement of the EASL (European Association for the Study of the Liver) International Consensus Conference on Hepatitis C (Paris, 26–28 February 1999) (the 'International Consensus Statement') in which, together with others, such as Drs Alter, Miriam Alter and Esteban, Professor Dusheiko participated; (c) articles, published in 1997 (described as 'landmark' by Dr Alexander), 1998 and 2000, by Dr Poynard and others; and (d) articles by Drs Fraser and others (Israel 1996), Hoofnagle of the NIH (1997), Fattovich and others (1997), Gane (Auckland Hospital, New Zealand 1998), Foster (St Mary's, London, 1999), Rodger and others (Australia 1999), Goh and others (Ireland 1999), Caronia and others (1999, including Dr Alexander), Mason and others (1999, also including Dr Alexander) and Knobler and others (Israel 2000). I have drawn on all this literature, and on the evidence given by the witnesses to whom I have referred, and their publications, in my attempt to summarise and make findings about the relevant scientific, epidemiological and medical background of Hepatitis C, as set out below.

j HEPATITIS C: THE DISEASE AND ITS TREATMENT

[190] The key word which Mr Brooke continually dinned into my ears throughout the course of this hearing—and it is fully supported by all of the evidence—is uncertainty. The medical profession is still learning about Hepatitis C, and we have had the benefit of evidence and input from some of the leading protagonists. Dr Dusheiko said as follows:

'I think it is most important that we have a balanced view of the natural history of Hepatitis C, [not least] from the point of view of deciding which patients need therapy in acquiring resources for treatment. If one is to understate the disease, that may be detrimental from terms of public health, and the management of the disease. If we are to overstate the disease, that would again also be detrimental.'

It may be that even this very case has contributed to the learning about Hepatitis C, both by virtue of the detailed consideration of the circumstances of the more than 100 claimants within the group, and by the examination of the full picture for the purposes of this hearing. The outlook is far less gloomy than it was in 1988–1989, as was made clear by Dr Alexander. Of course Hepatitis C was only identified in 1988, and the earliest date of infection of these claimants was 1 March 1988, by virtue of the fact that they are making claims under the CPA; and so the longest period of time for which any of them has been infected by Hepatitis C is 13 years, and it is, as will be seen, a disease with a potential duration of 50 years or more. Out of the cohort of claimants, I am informed that six have died of Hepatitis C-related liver disease and one, as it happens one of the six lead claimants, Mrs X, has had a life-saving liver transplant.

Clearance of the virus

[191] Hepatitis C can spontaneously clear, and does so in relation to 20% of those who are infected by it. Why that is so is unclear—it was suggested by Professor Dusheiko that there may be a genetic cause. In answer to questions from me he said as follows:

'Q. Is there any indication of what gives you a better chance of being in the 20% than in the 80%? A. There is some evidence that there is a genetic basis for this. Certain individuals with particular HLA types, determining their genetic type, seem much more likely to clear the virus. It clearly depends upon an appropriate cellular and human immune response, and we are just beginning to gain an understanding, but those individuals who are infected with Hepatitis C and mount a vigorous immune response ... do seem to be able to clear the virus. Q. Presumably ... it might be that the secret of why these 20% clear the virus might unlock a cure? A. It is a study—a very active area of research at the moment.'

[192] The way in which such 'clearance' of the virus can be identified is by the use of a PCR, that is the form of blood test, now much more fully available than it was in the 1980s, which can test for the virus (not the antibody) in the blood. Indeed there is now a 'qualitative PCR', which identifies whether there is virus in the blood (PCR positive) and, if there is, there can then be, if required, a 'quantitative PCR', which can calculate the amount of virus in the blood, that is the quantum of viraemia or 'viral load', which has a relevance to prognosis and to treatment. Apart from such spontaneous clearance, the aim of the treatment to which I have referred above, monotherapy or combination therapy, whether pegylated or otherwise, is of course to achieve such clearance. On occasion blood can test PCR negative during or after such treatment, but nevertheless revert to PCR positive (this disappointment occurred for Miss T). However, if it remains PCR negative for six months or more after treatment, it is regarded as clear, and, as will be seen below, reversion to positivity thereafter is very rare

a indeed. The virus may still remain in the blood, but at such a low level that it cannot be measured by PCR, or it may be entirely absent from the blood but still remaining in tissue, be it liver or pancreas: but if treatment has been successful, the patient is clear and the prognosis is excellent. As I understand it, whereas there is no evidence of a case in which spontaneous clearance has ever subsequently reverted, so far as those whose blood is cleared of the virus as the result of treatment, late reversion has, rarely, been experienced; but although strictly it is a matter not of *clearance* but of 'control' of the virus, they too, subject to the possible need, hopefully decreasing, for the occasional check-up or blood test, can be regarded as cured. (I refer to this further below, when dealing with the question of provisional damages.)

c *The course of the disease*

[193] Approximately 20 to 25% of those who are infected by the Hepatitis C virus have, during the period of acute infection, jaundice, the specific and obvious symptom; the others being 'anicteric' (without jaundice). The jaundice clears fairly quickly: there may be some interrelation between those who have jaundice and those referred to above who spontaneously clear (research is continuing). In any event, the main issue is not acute hepatitis but chronic hepatitis. As set out in [191] above, 20% of those infected do not proceed to chronic infection, but spontaneously clear. But, subject to the development of combination therapy, and some considerable ongoing research and study into other treatments, it is the balance of 80% who suffer, in varying degrees, from Hepatitis C for the rest of their lives. The prognosis is very variable. (i) Approximately one third of those with chronic Hepatitis C (Category A) will be largely asymptomatic during their lifetime. They may have relatively minor symptoms, such as will be discussed below, affecting their quality of life, but they will not suffer from any, or any material, liver disease. Any lesions to their liver will be benign and of no materiality. (ii) Approximately a further one third (Category B) will suffer from mild to moderate liver disease, with necro-inflammatory lesions and mild fibrosis, progressing slowly, if at all, to serious liver disease. Fibrosis is measured by a number of different systems, each with a level, either from one to five or one to six, but, on all such systems, levels one and two, and often three, are regarded as benign, and such fibrosis will have no deleterious effect on liver function.

g Professor Dusheiko described fibrosis as follows:

h 'For reasons that are not clear, because we do not understand the pathogenesis of the disease, it is a disease characterised by a sort of creeping fibrosis of the liver, where scar tissue, known as fibrosis, is laid down in a particular architectural distribution, starting with a small amount of fibrosis, if present at all, with the portal tracts: gradually then extending from portal tract to portal tract in the liver, linking [them], which is known as linking or bridging fibrosis, gradually then encircling the nodules of the liver.'

j At present the only effective way in which to estimate the extent and development of the fibrosis is by a biopsy. (iii) One third (Category C) will suffer from more serious liver disease—chronic liver disease (CLD). Some progress slowly and some more quickly, as the fibrosis increases, if it does, and, in doing so, it gradually encircles the nodules of the liver, as discussed above. Cirrhosis is simply extensive fibrosis, leading to a nodular change in the liver, with gross nodules visible to the naked eye and a gradual abnormality of the texture of the

entire liver. In the Poynard studies, to which I have referred in [189](iv)(c), the median estimated duration of infection through to cirrhosis was 30 years. It is now estimated that, of those with chronic Hepatitis C, 20% (ie about two-thirds of Category C) will develop cirrhosis in 20 years, and another 10% in 30 to 50 years. Cirrhosis itself can be asymptomatic for some time so far as its effect on liver function is concerned: it is gradual and can reach a plateau. There is a period during which the liver can cope, which is called 'compensated' cirrhosis. The later stage is called 'decompensated' cirrhosis; Professor Dusheiko describes it as follows:

'Compensated cirrhosis means the presence of cirrhosis histologically, proven by a liver biopsy, but where the patient has not suffered any gross sequelae of cirrhosis. So the patient is never presented with a variceal bleed, never presented with ascites, accumulation of fluid [in the peritoneal space within the abdomen], never presented with encephalopathy, the coma states that accompany it, never presented with any oedema or swelling in the legs. Decompensated cirrhosis is where patients begin to be hospitalised for complications such as those I have mentioned ... you could also use a biochemical test of liver function to start to recognise decompensation.'

Those in Category C are also at a small risk of liver cancer (hepatocellular carcinoma).

[194] There can, very exceptionally indeed, be extra-hepatic complications, such as porphyria, cryoglobulinaemia, glomerulonephritis and diabetes mellitus.

[195] For those with serious decompensated cirrhosis or liver disease, a liver transplant may be considered and carried out, as with Mrs X. Although there can be a risk of immediate rejection, and a very small risk of what is called late acute rejection, there is no reason why such transplants should not be successful, and indeed in the case of Mrs X it has been so. However, a liver transplant simply replaces the diseased liver, but it does not eradicate the virus. There is an inevitability of re-infection of the new liver while the virus remains in the blood, and the present figures are of a 10% risk of cirrhosis within five years of the transplant, with a 60% survival rate for ten years from transplant.

Prevalence of Hepatitis C

[196] The global prevalence of chronic Hepatitis C was estimated in the International Consensus Statement in 1999 as 150m (I note that Dr Gane had earlier given an estimate of 300m infected) and as 5m in Western Europe. The NICE guidance estimates 200,000 to 400,000 in England and Wales. Hepatitis C accounts for some 20% of acute hepatitis worldwide and 70% of those with chronic hepatitis (no doubt because of the relative absence of treatment or cure for Hepatitis C), for 40% of those with decompensated cirrhosis and for 30% of all liver transplants. Up to 50% of intravenous drug users suffer from Hepatitis C.

Transmission of Hepatitis C

[197] The main method of transmission of Hepatitis C is through intravenous drug use. According to the International Consensus Statement, its transmission by blood products has been reduced worldwide to near zero. Apart from drug use, there are other methods of 'horizontal' transmission of Hepatitis C. There is a small risk through tattooing, body piercing, electrolysis, and acupuncture.

a [198] It is common ground between the experts that the risk through sexual transmission is very small indeed. Dr Ryder stated that—

b ‘sexual transmission can occur, but it is very uncommon: the evidence is that sexual transmission is most likely to occur in individuals with multiple partners and high risk sexual practices, and the transmission in a stable monogamous relationship is very uncommon, and there is a fair amount of data from both the haemophilia cohorts and also the immunoglobulin D-spread cohorts that sexual transmission is uncommon in that setting.’

c In a group that he has studied, he could only identify sexual transmission as the sole probable mode of transmission in 1.3% of the cohort. Dr Alexander considered that there was a very rare risk of transmission if a patient had a very severe venereal infection, in which case the number of leucocytes in semen or vaginal fluid would increase; such that there might be a small risk if there was a high leucocyte count, and significant abrasions to the vagina or penis. But in other circumstances his view was that sexual transmission did not occur at all, and his experience in Cambridge was that they had screened many, many people, d and never found it. His conclusion was that, excluding those involved with drug use, there was no risk of sexual transmission at all, and that the very small percentage risk, below 5%, mentioned in literature, could all be accounted for by the factors of drug use or venereal disease.

e [199] As for vertical transmission, that is infection passed from mother to baby through pregnancy (there is no association at all from breastfeeding), it was common ground that there is a very low risk indeed. Dr Ryder put it at less than 5%: his, very wide, experience was certainly of substantially less than the 5–6% risk quoted in literature, and in his cohort of 30 children born to Hepatitis C positive mothers, he and his colleagues had not seen a single infected child. Dr Alexander adds further, while agreeing about the smallness of the risk, that f children have a low risk of liver disease relating to Hepatitis C, certainly through the early years of childhood, so that the risk of any liver damage would be small, and further, that a baby or child infected would be the most likely to respond successfully to therapy.

g *Prognosis*

h [200] As set out above, the condition can be all but asymptomatic for many years, and the most likely outcome is no serious liver disease. Cirrhosis may take between 20 to 50 years to develop, if it develops at all, although, it can, as in the case of Mrs X, who was 45 at the date of her infection, occur much more quickly. As for progress to fibrosis and cirrhosis, Dr Poynard predicted that this was linear. It seems now that there is considerable doubt about that. Though slow to start, it may speed up: it may speed up with the onset of age, it may be quicker if (as in the case of Mrs X) the patient is older when infected. There are five predictive factors, which have developed and been generally accepted as the clearest indicators of the likelihood of worsening progression of liver disease and hence j prognosis. (i) Age at time of infection: those who are young have a better prognosis and a slower rate of infection; over 40 is the yardstick. (ii) Degree of inflammation (and/or ALT score) on the first—or ‘index’—biopsy (normally now taken about one year after infection); Dr Alexander explained that there is an 85% chance on index biopsy of accurately forecasting the development of the liver over the next five years. (iii) Male gender: a much greater risk than female.

(iv) Alcohol intake: worse with intake of more than five units per week; Dr Alexander in particular would encourage less. (v) Co-infection with Hepatitis B or HIV: and possibly the degree of steatosis (fatty liver). This is a very helpful guide indeed for those estimating prognosis within the rest of the group actions, and is well exemplified in the lead cases by reference to Miss T and Ms V. a

Treatments

[201] As set out in [193](ii) above, biopsies at present are an essential tool for diagnostic and predictive purposes. Index biopsies are normally after one year, and then there is normally a need for follow-up biopsies, although hopefully the less regularly as time goes by (to which point I return below), because of their invasiveness and discomfort. They are certainly needed on a fairly regular basis after any transplant, and there would need to be a biopsy before the onset of any treatment or therapy. It is very much hoped and believed by Dr Ryder, Professor Dusheiko and Dr Alexander that there will soon be successful development of non-invasive methods as a substitute for a biopsy. Dr Ryder estimated that the existing research may well produce such methods over the next five to ten years. Dr Alexander considered that, although he did not think that within five years there would necessarily be a substitute for the index biopsy, follow-up biopsies might certainly be substituted by blood tests during that period; and he did not think it was optimistic, but reasonable, to expect that a significant proportion of his patients would be taken out of the schedule for follow-up biopsies on that basis. As for treatment by Interferon, combination therapy (or monotherapy in the event of contra-indication, or intolerance, of Ribavirin) has been given specific approval in the NICE guidance, which licenses the use by health authorities of such products, with the exceptions and expansions there set out. In particular: b

‘1.1 Interferon [alfa] and ribavirin as combination therapy is recommended for the treatment of moderate to severe Hepatitis C (defined as histological evidence of significant scarring (fibrosis) and/or significant necrotic inflammation) at standard doses for patients over the age of 18 years as follows: c

1.1.1: All treatment naive patients (that is, those who have not previously had Interferon [alfa] monotherapy or combination therapy) and all patients who have been treated with Interferon [alfa] monotherapy, and have had some response but have since relapsed. Such treatment should be continued for six months for all patients. d

1.1.2: A further six months combination therapy is recommended only for patients infected with Hepatitis C virus of genotype 1, who respond to therapy by becoming clear of circulating viral RNA as detected by ... PCR in the first six months. e

1.1.3: Those in whom liver biopsy poses a substantially increased risk (such as patients with haemophilia) may be treated on clinical grounds without histology. f

1.5: ... The recently licensed pegylated Interferon monotherapy has not been considered in this Guidance.’ g

[202] It is anticipated that pegylated combination therapy will replace standard combination therapy in what Professor Dusheiko called the ‘not too distant future’. Dr Ryder considered that it would be licensed for use as an NHS h

- a product by summer of this year, although it will not necessarily be an immediate part of the NICE guidance, with the result that not every authority will be able or prepared to fund its use, as would be the case if it were incorporated expressly into the NICE guidance. Dr Ryder himself had not had a problem in funding *standard* combination therapy prior to NICE, but he accepted that that would not have applied to all authorities.
- b [203] Other treatments are being urgently researched, priority already having been given over the last few years by drug companies. Dr Ryder foresaw at least ten years before there would be effective alternative treatments, but Dr Alexander, who is actively involved in their research, looked, although without certainty, to an availability within four or five years.
- c [204] As for the present combination therapy, there are once again predictive factors, first advanced by Poynard and now generally accepted, for the likely success of such treatment. (i) *Genotype*. There is a very marked greater likelihood of success of the treatment for those with genotypes 2 and 3: genotype 4 less successful, and genotype 1, as is apparent from the provision in the NICE guidance for a 12-month rather than six-month treatment, much less likelihood
- d of success. (ii) *Age at time of treatment*: again those under 40 have the better chance. (iii) Those with a *lower viral load* at time of treatment: certainly those with less than 2,000,000 copies per millilitre of virus in the blood have a better chance. (iv) Once again *male gender* is a worse indicator than female. (v) *Degree of existing fibrosis*. This guide is also vital, for consideration of whether to carry out the existing therapy.
- e [205] Not all patients are suitable for the treatment, and of course the indicators above will be a factor for consideration, as will be the NICE guidance, particularly so far as funding is concerned. The Interferon treatment itself is not pleasant. It requires self-injection (three times per week for standard or once per week for pegylated), monitoring and blood tests, and it has, in most cases,
- f side-effects: most frequently complained of are flu-like symptoms, headaches, fatigue, dizzy spells or nausea, nosebleeds, appetite loss. In addition there is the risk of hypo- or hyper-thyroidism (from which Miss T temporarily suffered), and a 15% risk of clinical depression (from which fortunately none of the lead claimants suffered). According to the NICE guidance there is a 10–20% discontinuance of the treatment. However, its success level, particularly for
- g those of genotypes 2 and 3, is very promising, and indeed improving. So far as non-pegylated standard combination therapy is concerned, the figures for genotypes 2 and 3 appear to be around 60% success, and for all genotypes between 35% and 47%. Dr Alexander has a rigorous system of supervision, because he believes that much of the failure rate results from non-compliance by
- h patients, and his overall success rate (the majority of his patients being genotype 1) is 55%. As for pegylated combination therapy, results of recent trials for genotype 1 appear to be improving from 30% up towards 40%, and for all genotypes to 53%: the common ground as to the success rate for genotypes 2 and 3 appears to be 80–85%. Indeed Dr Ryder referred to infection with
- j genotypes 2 and 3 as ‘in general now ... almost a curable disease’.

The effect of Hepatitis C

[206] *Quality of life*. The effect of Hepatitis C, apart from the possible development of serious liver disease, may be, or include, irritability, nausea and headaches. It may include fatigue and lethargy (to which I refer below). There

may be worry and stress about the future and prognosis, at least unless and until there is a more certain prediction derived from *clearance* of the blood or from a favourable biopsy or otherwise (what has been called the 'Sword of Damocles' factor). There is the need for fairly regular medical supervision—perhaps six-monthly blood tests, perhaps biopsies every three to five years, more often if there is evidence of some deterioration, or if treatment is being considered. There is the possibility of social 'stigma', to which I refer again below. There may be worry about sexual transmission, although the risk, as set out in [198] above, is agreed by the experts to be extremely small, and the firm and unanimous advice of the experts is that no extra or different precautions are necessary—for stable relationships no precautions that would not otherwise be taken are needed, while in the case of multiple relationships, the use of precautions would be recommended in any event, even apart from Hepatitis C. There may be worry about vertical transmission, again notwithstanding the very small risk. There is an effect, which Dr Foster has sought to identify and estimate in his published study, using approved questionnaires, on the 'Quality of Life'. Of course if and when CLD were to ensue, then there would be other and specific symptoms.

[207] *Fatigue*. Plainly fatigue is one of the possible, and indeed very common, complaints of those suffering from Hepatitis C, as is confirmed by the clinicians, who have seen so many. Fatigue is, however, as Dr Alexander pointed out, common among patients of all kinds, and certainly so among liver patients (though, according to Dr Ryder, not normally with those suffering from Hepatitis B). The question which was proposed by Professor Wessely, which it is necessary for me to resolve, is whether fatigue is an automatic concomitant of Hepatitis C. The report he prepared was accepted by all his fellow experts to be extremely learned and persuasive. He agreed that there was a clear aetiology for fatigue, which would lead to its being a regular feature among Hepatitis C sufferers. (i) Fatigue is common in any event (although he referred to the NIH study by Dr Hoofnagle, which showed that there was apparently a higher indication of fatigue among his cohort of healthy blood donors than amongst those infected by Hepatitis C). (ii) Fatigue is a very likely consequence of stress and worry, such as would be inevitable from learning and awareness of Hepatitis C infection: a number of studies indicate a tie-up between knowledge of Hepatitis C and fatigue. (iii) Fatigue will be a symptom of deteriorating CLD (characterised by Dr Alexander as 'exhaustion'). (iv) Fatigue will, or may, accompany depression or psychiatric disorder.

[208] However, Professor Wessely did not consider—and I accept his persuasive evidence—that fatigue was an automatic concomitant and a necessary symptom of the Hepatitis C condition. Of course, if a Hepatitis C patient is found to be suffering from fatigue, then that will be so, in his or her case. But it is not to be presumed or assumed as automatic. The consequence, as Mr Underhill has submitted, is that not only will it be necessary to establish, and prove, a period or periods of fatigue or indeed a continuity of fatigue, if such be the case, in the case of any particular claimant, rather than simply assuming it, but also: (a) if fatigue be proved, it may well be more likely to have occurred only after knowledge, and to improve if and as the stress and anxiety caused by such knowledge ameliorates, either by habituation to the condition or as a result of the advice of a favourable prognosis; (b) if it is a concomitant to depression, then it may ameliorate as the depression improves or is recovered from; and (c) if it is a symptom of the liver disease then it may, for example, improve upon treatment or even disappear after

a a transplant. This assessment, and in particular the linking of fatigue either to the date of knowledge of infection or to the onset of CLD, was fully exemplified, in my judgment, in the facts of the lead cases. Fatigue in the case of Mrs X was, in my judgment, plainly associated with the early onset of CLD (and there has been a dramatic improvement since her transplant). In the case of those who had interferon treatment (T, U, V, W), or an adjustment disorder, it was a likely
b concomitant or side-effect. But otherwise it improved or evaporated once stress and anxiety were alleviated by a successful treatment and/or a favourable prognosis.

[209] *Vulnerability to depression.* Three of the lead claimants, and no doubt others of those within the group action, have suffered a period of depressive disorder, and that is a matter for specific consideration. However, an issue has
c been raised by Dr Master with which his colleague Professor Wessely specifically disagreed and I must resolve it. Dr Master expressed the opinion that once a person has been infected by Hepatitis C, which is a 'life event', then, irrespective of whether such person recovers from any psychiatric disorder that may result from that life event, or indeed puts it entirely from his mind, he has an objective
d vulnerability to further life events, of whatever kind, so as to be the more liable to suffer psychiatrically in future. He put it in this way in answer to Mr Brooke:

'A. We probably all have a threshold for developing mental illness. It depends on the product, in rough terms, of the vulnerability, and the significance and impact of any given life event. So my postulation is that,
e having suffered from Hepatitis C infection, the vulnerability factor is increased. Q. [by me]: Are we talking about a vulnerability to the onset of Hepatitis C, then knocking him down yet further ten years later, or are we talking about a greater vulnerability generally, so that if his grandmother dies, he is then knocked down; which is it? A. It is the latter. I think there is a general increased vulnerability to develop further episodes of mental
f illness.'

Then further in cross-examination by Mr Underhill:

'Q. One of the things you were saying, the most general thing you were saying, is that the impact of adverse life events, as regards their liability to
g lead to psychiatric illness is cumulative. That is, the more adverse life events you suffer, the more likely you are to develop a psychiatric illness next time one comes along ... A. As a general proposition, I would say that ... Q. At one point, I thought you were qualifying it by saying that you are only really concerned with continuing life events ... That would ... deal with those
h people who treated the knowledge of their Hepatitis C infection as a continuing problem for them, but it would not explain those people, who had as far as one could tell, entirely put it behind them. By the end of your evidence it was clear you were saying that even for the latter group, there was an increased vulnerability? A. Yes, I am ... Q. The consequence is ...
j that every one of these claimants would be entitled to have some element of their damages to reflect an increased risk of developing psychiatric illness compared with if they had never been infected? A. Yes.'

[210] Professor Wessely accepts, as of course Dr Master confirms, that there may have been people who would not have been able fully to recover from the effect of the first life event—ie a continuing 'Sword of Damocles' effect—but he

does not accept that there is any such objective vulnerability as Dr Master postulates. A person is dealt what he called a 'hand of cards', derived genetically, or from his or her early development (he draws this from his own published studies and also from the seminal work of Brown and Harris *Social Origins of Depression* (1978)). A person who suffers from a life event *may* be rendered vulnerable by that circumstance to succumb to another life event, to which he might not otherwise have succumbed. On the other hand, it is equally if not more frequent that a person is rendered more *resilient* by suffering, so that, having succumbed on the first occasion, he is the less likely to do so on the second and future occasions. It all depends. If Dr Master were right as a matter of course, then, as it is commonplace for everybody to suffer more than one life event, if only by losing more than one parent, there would be what Professor Wessely described as 'an ever accelerating spiral' or 'an accelerating cascade of psychiatric disorder, because after each life event, you will be continually upping the stakes, as it were, until finally ... everybody would break down, because we all encounter adversity. So I do not accept that life events themselves feed onto the risk for the next life event'. This tournament between Master and Wessely, if I may allude to the similarity of the latter's appearance to that of a well-known irascible tennis player, was, in my judgment, won, game, set and match by Professor Wessely. If a claimant has suffered prior to trial from a psychiatric disorder then he is entitled to be compensated for it, and if (which has not been the case for any of the lead claimants) it be a continuing disorder, then on that basis. My judgment is, however, that there is no automatic continuing vulnerability in the absence of specific evidence in that regard. If in the future a claimant were to suffer from psychiatric disorder which he could bring within the agreed provisional damage 'triggers', to which I shall refer below, so as to be able to claim additional damages, then those damages will arise out of such fresh disorder.

ISSUES OF DAMAGES

Provisional damages

[211] Mr W, who is nearly 72, does not seek provisional damages. In the light of the uncertainties, to which I have referred above, all the other lead claimants, and, I anticipate, most if not all of the other claimants, will seek to take advantage of the sensible and flexible provisions of s32A of the Supreme Court Act 1981, which—

'applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.'

Pursuant to CPR 41.2, I can only make an order for an award of provisional damages if I am satisfied that the section applies, and if the particulars of claim included a claim for provisional damages (which they did). If I make such an order, I must specify the disease or type of deterioration in respect of which an application may be made at a future date, and specify the period within such application be made, although such period may be the duration of the life of the claimant. My attention has been drawn to two relevant authorities, *Willson v*

a *Ministry of Defence* [1991] 1 All ER 638, and *Thurman v Wiltshire and Bath Health Authority* [1997] PIQR Q115. The defendants did not oppose in principle the making of an order for provisional damages, although there was a good deal of disagreement between the parties as to the trigger or triggers for any such future damages. This led to a considerable amount of submission and exchange, and various and continuing amendments to the proposed triggers, but resulted in five triggers which satisfied, as I understood it, all the objectives and objections of both sides. I am entirely satisfied, as I must be, that this is a suitable case for provisional damages. I am also satisfied that the five triggers eventually resolved upon are sensible and necessary. I shall set them out below, together with a short explanation of each. I was satisfied that each trigger could only be used once (by each claimant) and therefore it was not possible to have one trigger containing more than one possible event (unless they were alternatives); and hence that all five triggers, none of which of course may be necessary in the case of any one claimant, are required in case there is one claimant, who, during a lengthy lifetime, might qualify under more than one trigger as time goes past. I am satisfied that the duration referred to in CPR 41.2 should indeed be the duration of the life of each claimant.

e Trigger 1: 'Testing Hepatitis C RNA Positive in blood, having always tested RNA negative in blood in the past or having tested RNA negative in blood for at least twelve months following anti-viral treatment, leading to a prognosis materially worse than at the date of assessment of damages.'

f As discussed in [192] above, there is a risk, presently considered to be very small, that one who has tested negative for such a period that it can be assumed that there has been clearance of the blood may subsequently revert to testing positive. This might simply occur because of the development of some even more sensitive test, so that it could be concluded that, although there has been a positive test, it does not in the circumstances lead to a materially worse prognosis. But, such unlikely circumstance apart, on the assumption that on any reasonable basis the particular claimant is now to be regarded as positive rather than, as before, negative, then that will, if not falsify, certainly change the basis upon which damages will have been assessed: eg PCR negative, never likely to deteriorate or suffer material liver disease, no further treatment, no or no further social, employment or insurance handicap (so far as that may be relevant, as I discuss further below), no further biopsies or follow-ups etc. Notwithstanding the smallness of the risk—seen by all the experts as perhaps between 1 and 2%—I am satisfied that this is an appropriate trigger, and enables me to assess damages for those, like Mr S and Mr U, who have cleared the virus, on that positive (or rather negative!) basis.

h Trigger 2: 'Developing decompensated cirrhosis and/or liver cancer and/or serious extra-hepatic complications resulting from Hepatitis C.'

j This speaks for itself. I am therefore able to assume that all those claimants who have not done so already will never deteriorate to decompensated cirrhosis. There is, as I have indicated, a small risk of liver cancer, and a very small risk of the extra-hepatic complications which I have set out in [194] above, and again notwithstanding the smallness in particular of the last-named risk, I have been satisfied that it is appropriate to have a trigger making specific reference to them.

Trigger 3: 'Developing decompensated liver disease and/or cancer and/or serious extra-hepatic complications resulting from Hepatitis C after transplant.'

The need for this separate and otherwise repetitive trigger results from the factor, referred to above, that each trigger can, it seems, only be used once.

Trigger 4: 'Onset of late rejection of a liver transplant.'

Once again this was a very small risk, as seen by all the experts, perhaps 1% to 2%, but needs to be provided for, in my judgment, so that it would be possible, for example in the case of Mrs X, to assess her claim on the basis that there will be no, very exceptional, late rejection of her liver transplant.

Trigger 5: 'Recurrence of, or onset of a fresh, serious psychiatric condition as a result, whether direct or indirect, of the claimant's Hepatitis C condition.'

The reason for this is really fully apparent from my discussion of the evidence of Professor Wessely. It is to be noted that, in order to comply with the statute, the condition, if it were to arise, would have to be a 'serious' one.

Heads of damage

[212] Mr Brooke has submitted that general damages for pain, suffering and loss of amenity (PSLA) should in this case be split out into sub-categories. This is, he says, a modern trend, but in any event is desirable in this case because of the fact that there are here lead cases and lead claimants, and assistance may be drawn from findings and separate assessments of sub-categories when coming to consider the cases of other claimants. The defendants have not opposed this as a matter of principle, and I am prepared to follow this course, subject to some slight emendation, as will appear below. But it is important, as the defendants have submitted, and I accept, to appreciate that it may be that once each such sub-category of damage is added up, the total of general damages for PSLA will not be simply the aggregate of them. It is essential, as has been pointed out on numerous occasions by higher authority, that general damages be looked at in the round and that, in particular if there be sub-categories, there should not be in the end any overlap or duplication: one example of reference to such overlap by the Court of Appeal is contained in an authority relied upon in one of the lead cases, *Curi v Colina* [1998] CA Transcript 1300 (Kemp and Kemp, *The Quantum of Damages* B2-008/1.)

PSLA

[213] *Infection simpliciter*. It is obviously necessary in assessing such damages first to identify the condition, to conclude whether there has been *clearance* of the virus and if so at what stage, and to decide whether the assessment is to be on the basis of provisional damages: then to assess the prognosis, treatability and treatment, the symptoms identified so far and continuing, and the state of mind, whether optimistic, resilient, pessimistic, anxious or fearful, and the circumstances of the claimant. Mr Brooke speaks of 'infection *simpliciter*'. But the meaning of this is not entirely clear. I take it to mean that it excludes any specifically liver disease-associated symptoms, or any identifiable psychiatric disorder. But he also seeks to extract, as a separate head, fatigue. That seems to me to have been put forward on the basis, which I have not accepted, that there

- a will almost automatically be fatigue as a concomitant to Hepatitis C, such that in a particular case there might be specific evidence of fatigue for separate identification. I conclude, in the light of my decision on the question in [207] and [208] above, that fatigue, if it is shown to exist for any period in relation to a particular claimant, ought to be included as part of 'infection simpliciter'. It seems to me very difficult indeed to sever off questions of fatigue from those of stress or anxiety or irritability or from any other factors counting by way of diminution of the quality of life. Subject to this adjustment, I accept Mr Brooke's invitation to sub-categorise by reference to 'infection simpliciter'. The assessment of it, taking into account questions such as the general need for monitoring and any specific concerns or worries of the individual claimant, will be carried out on the basis, discussed above, of the likely prognosis of that claimant, but upon the assumption that he or she will not reach the next relevant trigger: eg that Mr S and Mr U will remain PCR negative etc. I shall assess the sums for each claimant in such a way I hope, that, particularly as the lead claimants have been so well chosen, there will be assistance in quantifying the claims of others. However, I do not consider it helpful or appropriate to give a bracket of damages, as was at one stage canvassed, but not, I think in the end vigorously insisted upon by Mr Brooke.
- b
- c
- d

- [214] *Biopsies etc.* (i) Mr Brooke invites me, and the defendants do not oppose this in principle, as I have indicated, to put a separate figure on past and future biopsies. This is not an easy task, as neither side has been able to find any relevant authorities. Mr Brooke has taken me to examples in *Kemp and Kemp* of minor injuries, but I accept Mr Underhill's submission that, where there has been some minor accident or assault leading to minor injuries, and requiring compensation, that cannot, being the totality of the claim in the particular case, be of much help in relation to a case where there is a much larger claim, one of the incidents of which is the need for occasional hospitalisation. Given the relative rarity of the compartmentalisation of damages for which Mr Brooke contends, it is perhaps not surprising that there are no precedents that either side can find. A hospital visit is planned and expected and, in the case of biopsy, is short or relatively short, and does not carry with it the trauma, minor though it may be, of an accident or assault. The figures which he showed from *Kemp and Kemp* were for minor injuries, resulting in cuts, bruises, discomfort or nervous reaction for up to a week or so, for which in the region of £500 or so has been awarded for the totality of the incident: the valuation of the biopsy is, however, collateral. In valuing the biopsies, obviously it is necessary to bear in mind the particular circumstance relating to the individual claimant: whether it was a short visit, whether the claimant remained overnight, whether there was or was not general anaesthetic and whether there was more than usual pain or discomfort. As for future biopsies, an assessment must be made whether the particular claimant will require any, and if so how regularly. (ii) Evidence was given both about further biopsies, and indeed about follow-up treatment generally, which it seems appropriate to deal with now, as a matter of general application. (a) With regard to follow-up, evidence was given by Dr Ryder, in cross-examination by Mr Brook Smith, by reference to the circumstances of Mr S, one of the lead claimants who has cleared the virus, as follows:
- e
- f
- g
- h
- j

'Q. [Mr S] is currently on annual tests. He has cleared the virus completely. Can you contemplate a time when, if his tests remain as well as

they currently are ... there will no longer be a need even for annual tests, that he could come back for three-yearly tests or even five-yearly tests? A. At the moment, it is very difficult to give a definite answer to that, as our knowledge accumulates. One could say that it could be that we would be more reassured as time goes on, and therefore what you suggest is perfectly reasonable, but equally if more data becomes available such as that from the Edinburgh Group about the significance of intra-hepatic Hepatitis C, one may have to do more. I am afraid I can't really speculate on what we may do in the future. I think it is safe to say that over the next five to ten years a yearly check is likely to be required.' a b

Dr Ryder, however, also agreed, when cross-examined by Mr Underhill, that after another five years had gone by he might well think in terms of either discharging those who had successfully responded to treatment altogether, or at any rate making the follow-up much less frequent than annual. Dr Alexander said, in chief, when questioned by Mr Underhill about his anticipation for the follow-up regime for the next few years for those lead claimants, Mr S and Mr U, who had *cleared* the virus, as follows: c d

'I think on the current levels of evidence I would want to see those patients on an annual basis. There are several reasons: one can be checking to see if they remain PCR negative; one might also want to update them on any new information that has come around. I cannot foresee us doing that in the long term, because I do not think the majority of patients would need to be followed up in the very long term. I think what we are waiting for is strong evidence that we can allow some of these patients to be discharged from our clinic, and I think as soon as we have that we would be happy to do that ... I think we need someone to prove conclusively that a large number of patients who are PCR negative for five years never get liver disease. I suspect that evidence will come quite soon, and then we will have the confidence to do it ... I would imagine in five years we would be able to make those comments ... I think if we have a patient who is consistently negative in blood ... four or five years from now I am sure we would be able to discharge those patients, particularly when they have had liver biopsies showing no significant liver damage.' e f g

I conclude, preferring, in so far as there is a marginal difference, the evidence of Dr Alexander, that it is highly likely that, after five years, the regularity of such check-ups of those who have been PCR negative in blood for five years will substantially reduce, such that in the calculation of any damages relating to such ongoing follow-ups in the future there must be a discount. The letter received by Mr S, who has been PCR positive for five years, discharging him from further review, quoted below, appears to support this. (b) As for biopsies, I am satisfied that they are only relevant to those who remain at present PCR positive. Dr Ryder gave clear evidence in respect of those, such as Miss T and Ms V, who suffer from mild, if any, liver condition and may hereafter have further therapy. His evidence was that if such treatment was *successful*, and the patient became and remained PCR negative after six months, then they would be treated as having *cleared* the virus and thus require no further biopsy (and Dr Alexander agreed in terms): if the treatment was *unsuccessful*, then monitoring would continue, just as if they had not had the therapy, but such patients would also j

a never again have to have a routine biopsy. This too therefore will be relevant in the assessment of damage for those such as Miss T and Ms V, for whom, on the assumption that they will not deteriorate to cirrhosis (covered by a trigger), there need be no provision for any further routine biopsy, if I am persuaded to decide that they will have further therapy. There may further need to be consideration of, and discount for, the availability of non-invasive alternatives to, or substitutes for, biopsies within five years or so, as set out in [201] above.

b [215] *Interferon treatment.* Again I am invited separately within PSLA to assess damages for those claimants who have gone through past therapy, and also for those claimants with regard to whom I conclude there will be future therapy. As set out in [205] above, Interferon is not pleasant. It requires self-injection, and carries with it the risk, if not the certainty, of the side-effects there set out. As it happens, none of the claimants in this case has suffered from any Interferon-related depression, which I do not need separately to assess, as I would otherwise have done. However, the circumstances of each claimant need to be looked at: for what period of time they had the treatment, what side-effects they suffered, how badly affected by them they were. Mr Brooke invites me to assess c a different figure in relation to therapy which has been unsuccessful as compared with that which was successful. I do not accept the logic of this. If the treatment was, and remained, successful, then of course the damages of that claimant would otherwise reduce, by virtue of the more favourable prognosis. If it was, or soon afterwards was seen to have been, unsuccessful, then the damages for that claimant will increase, because of the more unfavourable prognosis. But each of d them will have gone through the same discomfort, if discomfort it was, with regard to the therapy at the time. I can see that if there is some particularly identifiable trauma arising in respect of the disappointment of a particular claimant as a result of failed treatment, then that might be separately compensable.

e [216] *Future treatment.* This is relevant under two heads. The first is in respect f of PSLA. If in fact there is the chance of future treatment, then that may impact upon the general damages. (i) The prognosis of the individual claimant may take into account the chance of success of such treatment (although given the existing good prognosis for the only relevant lead claimants, Miss T and Ms V, this will not be a substantial factor in these cases) e.g: (a) the prognosis may improve; (b) any continuing stress or worry may be capable of being alleviated; (c) the g duration of any existing anxiety state or of fatigue, or of social 'stigma' (if applicable) etc may be shortened. Assessment of general, and indeed of any special, damages may well be affected if a shorter period than the whole of life is being looked at. I refer again to Dr Ryder's reference set out in [205] to infection with genotypes 2 and 3 almost being a curable disease. The question not only of h the availability of existing or imminent therapy, but of possible improved treatments may be filtered into consideration. (ii) On the other hand there will be future discomfort from any such treatment to be allowed for, as mentioned in [215] above.

j [217] There is then the fact that there is a separate head of damage sought by the relevant claimants in respect of the cost of future treatment. What is said by the relevant claimants is that, insofar as they have not yet for any reason attempted, or have previously attempted but failed, combination therapy or in particular pegylated combination therapy, they should be compensated by the defendants in respect of the cost of such therapy, as and when appropriate in the future. There are three issues. (i) Is it reasonable for such treatment to be

provided for in respect of a claimant? That would be a question of assessment of the medical evidence. It would seem to me not to be reasonable if medically contra-indicated, as it is suggested to be for example in the case of Mr W, or if it were pointless (or a combination of the two). (ii) It will not be recoverable unless the court is satisfied that in fact the treatment will be taken by the claimant. That may to an extent be only a refinement of (i), for if it were contra-indicated medically, it would be unlikely that it would be taken by a claimant: and certainly in the case of unpleasant treatment, such as Interferon, it might be unlikely that it would be attempted if it were clearly pointless. (iii) The third question is whether such treatment, if to be attempted by a claimant, will be provided and accepted on the NHS, and therefore not be required to be paid for by the claimant (and hence not claimable from the defendants). There is in the event no issue between the parties as to the law in this regard, although Mr Brooke did make reference in opening to the Law Reform (Personal Injuries) Act 1948, s 2(4) (as amended), whereby 'In an action for damages for personal injuries ... there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977'. The relevant question is, as both parties have accepted, more by reference to *Harris v Brights Asphalt Contractors Ltd* [1953] 1 QB 617 at 635 per Slade J 'I do not understand section 2(4) to enact that a plaintiff shall be deemed to be entitled to recovery of expenses which in fact he will never incur' and *Cunningham v Harrison* [1973] 3 All ER 463 at 474, [1973] QB 942 at 957 per Lawton LJ 'the defendant cannot say that he could avoid that expense by falling back on the National Health Service ... What she can, however, submit is that he will probably not incur such expenses'. I accept Mr Underhill's submission that, if in fact the pegylated therapy is available on the National Health Service at the time when the relevant claimant seeks to take advantage of that treatment, and it is available to him within the NICE guidance, then it is likely that he will indeed accept that treatment on the National Health Service rather than seeking to pay for it himself, which would, whatever might be the case in other circumstances, gain him nothing in this case, as confirmed on the evidence.

[218] But the issue is rather whether, at the material time, pegylated combination therapy will indeed be so available, given that, at this stage, even pegylated monotherapy is not yet available within the NICE guidance. It will be a matter for consideration in each case whether I conclude, given the relevant time scale, that pegylated combination therapy will be so available within the NICE guidance. My conclusion is that it is likely within two to three years to be so available. However, it is quite a different and additional question as to whether a particular claimant is likely to qualify within the NICE guidance for such treatment. For example, it would seem to be common ground that, for differing reasons, none of the lead claimants, as things stand at present, would qualify within the existing guidance. That will have to be looked at in relation to each claimant: and of course there is the further element, which again will have to be considered in relation to each claimant, as submitted by Mr Underhill, namely that it may be that in relation to some, or even all such claimants, the only circumstance in which they will seek combination therapy, given its unpleasantness, will be if an existing acceptable condition and prognosis were to deteriorate, rendering it advisable or desired to have such therapy. In that case such claimant would then be likely to qualify within the guidance. However,

a Mr Brooke's case in relation to the existing lead claimants is that the desire of those such as Ms V to have such therapy in the future is not conditional upon any change in their condition, but simply because, in her case for example, she has not until now felt able to take on the treatment, given her other family responsibilities, but believes that she will in the future wish to do so.

b 'Stigma' or handicap

[219] Use has been made in the course of opening and closing submissions of the word 'stigma'. It falls into three areas: 'social stigma', 'employment stigma' or 'insurance stigma'. I do not see them as similar, and the word itself seems to have crept into play by analogy to 'stigma damages' as coined in respect of the entirely different case of *Malik v Bank of Credit and Commerce International SA (in liq)*, *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20. As for 'social stigma', what this is said to relate to is to possible prejudice suffered at the hands of others—and there is some evidence in relation to the lead claimants in relation to the experience of some of them with boy- or girlfriends or their families or with dentists—as a result of their Hepatitis C condition. There is of course no need or justification whatever for such 'stigma' or prejudicial treatment as: (i) there is a distinct and sad interconnection between Hepatitis C and drug use, but none of the claimants, all of whom are the innocent victims of blood transfusions, can or should in any way be associated in that regard; and (ii) the reality, I suspect, is that the prejudice towards, and such treatment of, the claimants insofar as it occurs, results not from any disapproval, justified or otherwise, but from fear. The sooner that there is education about, and familiarity as to, the condition of the 200,000 to 400,000 Hepatitis C sufferers in this country, and it is understood that in fact there is almost no risk of horizontal transmission from them, and that they are likely to be around, unchanged and almost completely non-infective for another 50 or so years, the better.

[220] If, however, unless and until there be such education and familiarity, any claimants can establish the suffering, past or future, of some slight or prejudice arising out of their Hepatitis C condition, then that can and must form part of their PSLA 'infection simpliciter' damages. In any event I would prefer to call it 'social handicap' than 'social stigma'. 'Employment stigma' is, however, completely different. Although it was submitted by Mr Brooke, in his opening, that this amounted to a different head or type of damage from *Smith v Manchester* damages, in the event he accepted—and Mr Underhill did not contest otherwise—that it was simply an exemplification of that head of damage. If it can be established, in a particular case, that a claimant is less likely to obtain, or more likely to lose, employment because of his or her Hepatitis C condition, then that is not 'employment stigma' or, at any rate, is better described as 'employment handicap' or 'loss of earning capacity'. Finally 'insurance stigma'. This is even less a question in my judgment of 'stigma', as the loss, if it can be shown, does not seem to arise out of some act of personal prejudice, but arises, if it does arise, out of underwriting judgments, which may be misguided (and, if so, it is to be hoped that this case may further educate them) or may be inevitable, for actuarial or other reasons. Thus 'insurance stigma' is plainly not so, but also should rather be described as 'insurance handicap' or 'loss of insuring capacity'.

Employment handicap

[221] In my judgment it is clear that the case that is put forward is not different from a *Smith v Manchester* case, although in relation to some claimants it may not be the normal such case, where a claimant is in employment and is fearful of losing such employment and being left handicapped on the labour market. (i) It is not an essential prerequisite in a *Smith v Manchester* claim that the claimant must, at the date of trial, be in employment. A dictum to that effect by Browne LJ in *Moeliker v A Reyrolle & Co Ltd* [1976] ICR 253 at 261 was corrected by the judge in the reports of that judgment in [1977] 1 All ER 9 at 15, [1977] 1 WLR 132 at 140, and was then recited by him in the subsequent case of *Cook v Consolidated Fisheries Ltd* [1977] ICR 635 at 640, so as to read 'this head of damage generally [corrected from only] arises where a plaintiff is at the time of the trial in employment'. Other cases were cited by Mr Brooke in which the claimant was not in employment at the time of trial, including *Mitchell v Liverpool AHA* (1985) Times, 17 June, [1985] CA Transcript 228 (*Kemp and Kemp* 6-611) and *Goldborough v Thompson and Crowther* [1996] PIQR Q86. (ii) Where the employee is not in employment, there is no need for the two-stage approach to risk of loss, namely the risk of losing the present job followed by subsequent risk on the labour market, but there is simply one test, whether there is a real risk of loss at some stage on the labour market—which need not apply to any particular employment. Of course it will be necessary to show that the difficulty in earning employment relates to an employment which, but for the Hepatitis C, the claimant would have hoped or expected to attain. (iii) As there is no established loss, but simply evidence of a risk of potential loss, the claim cannot be specifically quantified, but is in respect of a loss of earning capacity (see *Foster v Tyne & Wear CC* [1986] 1 All ER 567). Such loss must be calculated 'in the round' (*Smith v Manchester Corp* [1974] 17 KIR 1 at 8) or 'plucked from the air' (*Moeliker v A Reyrolle & Co Ltd* [1977] 1 All ER 9 at 19, [1977] 1 WLR 132 at 144 per Stephenson LJ).

[222] There must be evidence of such handicap or loss of earning capacity from which such rough and ready estimate of the loss can be arrived at. It has to be said that (and this is perhaps fortunate) not much has been found. Mr Langman was very frank:

'It is recognised that proving stigma is by no means an easy matter and the existence of stigma in relation to Hepatitis C and its impact on an individual's current and future job prospects must be a matter for the courts to decide on the basis of the available evidence. The results of this research suggests that the majority of [claimants] to date do not appear to have experienced discernible disadvantage in the labour market, and, whilst there may be specific examples amongst the sample of [claimants] who may be adjudged to have been disadvantaged, this could be due to any number of other factors, such as the individual's background and skills, qualifications and experience, the level of competition for the jobs applied for, the individual's age and, in some cases, any previous medical history.'

Any question of prejudice or bias against those with Hepatitis C in the employment field must, of course, be set against the existence of the Disability Discrimination Act 1995. Such prejudice would be irrational (unless grounded on genuine fear as to hygiene or the risk of horizontal transmission, which would appear either to be extremely unlikely or at any rate to be capable of being easily resolved and coped with) and possibly illegal. The area of real concern would

a seem not to be in respect of dismissal from existing jobs but the difficulty of obtaining new jobs, and there are said to be some examples of such problems in the cases of Mr S, Miss T and Ms V. Mr Langman, at the end of the day, appeals to what he calls common sense: 'It is also suggested that common sense has regularly prevailed with the courts recognising that if two people go for a job, and are otherwise equal applicants, if one has a possible investigatable blemish in their history, then [he/she is] unlikely to be the selected candidate.' There is some anecdotal evidence given by Mr Langman, drawn from his questionnaires, which is of doubtful admissibility or reliability, although I pay it some regard because it is evidence that could have been called (albeit it would then have been cross-examined), and there is some general opinion about risk, loss or prejudice to those with Hepatitis C drawn by Mr Brooke from Professor Zuckerman and Dr Ryder. Mr Langman also throws out the possibility that those with Hepatitis C may be regarded as less satisfactory employees, either because they may be suffering from fatigue or lethargy or because they may be absent from work due to medical attendance or treatment. At the end of the day—(i) There is no question of any automatic claim to damages for employment handicap or stigma by a claimant affected with Hepatitis C. Evidence either from the claimant or factual witnesses or by way of expert opinion must be called in each case. (ii) The most significant evidence of any risk would be in the event of there being a risk of any 'rational' objection by a potential employer rather than an 'irrational' one: but Mr Langman, though he leaves the door open, and emphasises the need for precautions, states that 'ostensibly there is no reason why an individual with Hepatitis C should not continue working in, or apply for, jobs involving food-handling/catering, hairdressing or teaching'. (iii) The particular circumstances of each claimant must be looked at, relative to the person, his or her age or stage of life, his or her stage and type of employment. Plainly, direct evidence is not necessary, but inferences may be sufficient.

f *Financial products/insurance handicap*

[223] This is an allegation of loss, as discussed in [219] above, of a different kind. (i) It may have already been suffered prior to the hearing—and such a case is made out in respect of Ms V. In so far as not yet suffered, I do not see the difference in principle and do not regard it as in any way a revolutionary new head of loss (although no previous examples have been drawn to my attention). Mr Underhill in any event did not seek to submit that it was objectionable in principle, but simply that, with the exception of Ms V's past loss, no loss was established on the evidence. (ii) It is necessary for the purpose of the claim to identify the specific area of additional expense or loss resulting from the unavailability, or more restricted availability, of financial products. It will be important, for example, not to allow such a claim to be a substitute for, or a duplication of, a lost years claim, by way of an inability to recover life insurance. (iii) There must be evidence of the fact that a product would otherwise have been sought and obtained by a claimant—e.g a mortgage would perhaps have been unlikely in the case of one who had no intention to purchase private housing (see the evidence of Mr Brimblecombe that applications for mortgages to buy houses have slowed down since the 1980s) and life assurance would not necessarily be taken out by everybody (again I note Mr Brimblecombe's view that only some 30% of the adult population actively sought to make such arrangements). (iv) There must further be evidence that such products, if sought

by the relevant claimant, would not be available or would be available only at a disadvantage to the claimant. The products which have been canvassed by the experts in this case include life insurance (term or whole of life), critical illness cover, permanent health insurance, private medical insurance, mortgage protection, unemployment insurance, travel insurance, and internal private or public company insurance benefit or pension arrangements. So far as the last is concerned, the issue is particularly speculative, because much may depend upon whether the company in question, or its insurer or pension fund, does, or does not, insist on the filling out of medical information in respect of existing or any employees. Travel insurance is also much more speculative, not least in the light of the fact that a number of the claimants in this case (all those, I think, who have wished it) have been successful in obtaining it, and there is, it seems, a real marketing opportunity for sensible travel insurance companies: like Prudential, which was prepared to offer unconditional travel cover to Mrs X. However, in general in relation to such products, the question will be whether such cover was, or was not, available on the same terms that it would have been if the claimants had not suffered from Hepatitis C, which they would of course be obliged to disclose in any application. The various possible answers would be unchanged cover; no cover; less benefit; higher premiums; special terms; unavailability of automatic increase in benefits or of waiver of premiums. (v) Once again, as with 'employment handicap', this loss, if established in a particular case, is one difficult to quantify and must be seen 'in the round'. Mr Asif, on the claimants' behalf, skilfully drew attention to Mr Purdy's evidence about likely standard premiums, to exemplify what a loaded premium might entail, but this could only be part of a hypothetical exercise.

[224] I have had the benefit of very helpful evidence from the three experts, and particularly the joint report referred to above. I shall have to make my mind up in relation to each specific claimant. However, the following appear to me to be general points to be made. (i) As set out in [220] above, this does not seem to me to be a matter of stigma or irrational prejudice. Underwriters are entitled to make their own judgments. It will be extremely important to make sure that such underwriters are fully educated generally about Hepatitis C, and informed in particular as to the individual circumstances and prognosis of an applicant. (ii) Some insurance and financial service companies are already more aware both of their obligations and their opportunities in this area, as is clear from the evidence by our experts. In particular it would seem that a compassionate and realistic and educated view has been taken by Norwich Union and Sun Life, and to some extent also by Swiss Re, M & G, and Medicals Direct, and, Ms Daniels also told the court, by Allied Dunbar. It is to be hoped that those and other companies, and other underwriters like Mr Brimblecombe and Mr Purdy, are now becoming more educated about Hepatitis C, so that they will be able to take sensible economic judgments and still provide financial products to those with Hepatitis C. Ms Daniels is no doubt not alone in being an IFA who has the specific expertise to help those such as Hepatitis C sufferers to obtain satisfactory insurance. It is plain that with what was called a 'cushioned' approach, ie an approach to a particular and sufficiently senior person at a relevant insurance company or underwriters, with the right amount of information, an application is more likely to succeed. (iii) Though Ms Daniels was less sanguine, Mr Brimblecombe was relatively confident of an improvement in the position:

a 'This is something which is new ... and there is not too much experience of Hepatitis C. Clearly the life assurance industry and underwriters are careful and therefore decisions generally on these issues are taken at a high level. Insurance companies ... once they get a broader experience of Hepatitis C may take a different approach.'

b There also seems to me room for a more sophisticated approach from insurance companies, for example by doing what they apparently do not do at present, namely giving cover, for example in respect of critical illness or health, with exclusions in respect of Hepatitis C; this must surely occur, or occur more frequently, once the insurance industry appreciates that, unlike the position in HIV where there are so many interrelated illnesses, with the exception of the very rare extra-hepatic conditions to which I have referred in [194] above, all the complications resulting from Hepatitis C relate to the liver.

c [225] Subject to all the above, however, the evidence from the experts was clear. A Hepatitis C sufferer is at present only likely to obtain cover on normal terms if he or she has cleared the virus for at least two to three years. In any other case with chronic infection, even with mild symptoms, cover is only likely to be obtained subject to a substantial loading, with no mortgage protection or critical illness or private health insurance cover.

The provision of gratuitous services

e [226] Such a claim arises primarily in the case of Mrs X (though also of Mr S and Mr U), but I consider it at this stage in general terms, since two issues are raised by the parties for decision which will be of general impact. (i) If, as in the case of Mr X, Mrs X's husband, a spouse has given up work, can he claim, in lieu of the commercial cost of care, his loss of earnings, benefits and pensions (in excess of such costs)? (ii) If the appropriate basis of recompense be commercial cost, does there fall, in respect of provision by a loving spouse of household or nursing services, to be a deduction from such commercial cost (in this case not suggested by the defendants to be more than 25%)?

f [227] *Housecroft v Burnett*. Although not of course the first decision in this area of recompense for gratuitous services (eg *Cunningham v Harrison*, *Donnelly v Joyce* [1973] 3 All ER 475, [1974] QB 454), the central starting point is of course *Housecroft v Burnett* [1986] 1 All ER 332. The seminal passages are those in the judgment of O'Connor LJ (at 342–343):

h 'Where the needs of an injured plaintiff are and would be supplied by a relative or friend out of love and affection (and, in cases of little children where the provider is a parent, duty) freely and without regard to monetary reward, how should the court assess "the proper and reasonable cost"? There are two extreme solutions: (i) assess the full commercial rate for supplying the needs by employing someone to do what the relative does; (ii) assess the cost at nil, just as it is assessed at nil where the plaintiff is cared for under the national health scheme ... Very often we find rates being agreed and, as is shown by the approach of the judge in the present case, regard is had as to what it would cost to buy the services in the open market, but it is scaled down ... Once it is understood that this is an element in the award to the plaintiff to provide for the reasonable and proper care of the plaintiff and that a capital sum is to be available for that purpose, the court should look at it as a whole and consider whether, on the facts of the case, it

is sufficient to enable the plaintiff, among other things, to make reasonable recompense to the relative. So, in cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to enable the plaintiff to achieve that result. The ceiling would be the commercial rate. In cases like the present I would look at the award ... and ask: is this sufficient to provide for the plaintiff's needs, including enabling her to make some monetary acknowledgement of her appreciation of all that her mother does for her? I would also ask: is it sufficient for this plaintiff should her mother fall by the wayside and be unable to give as she gives now ... The court is recognising that part of the reasonable and proper costs of providing for the plaintiff's needs is to enable her to make a present, or series of presents, to her mother. Neither of the extreme solutions is right. The assessment will be somewhere in between, depending on the facts of the case.'

The claimants' submissions

[228] Mr Brooke effectively submits as follows. (i) There is no binding rule of law, notwithstanding that passage from O'Connor LJ, that the commercial rate is the ceiling. Stuart-Smith LJ, in *Fish v Wilcox and Went AHA* (1993) 13 BMLR 134 at 138, said:

'If the plaintiff had had to give up highly paid work in order to look after her daughter, then no doubt she would have recovered that figure by way of loss of earnings, rather than the figure which the judge in fact assessed, subject, as O'Connor LJ said in the *Housecroft* case, to the ceiling, being the cost of providing professional care. It may that if the plaintiff's earnings had been slightly in excess of the cost of providing professional care, it would nevertheless have been reasonable for her to give up that employment to look after her child ...'

In *Lamey v Wirral Health Authority* (22 September 1993, unreported), a first instance decision of Morland J, reported only in *Kemp and Kemp* (A4-026), Morland J said: 'I do not understand O'Connor LJ as meaning that [sc the ceiling of the commercial rate] is a rule of law but that as a guideline it is an upper limit. It will be particularly an upper limit in cases of routine care of the physically or mentally disabled by a carer with professional qualifications'. (ii) The award must, as Morland J also said in *Lamey's* case, be assessed 'not only quantitatively but also qualitatively', and care by a loving spouse is just as valuable as that by a commercial carer, but provides additional value by way of love and support. Mr Brooke, referring to the case of Mrs X, submitted in closing as follows:

'What you have is ... Mrs X being looked after by her husband, from clearly a long and strong marriage, who is her best friend, who knows her inside out, who can meet her needs before she actually expresses them, who knows the house backwards, who knows the family; and so the quality of the care she is given by him is clearly far better than the quality of care she would get from a series of day nurses.'

(iii) Where it is in those circumstances reasonable for the loving spouse to have given up work, the recompense is restitution of the loss so caused to the spouse.

- a In the case of Mr X this is claimed as his loss of earnings, his loss of pension and his loss of a tax-free cash sum to which he would otherwise have been entitled had he remained in employment. (iv) If (contrary to the claimants' submission) it is not appropriate to reimburse the lost earnings and benefits, but to adopt the cost of commercial care, then in the light of the authorities it is neither necessary in law to make any deductions nor, if deductions be made, to deduct 25%. In
- b *Lamey's* case a sum of apparently more than the commercial rate was awarded to the plaintiff's parents, in *Housecroft's* case itself the reduction was not expressed in a percentage, but can be calculated out at about 18%, and in *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854, [1990] 1 WLR 963, a deduction equivalent to 14% was not disturbed by the Court of Appeal. (v) In *Biesheuvel v Birrell* [1999] PIQR Q40 at Q43, Eady J was not satisfied that a distinction could be
- c very readily drawn between 'companionship' and 'care' and, in a case where the claimant himself was contending for a 25% discount and the defendants for a greater one, he took account of the 'level and intensity of the care required' especially by the mother of the plaintiff, who was a tetraplegic, in accepting the 25% discount contended for by the claimant.

d *The defendants' response*

- [229] Mr Underhill responds as follows. (i) The logic of *Housecroft's* case is quite clear, that the 'extreme solutions' (full commercial costs on the one hand and nothing on the other) are normally both inappropriate. (ii) *Fish's* case makes clear (at Court of Appeal level) that if there is any flexibility in O'Connor LJ's
- e ceiling, it is a minimal one. (iii) The test for recovery of a sum for reimbursement of gratuitous care is of reasonable recompense: thus per Megaw LJ in *Donnelly v Joyce* [1973] 3 All ER 475 at 480, [1974] QB 454 at 461–462 'the proper and reasonable cost of supplying those needs', in *Housecroft v Burnett* [1986] 1 All ER 332 at 343 per O'Connor LJ 'reasonable recompense to the relative' and in *Hunt*
- f *v Severs* [1994] 2 All ER 385 at 394, [1994] 2 AC 350 at 363 per Lord Bridge 'the reasonable value of gratuitous services rendered to him by way of voluntary care by a member of his family'. (iv) In *Lamey's* case the care given was recognised as having been extraordinary (per Morland J):

- g 'The many many hours of care for her over more than eleven years ... I have no doubt, have caused Mr & Mrs Lamey real and significant distress. Care and supervision have been required day and night. Not surprisingly through broken sleep, worry and anxiety Mr Lamey has been fatigued and unable to concentrate and put as much into his business as he had done before Elizabeth's birth. Mrs Lamey has been depressed and required
- h medication ... Both [experts] found it difficult to suggest what was suitable recompense for Mr & Mrs Lamey's care for Elizabeth at night, which involved putting her back to sleep several times a night, and most nights having to change her bedding when wet ... Miss Smalley's figure of £42,982, did not take into account night care. Both Miss Smalley and Miss Buckle did not regard a paid sleeper's rate, currently £25 per night, as appropriate for
- j parental nightcare. With that view I agree.'

Even in that case Morland J rejected a claim based on alleged loss of profit in Mr Lamey's business as a proper basis for the cost of care; and it was in those circumstances that the sum awarded was slightly over the outsider's rate—but a rate which the judge, and the experts, clearly thought was *not* commercially

appropriate. (v) In *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854 at 857, [1990] 1 WLR 963 at 966–967, although the Court of Appeal left the judge's award unaltered, O'Connor LJ said as follows:

'The defendants say that the judge has applied the full commercial rate and that we should interfere and reduce it, perhaps by half. The judge has in fact reduced the amount suggested by Mrs Watkins by some £4,000. We confess that we regard the judge's assessment as very high. On the other hand there is no doubt that, certainly in the early stages, a very great burden was put on Mrs McCamley ... The present case is near the bone but the judge has made some reduction and we do not feel it would be right to interfere.'

(vi) The substantial justification for the deduction from the amount that is actually charged for commercial care, on the evidence of experts, is in respect of tax and national insurance, which is of course not paid to or in respect of a gratuitous carer. This is well established, but is particularly clear from *Fitzgerald v Ford* [1996] PIQR Q72 (a case in which a claim based on loss of earnings was rejected), where Stuart Smith LJ indicated: '... the gross cost of employing a carer. Obviously ... is not the relevant figure. It should be the net cost, which, after a reduction of 25 per cent for tax and national insurance, comes to about £82,000.'

[230] I accept the submissions of Mr Underhill, and am satisfied that the following is the position. (i) The appropriate question is reasonable recompense for the carer. The carer is, however, not the victim of the tort, and is not entitled to his or her own claim for reimbursement of loss caused by all and any reasonable steps taken in mitigation or in consequence. The claimant is the victim; and the issue is what is reasonable to pay for his or her care to the gratuitous provider of such services. (ii) It is clear that the care given by a loving spouse may be additionally supportive, and may be preferable from some points of view to outside qualified care: it may also involve considerably more dedication, concentration and effort than would, on the facts of a given case, be given by an outsider. It is plainly right that the services must be valued qualitatively as well as quantitatively. However, the kind of services that are indicated in *Lamey's* case, or indeed in other cases involving care for an extremely physically handicapped or mentally handicapped claimant, fall into such a category. There is no authority relied upon by the claimants which would support the proposition, nor in my judgment is it the case, that simply giving to a claimant the same services, but with greater affection, would justify payment over and above commercial cost. (iii) The justification for the discount is substantially the saving of tax and national insurance (although there may be additional justification for discounts, if, for example, the level of the care is inevitably less than a commercial cost because of the absence of special qualifications possessed by a commercial carer). If such discount is not allowed for, then the recipient is receiving, by way of a gross sum including provision for tax and national insurance for which he or she will not in fact have to account to the Revenue, that amount *more* than the cost of commercial care. (iv) In *Nash v Southmead Health Authority* [1993] PIQR Q156, a deduction of one third of the commercial rate was made by Allott J in respect of care provided by the plaintiff's parents in respect of dressing, bathing and eating. In *Fairhurst v St Helens and Knowsley Health Authority* [1995] PIQR Q1 at Q4, Judge David Clark QC made a 25% deduction, rather than a one-third deduction, because 'caring for [the

a plaintiff] undoubtedly involves special skills over and above those normally possessed by Crossroads assistants or nursing auxiliaries'. In *Petrovska v Mullings* (13 August 1999, unreported) I concluded 'that there ought to be a discount of one third, which is or has become the norm for discount from the commercial rate, save where special skills are required (and allowing for the absence of incidence of tax or national insurance)'. On that basis, if a 25% deduction is
b adopted, which is all that in this case the defendants contend for (the defendants in *Biesheuvel*'s case having contended for a greater discount), then there is already a slight uplift to allow, if not for special qualifications, then for extra love and support; although, as pointed out in the course of argument, love and support must be the inevitable basis of the provision of almost any gratuitous services that can be contemplated, so, if material, it would follow that it would be likely to
c apply in every case.

[231] In the absence of any special evidence of any exceptional circumstances, I conclude that the proper recompense for gratuitous services in these cases will normally be commercial cost, less a deduction to allow at least for tax and national insurance, which in this case is conceded to be no more than 25%; and
d that it is not appropriate to allow recovery in respect of loss of the gratuitous carer's earnings or benefits of more than that amount.

Discount rate

[232] The final point of general interest raised by the claimants in respect of quantum was Mr Brooke's contention that, notwithstanding, or in the light of,
e the decision of the House of Lords in *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345, and notwithstanding the absence of any exercise by the Lord Chancellor of his powers under s 1 of the Damages Act 1996 to set a rate, I should adopt, for the purpose of calculation of the multiplier in respect of future loss, a discount rate of 2%,
f rather than the 3% adopted by the House of Lords. I dealt at a little length with a similar submission made by counsel for the claimant in *Petrovska*'s case, in that case allowing the belated admission of what was, in the event, agreed actuarial evidence in support of such contention, and rejected it. Although my decision in *Petrovska*'s case was not appealed, there has subsequently been a binding decision of the Court of Appeal in *Warren v Northern General Hospital NHS Trust (No 2)*
g [2000] 1 WLR 1404, which firmly concluded that there were no grounds in law, and in any event none in fact, to alter the discount rate of 3% set in *Wells v Wells*. In the event that I had entertained Mr Brooke's submission, Mr Underhill indicated that he would have sought to adduce evidence in opposition to the belated evidence to be adduced by Mr Brooke. I indicated that there was no need
h for him to do so, as I rejected Mr Brooke's contention. In those circumstances, the position of both sides is preserved so far as concerns any appeal: but I shall continue to adopt the 3% rate, for the reasons given both by me in *Petrovska*'s case and more conclusively by the Court of Appeal in *Warren*'s case.

ISSUE VI: THE SIX LEAD CASES

j [In [233]–[283] his Lordship considered and resolved the outstanding issues of quantum in the six lead cases. He continued:]

JUDGMENT

[284] I wish to conclude by giving my thanks to solicitors and counsel for their considerable help in relation to the achievement of a full, but also expeditious,

hearing of this action, and for the efficiency and completeness of the evidence adduced and of their submissions; to the expert witnesses for the clarity of their information and exposition; to the transcribers from Livenote, whose dedicated concentration and expertise, in dealing with often complicated legal and technical evidence and submissions, provided 49 superlative daily transcripts, which made my work very much easier; and finally to my clerk for her long hours of enthusiastic and conscientious preparation of the transcript of this judgment. For the reasons set out at length during its course, I give judgment for the claimants on the issues before me. So far as concerns the individual lead claimants, an order will need to be drawn up, in compliance with CPR 41.2(2), and containing the triggers for provisional damages which I have set out in [211]: including, in respect of each lead claimant, the amounts reflecting the conclusions which I have reached, some of which require some arithmetical calculation by counsel, together with the various sums which the parties had agreed in respect of each claimant, and which therefore did not need to form part of my judgment: and with appropriate allowance for the settlement agreement in respect of Mr S and Mr W.

Order accordingly.

Alexander Horne Barrister.

a **Aston Cantlow and Wilmcote with Billesley
Parochial Church Council v Wallbank and
another**

[2001] EWCA Civ 713

b

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, ROBERT WALKER AND SEDLEY LJJ

29 MARCH, 17 MAY 2001

c

Ecclesiastical law – Chancel – Liability to repair chancel – Improprate rectory – Liability of lay impropriators to contribute to repair of chancel – Whether enforcement by Parochial Church Council of liability to repair chancel breaching lay impropriators' right to peaceful enjoyment of possessions under human rights convention – Chancel Repairs Act 1932 – Human Rights Act 1998, s 6, Sch 1, Pt I, art 14, Pt II, art 1.

d

The defendants, as freehold owners of certain former glebe land, were lay rectors of a parish in Warwickshire. One of the legal obligations of a lay rector, imposed by common law rather than statute, was the obligation to keep the chancel of the parish church in repair. The power to enforce that obligation lay with the Parochial Church Council (PCC), a statutory corporation which discharged certain functions as part of the Church of England. By 1990 the chancel of the parish church was in serious disrepair, and in 1994 the PCC served a notice in proper form on the defendants, pursuant to the Chancel Repairs Act 1932, calling upon them to repair the chancel. The defendants disputed their liability, and proceedings were issued against them to recover £95,260.84, the estimated cost of the repairs. On the determination of a preliminary issue, the judge held that

e

the defendants were liable for the cost of the repairs. The defendants appealed, contending that the enforcement by the PCC of the defendants' common law liability to repair the chancel breached their right to peaceful enjoyment of their possessions under art 1^a of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), read without or, if necessary with, the prohibition of discrimination in art 14^b of the convention. In its second paragraph, art 1 provided that it did not impair the right of the state to enforce such laws as it deemed necessary to secure the payment of taxes. The PCC submitted, inter alia, that it was not a 'public authority' within the meaning of s 6(1)^c of the 1998 Act, and that accordingly it was not subject to that provision, which made it unlawful for such a body to act in a way that was incompatible with convention rights. Under s 6(3), 'public authority' included 'any person certain of whose functions are functions of a public nature'.

f

The defendants appealed, contending that the enforcement by the PCC of the defendants' common law liability to repair the chancel breached their right to peaceful enjoyment of their possessions under art 1^a of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), read without or, if necessary with, the prohibition of discrimination in art 14^b of the convention. In its second paragraph, art 1 provided that it did not impair the right of the state to enforce such laws as it deemed necessary to secure the payment of taxes. The PCC submitted, inter alia, that it was not a 'public authority' within the meaning of s 6(1)^c of the 1998 Act, and that accordingly it was not subject to that provision, which made it unlawful for such a body to act in a way that was incompatible with convention rights. Under s 6(3), 'public authority' included 'any person certain of whose functions are functions of a public nature'.

g

The defendants appealed, contending that the enforcement by the PCC of the defendants' common law liability to repair the chancel breached their right to peaceful enjoyment of their possessions under art 1^a of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), read without or, if necessary with, the prohibition of discrimination in art 14^b of the convention. In its second paragraph, art 1 provided that it did not impair the right of the state to enforce such laws as it deemed necessary to secure the payment of taxes. The PCC submitted, inter alia, that it was not a 'public authority' within the meaning of s 6(1)^c of the 1998 Act, and that accordingly it was not subject to that provision, which made it unlawful for such a body to act in a way that was incompatible with convention rights. Under s 6(3), 'public authority' included 'any person certain of whose functions are functions of a public nature'.

h

The defendants appealed, contending that the enforcement by the PCC of the defendants' common law liability to repair the chancel breached their right to peaceful enjoyment of their possessions under art 1^a of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), read without or, if necessary with, the prohibition of discrimination in art 14^b of the convention. In its second paragraph, art 1 provided that it did not impair the right of the state to enforce such laws as it deemed necessary to secure the payment of taxes. The PCC submitted, inter alia, that it was not a 'public authority' within the meaning of s 6(1)^c of the 1998 Act, and that accordingly it was not subject to that provision, which made it unlawful for such a body to act in a way that was incompatible with convention rights. Under s 6(3), 'public authority' included 'any person certain of whose functions are functions of a public nature'.

j

Held – (1) A PCC was a public authority within the meaning of s 6 of the 1998 Act. It was an authority in that it possessed powers, which private individuals lacked, to determine how others should act. Thus, in particular, its notice to repair had statutory force. It was public in the sense that it was created and

a Article 1 is set out at [38], below

b Article 14 is set out at [48], below

c Section 6, so far as material, is set out at [28], below

empowered by law; it formed part of the church by law established; and its functions included the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. Even if that were wrong, a PCC would, for the same reasons, be a legal person, certain of whose functions, including chancel repairs, were of a public nature. It followed that on either basis the acts of a PCC had to be compatible with convention rights in order to be lawful (see [35], below).

(2) The modern liability of lay owners of what was once the glebe lands of a rectory to defray the unmet cost of repairs to the chancel of the parish church was a form of taxation which operated arbitrarily, and accordingly it did not meet the basic standard for the protection of citizens' possessions from the demands of the State, set by art 1 of the First Protocol to the convention. It was arbitrary in its incidence because (i) the land to which it attached, now shorn of any connection with the rectory, did not differ relevantly from any other freehold land, and (ii) the liability could arise at any time and (within the cost of total reconstruction) could be in almost any amount. The rationale which once distinguished such land materially from other freehold land had vanished into history. No rational link was discernible between the extent or value of the interest in the land and the potential amount of the liability. Arbitrariness was thus not simply a side-effect but the dominant feature of that historical form of taxation. Moreover, because the system was an historical legacy and not a parliamentary enactment, it was much harder to bring it within the second paragraph of art 1. To defend, under that provision, a considered system, voted upon by a representative legislature familiar with contemporary social conditions, was one thing. To defend under it a residual common law liability to a special local tax, which had long since lost its factual and legal basis, was another. It was unsurprising, therefore, that art 1 would not accommodate the legal liability with which the instant case was concerned. Even if that were wrong, the way in which the common law singled out the owners of former glebe land from other landowners was unjustifiably discriminatory, and so contrary to art 14 of the convention. Accordingly, the PCC could not lawfully recover the cost of the chancel repairs from the defendants, and the appeal would therefore be allowed (see [45], [46], [50]–[54], below).

Notes

For the prohibition of discrimination and the right to property, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 164, 165, and for liability to repair chancels, see 14 *Halsbury's Laws* (4th edn) para 1100.

For the Chancel Repairs Act 1932, see 14 *Halsbury's Statutes* (4th edn) 860.

For the Human Rights Act 1998, s 6, Sch 1, Pt I, art 14, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 504, 525.

Cases referred to in judgment

Ashingdane v UK (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.

Belgium Linguistic Case (No 2) (1968) 1 EHRR 252, ECt HR.

Chivers & Sons Ltd v Secretary of State for Air [1955] 2 All ER 607, [1955] Ch 585, [1955] 3 WLR 154.

Darby v Sweden (1991) 13 EHRR 774, [1990] ECHR 11581/85, ECt HR.

Derbyshire CC v Times Newspapers Ltd [1992] 3 All ER 65, [1992] QB 770, [1992] 3 WLR 28, CA; *aff'd* [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL.

Håkansson v Sweden (1990) 13 EHRR 1, [1990] ECHR 11855/95, ECt HR.

- a *Hentrich v France* (1994) 18 EHRR 440, [1994] ECHR 13616/88, ECt HR.
HM A-G v Dean and Chapter of the Cathedral Church of St Peter and St Wilfrid at Ripon [1945] 1 All ER 479, [1945] Ch 239.
James v UK (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.
Lithgow v UK (1986) 8 EHRR 329, [1986] ECHR 9006/80, ECt HR.
Marshall v Graham, Bell v Graham [1907] 2 KB 112.
- b *Millar v Palmer* (1837) 1 Curt 540, 163 ER 189.
Northwaite v Bennett (1834) 2 C & M 316, 149 ER 781.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 132, HL.
R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 2 All ER 853, [1993] 1 WLR 909, CA.
- c *R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening)* [1987] 1 All ER 564, [1987] QB 815, [1987] 2 WLR 699, CA.
Sporrong v Sweden (1982) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.
Stubbings v UK (1996) 23 EHRR 213, [1996] ECHR 22083/93, ECt HR.
Wickhambrook Parochial Church Council v Croxford [1935] 2 KB 417, CA.

Appeal

The defendants, Gail R Wallbank and Andrew David Wallbank, appealed with permission of Aldous LJ from the decision of Ferris J on 28 March 2000 whereby, on the determination of a preliminary issue in proceedings brought by the Parochial Church Council (PCC) of Aston Cantlow and Wilmcote with Billesley, Warwickshire, he held that the defendants were liable for the cost of repairs to the chancel of the church of St John the Baptist, Aston Cantlow. The facts are set out in the judgment of the court.

- e *Ian Partridge* (instructed by *Eddowes Perry & Osbourne*, Sutton Coldfield) for the defendants.
- f *Sarah Asplin* (instructed by *Rotherham & Co*, Coventry) for the PCC.

Cur adv vult

- g 17 May 2001. The following judgment of the court was delivered.

SIR ANDREW MORRITT V-C.

The appeal

- h [1] The question in this appeal is whether the defendants, as the freehold owners of Glebe Farm and consequently as rectors of the rectory of Aston Cantlow, are in law liable to defray the cost of repairing the chancel of the parish church.

- j [2] The issue has arisen in this way. The farmhouse stands on a field once known as Clanacre which was allotted by an inclosure award of 1743 to Lord Brooke in exchange for other land which he owned as lay impropiator of the rectory. For reasons explained below, this made Clanacre rectorial property, and its owners then and thereafter lay rectors of the parish. One of the legal obligations of a lay rector is to keep the chancel of the parish church in repair. The power to enforce this obligation rests with the Parochial Church Council (PCC).

[3] By 1990 the chancel of the church of St John the Baptist, Aston Cantlow, was in serious disrepair. On 12 September 1994 the PCC served a notice in proper form upon Mrs Wallbank calling upon her to repair the chancel. Mrs Wallbank

disputed her liability, with the result that proceedings were issued against her to recover the estimated cost, a sum of £95,260.84. When it was found that Mr Wallbank was a joint freeholder, he was joined in the proceedings. a

[4] On 29 September 1999 Master Bragge ordered the trial of two preliminary issues. The first, concerning the existence of a customary liability in somebody other than the lay rector, has gone by common consent. The second was whether the liability of the lay rector to repair the chancel of the church or otherwise to meet the cost of repairs by reason of the provisions of the Chancel Repairs Act 1932 and the common law is unenforceable by reason of the Human Rights Act 1998 or otherwise. b

[5] On 28 March 2000 Ferris J, having heard argument on this issue, found for the PCC and held the defendants liable for the cost of the chancel repairs. The issue now comes before us by leave of Aldous LJ, who ordered a stay pending our decision. c

[6] At the time of the decision of Ferris J the 1998 Act was enacted but not yet in force. The case for the defendants was accordingly put on the basis that, the law being in doubt, the doubt should be resolved compatibly with the United Kingdom's treaty obligation to observe the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). Since then, on 2 October 2000, the Act has been brought into effect, with the consequence that before us the shape of the argument has changed significantly. At the outset of the appeal, without objection, we gave permission for the notice of appeal to be amended and a respondent's notice lodged, so that the issues as they now stand might be properly pleaded. They engage two important new questions: whether the PCC is a public authority within s 6 of the 1998 Act and, if so, whether its action in serving notice upon the defendants was unlawful by reason of art 1 of the First Protocol, read either alone or with art 14 of the convention. d

[7] It is accepted by the PCC that these related issues are open to the defendants, notwithstanding that the impugned notice antedates the 1998 Act, by virtue of ss 22(4) and 7(1)(b) which permit a potential victim of a breach of a convention right to rely on that right in any legal proceedings brought by a public authority whenever the act in question took place. We are aware that this construction of the 1998 Act is at present contested, but we have accepted the concession because we consider it to have been rightly made. In brief, Parliament's intention in enacting the material provisions appears to us to have been the straightforward one that nobody should be able to attack a public authority for having violated the convention before the 1998 Act brought it into force, but equally that no public authority should be able, once the convention rights were in force, to continue to rely on earlier acts of its own which, though lawful, were incompatible with the convention. The words 'has acted ... in a way which is made unlawful by s 6(1)', used as they are in a statute distinguished by its lack of technicality, are in our view entirely consistent with this meaning. The alternative, which will have been apparent to Parliament, is a continuing residue of non-compliant decisions of public authorities kept indefinitely in effect by their own antiquity. The point not having been the subject of argument, however, we refrain from developing it. e
f
g
h
j

The historical liability for chancel repairs

[8] In addition to the judgment of Ferris J, we have had the advantage both of well-informed submissions and of valuable synoptic material in the form of

a Professor John Baker's article 'Lay rectors and chancel repairs' (1984) 100 LQR 181 and of Appendix B to the Law Commission's report *Liability for Chancel Repairs* (Law Com No 152 (1985)), which reproduces the historical conspectus set out in its earlier working paper on the topic. It is possible in consequence to restrict this judgment to an outline. It is useful, however, first to be clear about nomenclature. The term canon law is properly applied to the law made by the churches for the regulation of legal matters within their competence (see Bray 'Canon law and the Anglican Church', *The Anglican Canons 1529–1947* (1998) pp xxi ff). Ecclesiastical law is a portmanteau term which embraces not only the canon law but both secular legislation and common law relating to the church:

c 'The law of the Church of England is part of the law of the land. As Uthwatt J stated in *Attorney-General v Dean and Chapter of Ripon Cathedral* ([1945] 1 All ER 479 at 483, [1945] Ch 239 at 245): "The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts" ...' (See Hill *Ecclesiastical Law* (2nd edn, 2001) p 1.)

d While some matters (for example defamation, probate and matrimony) have passed from the canon law to the general law, others have always been within the jurisdiction of the secular courts. Among the latter is the law governing church property (Bray, *loc cit*; but see also [13] below).

e [9] The liability of the rector of a parish to repair the chancel of the parish church (the nave commonly was, though it no longer is, the responsibility of the parishioners) has been known to the law from time immemorial. It was part of the medieval canon law and has been absorbed by the common law; but its form has changed radically over time. The rectory of a parish included the right to receive tithes (the surrender of a tenth) of the product of the labour of parishioners, and the whole produce of the rectorial glebe (land forming part of the endowment, other than the parsonage house and grounds). This income was for the rector's maintenance. A rectory also included the obligation to keep the chancel of the church in repair out of the same profits. It was these proprietary rights and concomitant repairing obligations which the word 'rectory' in its original usage connoted.

g [10] Many rectories in the course of the later middle ages became monastic property. The mechanism was for the monastery to acquire by royal licence the advowson (the right—usually vested in lay persons—of appointment to a rectory) and to use it to appoint itself to the rectory, with the benefit of its tithe income and glebe holdings. The cure of souls in the parish would thereafter be discharged by a vicar, that is to say a surrogate for the monastery. But the liability to repair the chancel vested in the monastery as rector along with the property rights.

j [11] Upon the dissolution of the monasteries in the reign of Henry VIII these rectories were given or (more often) sold by the Crown to lay persons or to lay corporations, frequently colleges. These became the lay rectors of parishes, entitled like their predecessors to the fruits of the rectory and bearing the associated burden of chancel repairs. Since the same lay impropiators (as they are called in ecclesiastical law) held the advowsons, lay rectories never fell vacant and became perpetual.

[12] The major benefit of a rectory, tithe, has its own complex history; but it is enough for present purposes to say that no tithes now survive. They went first by voluntary commutation, then by statutory conversion under the Tithe Act 1836 into tithe rentcharges, and finally by extinction with compensation by the Tithe Act 1936.

Glebe has undergone no such legal metamorphosis. Fate, as Professor Baker remarks (*loc cit*), had its own revenge in store for its lay impropiators. Spiritual a
rectors were relieved of the repairing liability in 1923. But wherever rectorial glebe has come through monastic hands to a lay rector it continues at common law to carry (subject to immaterial exceptions) the ultimate liability to repair the chancel of the parish church.

[13] The penalty for breach of this obligation was admonition by ecclesiastical b
courts, followed—if the breach continued—by excommunication. If these spiritual expedients failed, the final resort was committal by the High Court for contempt of the ecclesiastical court.

The present law

[14] The present situation is described in this way in the leading textbook, Hill c
Ecclesiastical Law (2nd edn, 2001) para 3.75:

[T]he liabilities of the incumbent in respect of the church and churchyard are limited to reflect the emasculation of his rights of ownership. The responsibility d
for maintaining the church building and the churchyard falls upon the PCC to the extent that it has funds at its disposal to do so [*fn: Northwaite v Bennett* (1834) 2 C & M 316, 149 ER 781; *Millar v Palmer* (1837) 1 Curt 540, 163 ER 189]. The personal liability of the rector for repairs to the chancel no longer exists [*fn: Ecclesiastical Dilapidations Measure 1923*, s 52], although the obligations of a lay rector subsist. e

[15] The obligation to effect chancel repairs, being several, rests in its entirety upon each lay rector no matter into how many freeholds the glebe has been divided. It attaches to the land, notwithstanding that the land is no longer a source of income for a spiritual rector accommodated elsewhere. It is not limited or proportioned to the value or fruits of the benefice: its sole measure is the cost f
of necessary repairs to the chancel: *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 (the decision which prompted the 1936 Act).

[16] The liability passes with the land irrespective of the will or even the knowledge of the parties, so as to make the transferee a co-rector: *Chivers & Sons Ltd v Secretary of State for Air* [1955] 2 All ER 607, [1955] Ch 585; 14 *Halsbury's Laws* (4th g
edn reissue) para 1100. It is not registrable, whether as a land charge or otherwise, although it may be noted on the Land Register.

[17] In 1982 the General Synod of the Church of England gave its support to the phased abolition of the legal residue of chancel repair liability. In its 1985 report mentioned at [8] above, the Law Commission endorsed this proposal. It h
noted without dissent the criticism that the law on this topic was 'anomalous, uncertain and obscure', capable of creating financial hardship and unsuited to a modern society. It adopted Professor Baker's description of it as 'one of the more unsightly blots on the history of English jurisprudence'.

[18] By the Chancel Repairs Act 1932 the jurisdiction of the ecclesiastical j
courts to enforce chancel repairing obligations is replaced by a process of notice to repair followed if necessary by proceedings brought by the PCC to recover the requisite sum (s 2). This is the procedure which has been duly followed in the present case. The 1932 Act, however, contains no substantive provision about the liability itself; it makes provision for 'proceedings to enforce liability to repair a chancel' (s 1), assuming therefore the existence of the liability at common law.

Glebe Farm

a [19] The local inclosure Act of 1742 recited that the lay impropiator of the parish of Aston Cantlow, Lord Brooke, was entitled both to the great tithes of the parish and to parcels of open and common land; while the vicar held the title to, inter alia, glebe lands. The Act empowered the commissioners to allot Lord Brooke land in lieu of his tithes. In the event he was allotted 52 acres, two roods and 21 perches within the parish, of which Clanacre was part. We have been told, however, by Mr Ian Partridge for the defendants that the assertion in the statement of claim that Clanacre was allotted to Lord Brooke in the exercise of this power of conversion may be incorrect, and that the allotment was probably an exercise of the commissioners' general power. Ferris J in his judgment took the land to have been allotted in substitution for glebe land, and Miss Sarah Asplin, for the PCC, has not objected to this assumption.

b [20] Whichever is the case, Clanacre, and in time Glebe Farm, was from 1743 impressed by law with an obligation upon its successive owners to repair the chancel of the church. As Ferris J pointed out, the defendants are in consequence severally liable for the whole cost of chancel repairs 'even though they do not own the whole of the rectorial property and there are doubtless other lay impropiators'.

c [21] The defendants came into ownership of Glebe Farm by way of a gift in 1974 from Mrs Wallbank's parents to her of the farmhouse and orchard. In 1990 these were conveyed, with other land, into the defendants' joint names. The land had come to Mrs Wallbank's parents by a conveyance made in 1970 'subject to the liability to repair the chancel of Aston Church ... so far as the same still affects the property conveyed and is still subsisting and capable of being enforced'. Minutes of the PCC in 1963 and 1968 display a similar dubiety about the continuing liability of the owners for the time being of Glebe Farm. But a conveyance of the land in 1875 as part of a larger conveyance of almost 220 acres recites that it carries with it the tithes and tithes rentcharges and is 'subject to ... the repairs of the chancel of Aston Church'; and a subsequent conveyance in 1918 of just under 180 acres (in effect the defendants' present holding) to the predecessors in title of Mrs Wallbank's parents is likewise 'subject primarily and in priority to the other hereditaments charged therewith to the repairs of the chancel of Aston Church'.

d [22] It follows, in Miss Asplin's submission, that whatever may be the situation in other cases, the present defendants cannot say they took the property in ignorance of the risk of having to pay for repairs to the church chancel.

The arguments

e [23] Mr Partridge maintained before us the initial position adopted by him before Ferris J that the law is uncertain, at least as to the liability of a part-owner of the rectory or of land allotted otherwise than in lieu of the great tithe. While tithe is extrinsic to the rectory, he argues, glebe is intrinsic and so is not necessarily governed by the same logic in relation to the transmission of its incidents. If so, the common law falls to be ascertained consistently with the European Convention on Human Rights: *Derbyshire CC v Times Newspapers Ltd* [1992] 3 All ER 65 at 86–87, 93, [1992] QB 770 at 822, 830. Miss Asplin disputes his premise, and Ferris J, agreeing with her, concluded: 'I have to say that I am unable to discern this uncertainty in the common law.'

f [24] Although there is plenty of room for argument about what the law ought to be, and although not all the relevant authority binds this court, the state of the

common law, for better or for worse, is plainly enough what is set out in [14] and [15] above. If it were not for the intervention of the 1998 Act it might have been appropriate for this court to decide whether it was necessary to reconsider it, and to this end to use the convention as a touchstone. But the scene has shifted radically, and with it the locus of the argument. It is to this that we therefore turn.

[25] For the reason explained in [7] above, the critical issue since the coming into force of the 1998 Act on 2 October 2000 has been whether the common law liability upon which the claim is based is one which the PCC is debarred from enforcing because it is incompatible with the defendants' convention rights. The defendants' argument that it is incompatible is available before this court as it was not before Ferris J; but Ferris J most helpfully turned in the latter part of his judgment to the convention issues and gave, albeit obiter, his reasoned view on them.

[26] For the defendants Mr Partridge contends (a) that the PCC is a public authority within the meaning of s 6; and (b) that the enforcement by the PCC of the defendants' common law liability to repair the chancel infringes the defendants' right to the peaceful enjoyment of their possessions—viz their money—in breach of art 1 of the First Protocol read without or if necessary with art 14 of the convention. He no longer invokes art 9 (freedom of religion).

[27] Miss Asplin contends (a) that the PCC is not a public authority; (b) that if it is, it is compelled by primary legislation to act as it has done; (c) that in any event the liability involves no deprivation of possessions but simply the realisation of a contingency inherent in the property; and (d) that the liability does not involve any impermissible discrimination in the enjoyment of a convention right.

Is the PCC a public authority?

[28] Section 6 of the 1998 Act materially provides:

'Public authorities

6.—(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament ...

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.'

[29] The phrase 'public authority' is not a term of art; nor is its application always obvious or easy. This, however, is some distance from Miss Asplin's submission that it is so ambiguous or obscure that resort may be had to Hansard for help in interpreting it (see *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593). The words are perfectly intelligible. The fact that there will be cases in which their application is problematical does not begin to bring them

a within the class of words for which Parliamentary debates have been held to be an admissible aid to construction. We accordingly declined Miss Asplin's invitation to look at these.

[30] It would be a mistake to attempt an abstract definition. It is more useful first to look at the characteristics of a PCC and then to see how far they match the statutory concept (which is more than the two statutory words).

b [31] The Church of England has enjoyed a unique status (the Church in Wales having been disestablished in 1914) since the passage in 1532–34 of the five statutes which severed the hegemony of Rome and placed the Church under the spiritual and temporal sovereignty of the Crown; this notwithstanding its theological continuity since Saxon times (see *Marshall v Graham*, *Bell v Graham* [1907] 2 KB 112 at 226). Both the spiritual and the temporal courts were c thenceforward the King's courts, and it is by the latter that the liability of first spiritual and then lay rectors to repair the chancel has been both enunciated and enforced.

[32] The PCC itself exemplifies the special status of the Church of which it forms part. The parish itself is aptly described (*Hill* para 3.74) as 'the basic building block of the Church'. The successor of the vestry, the PCC is constituted d not as a voluntary association but by law. In the exercise of statutory powers originating (Miss Asplin tells us) in the Act of Supremacy 1568, but found more immediately in the Church of England Assembly (Powers) Act 1919, the Parochial Church Councils (Powers) Measure 1956 as amended provides for the discharge of the functions of the PCC and, by s 3, constitutes it a body corporate. e That a measure of its National Assembly can make every PCC a statutory corporation is an index both of the public character of the Church of England and (to some extent) of that of a PCC. The functions of the latter, which include but are not confined to those set out in s 2 of the Measure, subsume those of the vestry (s 4) which included both spiritual and civil matters (see 14 *Halsbury's Laws* f (4th edn reissue) para 568). It is sufficient for present purposes that these include the recovery of the cost of chancel repairs from lay rectors.

[33] Miss Asplin submits that the test of what is a public authority for the purposes of s 6 is function-based. There is plainly force in this in relation to the 'hybrid' class of public authority created by s 6(3)(b), which depends on the performance of 'functions of a public nature'. But it does not follow that this g governs the principal category of 'public authority', though it may well have a bearing on it. The long title of the 1998 Act describes it as 'An Act to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights', and art 1 of the convention, though for obvious reasons not scheduled to the 1998 Act as a convention right, obliges each high contracting h party to secure the convention rights to everyone within its jurisdiction. Article 34 limits the status of potential victim of a breach of the convention to 'any person, non-governmental organisation or group of individuals'. In other words, the convention assumes the existence of a state which stands distinct from persons, groups and non-governmental organisations. It is in order to locate that j state for the 1998 Act's purposes that the concept of a public authority is used in s 6.

[34] For this reason the decided cases on the amenability of bodies to judicial review, while plainly relevant, will not necessarily be determinative of a body's membership either of the principal or of the hybrid class of public authority. Miss Asplin relied in this regard upon the decision of this court in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909 as demonstrating that the possession of a legal power to determine matters of

great significance to individuals, even if underpinned by Royal Charter, does not necessarily make a body amenable to judicial review. As Bingham MR recounts in the leading judgment, the Jockey Club was and, despite incorporation in 1970 remained, a voluntary association whose authority over its members derived entirely from their contract with it and with each other. What arguably made the difference was its practical monopoly of the control of horse-racing and training in Great Britain. To this end the applicant had relied heavily on the decision of this court in *R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening)* [1987] 1 All ER 564, [1987] QB 815 in which a non-statutory City panel with dispositive powers over companies involved in takeover or merger bids was considered to be exercising quasi-governmental functions and so held amenable to judicial review. There, having rejected a 'checklist' definition of amenability, Donaldson MR said:

'Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to [their] jurisdiction.' (See [1987] 1 All ER 564 at 577, [1987] QB 815 at 838.)

While the *Jockey Club* decision has not escaped academic criticism (see Bamforth [1993] PL 239; Wade and Forsyth *Administrative Law* (8th edn, 2000) p 633), the authorities as they now stand draw at least a conceptual line between functions of public governance and functions of mutual governance. Neither of these classes is defined, though each may be indicated, by the presence or absence of statutory authority: thus its absence did not protect the panel on takeovers and mergers from judicial review, and its presence does not render a limited liability company amenable to judicial review. It may be, as Miss Asplin suggests, that this analysis sits well with the concept of the state to which s 6 of the 1998 Act seeks to give effect. It may also be—though there is room for debate about it—that the concept of a public authority is function-based. But neither proposition, in our judgment, comes to the aid of the PCC, for there is no surviving element of mutuality or of mutual governance as between the proprietor and the church in the lay rector's modern liability for chancel repairs, and no question but that the recovery of the cost of such repairs, like much else that characterises it, is a function of the PCC. The relationship in which the function arises is created by a rule of law and a state of fact which are independent of the volition of either of them.

[35] In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person certain of whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of s 6 that its acts, to be lawful, must be compatible with the rights set out in Sch 1 to the 1998 Act.

[36] There is an ancillary reason for coming to this conclusion. Article 1 of the First Protocol protects the appropriation of private possessions only if, among other things, it is done in the public interest. While Miss Asplin both accepts and

a asserts that if the PCC is a public authority its present action will be in the public interest, she resists the inverse proposition that because the upkeep of church chancels is in the public interest the PCC, at least to the extent that it has the power and duty to enforce this obligation on persons with whom it has no other relationship, is either manifesting its character as a public authority or performing a function of a public nature. It seems to us that, understandably cautious though

b her stance is, she cannot have the one without the other. If, for reasons to which we now turn, the imposition of this financial burden is to be legitimated by the convention, it must be in part because it is in the public interest; and if it is in the public interest, this will be relevant certainly to the function which the PCC is carrying out and arguably also to the legal character of the PCC.

c *Is the PCC acting under the compulsion of primary legislation?*

[37] For well-known constitutional reasons, action which may be incompatible with the convention is at least provisionally protected if it is demanded by statute: see s 6(2) of the 1998 Act. For reasons which will be apparent from the account given in [18] above, Miss Asplin's resort to this provision in the present case

d cannot succeed. Nothing in the 1932 Act requires the PCC to recover the cost of chancel repairs from Mr and Mrs Wallbank. The Act simply changes the mechanism by which this is to be done. The power, and no doubt duty, of recovery which the PCC seeks to exercise is a common law power unprotected by s 6(2).

e *The right to the peaceful enjoyment of possessions*

[38] The principal right relied on by the defendants is the right set out as art 1 of the First Protocol to the convention:

'Protection of property

f Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

g The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

In interpreting and enforcing this right, we are required by s 2 of the 1998 Act to take into account any relevant jurisprudence of the European Court of Human

h Rights or opinion of the (now defunct) commission.

[39] It is clear that possessions, for the purposes of this article, may include money. In *Darby v Sweden* (1991) 13 EHRR 774 at 781 (para 30), the European Court of Human Rights derived this proposition from the simple fact that the second paragraph of the article refers explicitly to taxation. We would adopt the

j same view.

[40] Is the liability to defray the cost of chancel repairs a form of taxation? In our view it inescapably is. Miss Asplin has argued bravely that it is simply a characteristic of the particular piece of land, like (she suggests) a grub in an apple. The defendants may well regard the simile as apt, but it does not deflect the essential fact that a private individual who has no necessary connection with the church is required by law to pay money to a public authority for its upkeep.

Erratic though its incidence is, the liability is a tax upon the ownership of land. It may also be, as Ferris J was disposed to hold, that it is an incident of such ownership; but it does not follow that it is not a tax. The liability to pay council tax, which equally is a personal liability deriving from a legal relationship with land (Local Government Finance Act 1992, s 6), can similarly bear both descriptions. The fallacy in Miss Asplin's argument is to treat Glebe Farm as the possession of which Mr and Mrs Wallbank's enjoyment is being disturbed. This is not so: the levy is upon their personal funds. Their ownership of Glebe Farm, while it is the source of their liability to pay, is undisturbed. For this reason we do not, with respect, share the judge's view that—

'The case is quite different from that in which an outright owner of property finds that his ownership is entrenched upon by some outside intervention in the form of taxation.'

In our judgment there is in this case, as in that postulated by Ferris J, an outside intervention—that of the general law—which makes ownership of the land a fiscal liability.

[41] Is the tax in the public interest? Miss Asplin, if she is to be driven this far, submits that it is; Mr Partridge does not disagree; and we would readily accept that the upkeep of England's church buildings, at least of those old and interesting enough to be part of our history and landscape, is in the public interest.

[42] Next, is the tax levied in conditions provided for by law? Mr Partridge has not pressed the argument that although the law itself is ascertainable, its effect, both on the identity of land affected by it and on the amount of the consequent liability, is not. He allocates these issues to his case on proportionality, to which we therefore turn.

[43] In *James v UK* (1986) 8 EHRR 123 the European Court of Human Rights rejected the claim of the Duke of Westminster's trustees that the United Kingdom's leasehold enfranchisement legislation contravened art 1 of the First Protocol. In doing so, however, the court made it clear (at 145 (para 50)) that in its jurisprudence (for example, *Ashingdane v UK* (1985) 7 EHRR 528 at 546–547 (para 57)) a requirement in the convention of a legitimate aim carries with it a requirement that the aim be pursued by means which are both appropriate and proportionate. In *Håkansson v Sweden* (1990) 13 EHRR 1 at 12–13 (para 51), the court said:

'Article 1 of Protocol No 1 also requires that there be a reasonable relationship of proportionality between the means employed and the end sought to be realised. The requisite proportionality will not be found if the person concerned has had to bear "an individual and excessive burden".'

Although footnoted in the judgment by reference to *Lithgow v UK* (1986) 8 EHRR 329 at 372 (para 120), where it is adopted, the origin of the last phrase in the above passage is *Sporrong v Sweden* (1982) 5 EHRR 35 at 54 (para 73). There the court by a majority of ten to nine held that the prolonged blight caused by a compulsory purchase notice which was finally withdrawn imposed 'an individual and excessive burden which could have been rendered legitimate only if [the applicants] had had the possibility of seeking a reduction of the time-limits or of claiming compensation'. The minority disagreed as to the outcome, but not as to the test.

[44] Our task is not to cast around in the European Human Rights Reports like blackletter lawyers seeking clues. In the light of s 2(1) of the 1998 Act it is to draw

a out the broad principles which animate the convention. These, in our view, include a requirement that the legitimate aim of taxation in the public interest must be pursued by means which are not completely arbitrary or out of all proportion to their purpose. We deliberately put it in these strong terms because the second paragraph of art 1 of the First Protocol makes it plain that the state in this area enjoys a large choice of measures to control the use of property or

b redistribute wealth. How large is well illustrated by the unanimous decision of the court in *James v UK* confirming the compatibility with the convention of the expropriative measures contained in the Leasehold Reform Act 1967. But that it has limits relevant to the present case is illustrated by the court's decision in *Hentrich v France* (1994) 18 EHRR 440, where a power of pre-emption had been

c exercised by the state against a buyer of land on the ground that she had paid too low a price. The court, applying art 1 of the First Protocol, accepted that the system has a legitimate aim—the prevention of tax evasion—but held (at 469 (para 42)) that in the absence of any independent and objective process for deciding whether the power ought to be exercised 'the pre-emption operated

d arbitrarily and selectively and was scarcely foreseeable'. This went to legality. The interference was also held, however, to be disproportionate (at 470–471 (paras 47–48)) because the power could be exercised against bona fide purchasers pour encourager les autres, placing an unacceptable degree of risk upon the former.

[45] Without being schematic, it can be said in the light of this jurisprudence

e that a tax which operates entirely arbitrarily violates the convention right contained in art 1 of the First Protocol. In our judgment, the liability for chancel repairs attaching to former rectorial glebe land is such a tax. It is arbitrary in its incidence, first because the land to which it attaches, now shorn of any connection with the rectory, does not differ relevantly from any other freehold

f land, and secondly because the liability may arise at any time and be (within the cost of total reconstruction) in almost any amount. The rationale which once distinguished such land materially from other freehold land has vanished into history. No rational link is discernible between the extent or value of the interest in the land and the potential amount of the liability. Arbitrariness is thus not simply a side-effect but the dominant feature of this historical form of taxation.

g [46] Because the system is an historical legacy and not a parliamentary enactment it suffers the additional handicap of being much harder than ordinary tax systems to bring within the second paragraph of art 1 of the First Protocol. To defend under this provision a considered system, voted upon by a representative

h legislature familiar with contemporary social conditions, is one thing. To defend under it a residual common law liability to a special local tax which has long since lost its factual and legal basis is another. It is unsurprising, in the end, that art 1 of the First Protocol will not accommodate the legal liability with which this case is concerned.

j *Discrimination in the enjoyment of convention rights*

[47] The foregoing, if right, is enough to conclude this appeal in the defendants' favour. If, however, it is wrong, there remains the question whether the way in which the liability operates results in impermissible discrimination in the enjoyment of the right to peaceful enjoyment of the individual's possessions.

[48] Article 14 of the convention provides:

'Prohibition of discrimination'

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

If this article applies to the present case, it has to be because the state, by its laws, is failing on grounds related to their property to secure to the defendants the enjoyment without discrimination of the right assured by art 1 of the First Protocol.

[49] Because the article is framed in such catholic terms, the jurisprudence of the European Court of Human Rights makes the necessary distinction between discrimination which is justified and which is not. Article 14 strikes at discrimination which has 'no reasonable and objective justification'. This in turn depends upon (a) the aim and effect of the impugned measure, and (b) whether there is a reasonable relationship of proportionality between the means employed and the end sought to be realised: see *Starmer European Human Rights Law* (1999) para 29.10; Clayton and Tomlinson *The Law of Human Rights* (2000) para 17.102. In *Belgium Linguistic Case (No 2)* (1968) 1 EHRR 252 at 293 (para 7), the court said:

'Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the Community and respect for the rights and freedoms safeguarded by the Convention.'

[50] Ferris J was disposed to reject this ground of challenge on the ground that there was no differential treatment. He said:

'[I]t seems to me that if a comparison is to be made between the position of Mr and Mrs Wallbank and that of the members of some broader class the appropriate broader class to take is the class of lay impropiators generally. If this is done it does not appear to me that there is any discrimination involved.'

While the judge's conclusion follows seamlessly from his premise, the premise is incorrect. The treatment complained of is not that of Mr and Mrs Wallbank personally but that of lay impropiators generally, the Wallbanks included. It is therefore necessary to compare the situation of lay impropiators with that of a larger class of which they form part—a class of persons 'in an analogous or relevantly similar situation' (*Stubbings v UK* (1996) 23 EHRR 213 at 238 (para 70)). This class has therefore to be identified by reference to shared material characteristics other than the impugned one. The material characteristic in the present case is in our view the ownership of freehold land either in England at large or in the parish of Aston Cantlow. Whichever is taken, the answer is the same: the law discriminates between the owners of land which was formerly glebe and of land which was not by making the former but not the latter liable for chancel repairs. (Whether a similar tax on the larger group would amount to unjustified discrimination as against the whole body of taxpayers does not matter here.)

[51] Assuming for the present purpose that this discrimination in liability to tax is not arbitrary, does it have a reasonable and objective justification in the sense described above? This turns on proportionality. Proportionality, in the

a jurisprudence both of the European Court of Human Rights and of the Court of
Justice of the European Communities, calls for consideration of the appropriateness
of the measure to the need which it is designed to meet. The need here is the
legitimate one of maintaining historic buildings in the public interest. The means
employed, however, are a tax (and therefore a deprivation of possessions falling
prima facie within art 1 of the First Protocol) levied exclusively on the owners of
b land which has for centuries been divorced from the system of rights and
responsibilities with which ecclesiastical law clothed the rectories of which the
land once formed part. It may—we do not need to decide the question—be
reasonable to raise the necessary funds by a general or local tax, but it cannot in
our judgment be appropriate or therefore proportionate to single out those
landowners whose property was once glebe. If the liability were a registrable
c charge or interest reflected in the price or value of the land, an argument to the
contrary might begin to run, although the indeterminate extent of the liability
would still have to be confronted. But that is not the law. The law is that the
defendants are singled out for taxation as owners of former rectorial glebe lands
without any surviving reasonable and objective justification for distinguishing
d them from other freehold property owners whether locally or nationally.

[52] In our judgment, therefore, the alternative argument that the liability for
chancel repairs amounts to unlawful discrimination in the enjoyment of a
convention right is also correct.

Conclusion

e [53] To summarise what has been a long judgment, this appeal succeeds on
each of two alternative grounds. The first is that the modern liability of lay
owners of what was once the glebe land of a rectory to defray the unmet cost of
repairs to the chancel of the parish church is a form of taxation which does not
meet the basic standard set by art 1 of the First Protocol for the protection of
f citizens' possessions from the demands of the state, because it operates
arbitrarily. The second is that the way in which the common law singles out the
owners of such land from other landowners is unjustifiably discriminatory and so
contrary to art 14. By virtue of s 6 of the 1998 Act the PCC, as a public authority
acting otherwise than under the compulsion of primary legislation, may
therefore not lawfully recover the cost of chancel repairs from Mr and Mrs
g Wallbank.

[54] It follows that the appeal is allowed; the preliminary question set out in
[4] above is to be answered in the affirmative and will be dispositive of the claim.

Appeal allowed.

Kate O'Hanlon Barrister.

Royal Masonic Hospital and another v Pensions Ombudsman and another

CHANCERY DIVISION

RIMER J

29, 30 NOVEMBER, 20 DECEMBER 2000

Pension – Pension scheme – Unfunded scheme – Private sector hospital operating unfunded occupational pension scheme – Scheme providing no benefits for early leavers – Employee leaving early and claiming right to deferred pension under statutory provisions requiring defined category of occupational pension scheme to preserve short service benefit for early leavers – Whether preservation requirements applying to unfunded private sector occupational pension schemes – Pension Schemes Act 1993, ss 69(3), 181.

The complainant, Z, was an employee of the appellant private hospital and a member of its occupational pension scheme. The scheme was unfunded, ie neither the hospital nor the employee members were required to make contributions towards a fund that would be applied in paying retirement benefits. Instead, the employees simply had the benefit of the hospital's pension promise, and the payment of benefits were to be made out of the general assets of the hospital at the time when they fell due. The scheme provided no benefits for those who left service before normal retirement age. After the hospital encountered financial difficulties, a receiver was appointed and Z was made redundant. Although she was an early leaver for the purposes of the scheme, Z claimed that she was entitled to a deferred pension by virtue of the 'preservation requirements' set out in Ch I of Pt IV of the Pension Schemes Act 1993. Under those requirements, occupational pension schemes which were subject to them were required to preserve for early leavers a 'short service benefit', namely a deferred right to receive, at normal pension age, a pension computed by reference to the member's length of service and salary at the date of leaving service. By virtue of s 69(3)(a)(i)^a, Ch I applied to any occupational pension scheme whose 'resources' were derived in whole or in part from payments made or to be made by employers of earners to whom the scheme applied, being payments under an actual or contingent legal requirement. Section 181^b defined 'resources' as 'funds' out of which the benefits provided by the scheme were payable from time to time. The receiver rejected Z's claim, and she made a complaint to the Pensions Ombudsman. He upheld the complaint, holding that Ch I applied to unfunded schemes. In doing so, he held that the nature of a pension promise in an unfunded scheme was that, when the promise fell due, the employer was obliged to provide funds necessary to meet the pension liabilities to the member. He further held, inter alia, that the employer's assets available for its creditors generally, from which the benefits would be paid, were the funds of the scheme, and that payments made by an employer to a member in satisfaction of the pension promise given in an unfunded scheme would be 'resources' for the purposes of s 69(3). The hospital appealed to the High Court.

a Section 69 is set out at p 411 b to d, below

b Section 181, so far as material, is set out at p 411 e, below

- Held** – On the true construction of s 69(3)(a)(i) of the 1993 Act, Ch I did not apply to an unfunded private sector occupational pension scheme. In relation to private sector schemes, it applied only to those schemes in which, pursuant to a legal obligation, the employer had made, or was obliged to make, payments constituting resources out of which benefits were payable. The scheme in the instant case was not such a scheme, and accordingly neither Ch I nor the preservation requirements applied to it. The reasoning supporting the Ombudsman's conclusion to the contrary was incorrect. The employer's pension promise in an unfunded scheme involved no more and no less than a promise to pay the member whatever was due to him when his benefits fell for payment. There was no obligation to provide funds. Nor could the employer's assets available for his creditors generally be properly described as the funds of the scheme. Such assets were not constituted by payments made by the employer as required by s 69(3)(a). The 'funds' or 'resources' formed a special class of assets that was (i) at least in part constituted by payments made out of the employer's general assets pursuant to his obligations under the pension scheme and (ii) was set aside as a fund out of which the pension obligations would fall to be satisfied. There had been no intention to establish such a fund in the instant case and none had been established. The scheme had no 'resources'. Accordingly, the appeal would be allowed (see p 411 *g h*, p 412 *g* to p 413 *a e f h* and p 416 *b*, below).

Notes

- For the circumstances in which the preservation requirements apply, see 44(2) *Halsbury's Laws* (4th edn reissue) para 931.

For the Pensions Act 1993, ss 69, 181, see 33 *Halsbury's Statutes* (4th edn) (1997 reissue) 682, 801.

Cases referred to in judgment

Barber v Guardian Royal Exchange Assurance Group Case C-262/88 [1990] 2 All ER 660, [1991] 1 QB 344, [1991] 2 WLR 72, [1990] ECR I-1889, ECJ.

Coloroll Pension Trustees Ltd v Russell Case C-200/91 [1995] All ER (EC) 23, [1994] ECR-I 4389, ECJ.

Appeal

The appellants, the Royal Masonic Hospital and its receiver, Adrian Stanway, appealed from a determination of the first respondent, the Pensions Ombudsman, on 28 February 2000 upholding a complaint by the second respondent, Nenita Zarate, a former employee of the hospital, that the appellants had failed to recognise her pension rights under the hospital's unfunded occupational pension scheme. Miss Zarate took no part in the appeal. The facts are set out in the judgment.

Brian Green QC and Thomas Seymour (instructed by Hammond Suddards Edge, Manchester) for the appellants.

Christopher Tidmarsh for the Pensions Ombudsman.

20 December 2000. The following judgment was delivered.

RIMER J.

1. Miss Nenita Zarate complained to the Pensions Ombudsman (the Ombudsman) about the alleged failure by the Royal Masonic Hospital (the hospital) and its receiver, Adrian Stanway, to recognise her pension rights. By a determination dated 28 February 2000 the Ombudsman upheld her complaint and gave directions to Mr Stanway requiring him to give effect to what he found to be her rights. This is an appeal against that determination by the hospital and Mr Stanway, who were represented by Mr Brian Green QC and Mr Thomas Seymour. Miss Zarate and the Ombudsman were both joined as respondents. Miss Zarate took no part in the appeal. The Ombudsman was represented by Mr Christopher Tidmarsh. The appeal turns on the construction of s 69(3) of the Pension Schemes Act 1993 (the 1993 Act).

The facts

2. In 1949 the hospital established a pension scheme (the scheme) for its employees. The scheme was an unfunded one: that is, it was not a scheme under which either the hospital or the employee members were required to make contributions towards a fund that would be applied in paying retirement benefits. The employees simply had the benefit of the hospital's pension promise, and the payment of benefits would have to be made out of the general assets of the hospital at the time when they fell due.

3. With effect from 1 April 1961, the scheme provided for the payment of a retirement pension calculated at 1/100th of the average annual gross remuneration during the two years preceding retirement multiplied by the years of service. The earliest retirement age was 60 for women and 65 for men (normal pension age), and a condition of entitlement to a pension was that the member should have been in service for at least ten years. The scheme provided no benefits for those who left service before normal pension age.

4. Miss Zarate was employed by the hospital from 23 September 1974 until she was made redundant on 28 February 1994, when she was 48. She was a member of the scheme. By 1994 the hospital was in financial difficulty, and a receiver was appointed on 27 January 1994 pursuant to s 18 of the Charities Act 1993. Mr Stanway is his successor, having been appointed on 27 October 1995.

5. As Miss Zarate was an early leaver the scheme rules provided no benefit for her. She claims that she is nevertheless entitled to a deferred pension by virtue of the provisions of Ch I of Pt IV of the 1993 Act. Her complaint to the Ombudsman was that the hospital and Mr Stanway refused to agree that she was so entitled.

6. Part IV of the 1993 Act is headed 'Protection for Early Leavers'. Chapter I sets out the 'preservation requirements' of the Act. Their principal effect is to require those occupational pensions schemes to which they apply to preserve for early leavers a 'short service benefit', namely a deferred right to receive at normal pension age a pension computed by reference to the member's length of service and salary as at the date of leaving service.

7. The issue for the Ombudsman was whether or not the preservation requirements apply to the scheme. He held that they do and that Miss Zarate is entitled to a deferred pension. The appellants challenge that decision and ask the court to hold that he was wrong and that Miss Zarate is not so entitled. The point

- a is of considerable importance to them. Miss Zarate's case is not an isolated one: there are many other former employees of the hospital who are in a like position.

The issue

- b 8. Although the scheme is an unfunded one, it is agreed that it is an 'occupational pension scheme' within s 1 of the 1993 Act. The question is whether it is also a scheme to which the preservation requirements apply. That turns on a consideration of s 69, which provides as follows:

'(1) This Chapter has effect in relation to the preservation of benefit under occupational pension schemes to which it applies.

- c (2) In this Act "the preservation requirements" means the requirements specified in or under sections 71 to 82.

- d (3) This Chapter applies to any occupational pension scheme whose resources are derived in whole or in part from—(a) payments made or to be made by one or more employers of earners to whom the scheme applies, being payments either—(i) under an actual or contingent legal obligation; or (ii) in the exercise of a power conferred, or the discharge of a duty imposed, on a Minister of the Crown, government department or any other person, being a power or duty which extends to the disbursement or allocation of public money; or (b) such other payments by the earner or his employer, or both, as may be prescribed for different categories of scheme.'

- e 9. The word 'resources' in s 69(3) is defined in s 181 as follows:

'... "resources", in relation to an occupational pension scheme, means the funds out of which the benefits provided by the scheme are payable from time to time, including the proceeds of any policy of insurance taken out, or annuity contract entered into, for the purposes of the scheme ...'

- f 10. In support of the appeal, Mr Green subjected s 69(3) to a detailed analysis and showed how it fits into the wider context of the 1993 Act. He submitted that it is obvious from s 69 that Ch I applies only to funded schemes, which the scheme is not. More specifically, s 69(1) shows that preservation of benefit does not apply to all occupational pension schemes, but only those to which Ch I applies.

- g Section 69(3) defines the schemes to which it does apply, although there is no question of s 69(3)(a)(ii) or (b) having any application to the present case. Mr Green submitted that it is plain from a natural reading of s 69(3)(a)(i) that, as regards private sector occupational pension schemes, Ch I only applies to that sub-class of them in which, in pursuance of a legal obligation, the employer has made, or is obliged to make, payments constituting resources out of which benefits are payable. As the scheme was not such a scheme, Ch I does not apply to it and nor do the preservation requirements.

- h 11. I regard that submission as correct. The language of s 69(3) appears to me to speak with unambiguous clarity and to point unanswerably to the interpretation that Mr Green advanced.

- j 12. The essence of the Ombudsman's reasoning in support of his contrary conclusion that Ch I also applies to unfunded schemes is contained in the following paragraphs of his determination:

'11. A funded scheme is one where assets are built up necessary to meet future pension liabilities as they accrue. An unfunded scheme by contrast

will not have assets built up as liabilities accrue—by its nature it will not have an accumulated fund out of which to provide benefits (as it is merely a contractual promise). The pension benefits under the promise accrue during a member's service and the promise is exercisable when the pension falls to be paid for the first time. The essence of the unfunded scheme therefore is the benefit of the contractual promise (ie to provide retirement benefits) to the employee.

12. It is my judgment that the pension promise provides that funds, for the purposes of the Scheme, will be made available at the date on which the promise falls due. In other words, when the pension promise is realised (or enforced) this will have the effect of realising an obligation to provide funds at the moment in time necessary to meet the pension liabilities of the member.

13. The funds of a scheme established under an unfunded scheme are the assets generally available to the employer's creditors. Any unfunded scheme that insures, for example, its death benefits, will also clearly have resources (as defined in section 181 of the [1993 Act]) *notwithstanding* that it is unfunded. For an unfunded scheme established under trust, its funds are (or include) the employer's promise to make payments to the scheme. For the purposes of section 69(3)(a) of the [1993 Act] the funds (or proceeds of any annuity) referred to will be those that derive (in part) from the specific payments by the Hospital under a legal obligation to Miss Zarate. See also paragraph 22 below.

14. In my judgment, section 181 of the [1993 Act] does not expressly provide or mean that the *funds* must be provided by the Scheme. However, *benefits* must be provided by the Scheme. In this sense, schemes have resources whether they are funded or not. I do not find that sections 181 or 69(3)(a) of the [1993 Act] expressly provide that a scheme must be funded (and excludes unfunded schemes in respect of which funds will only be made available when the promise falls due).

15. Section 181 of the [1993 Act] is supplementary to section 69(3) of the [1993 Act] and it is my judgment that it is section 69(3)(a) of the [1993 Act] that prescribes the conditions and where the resources should come from, ie (section 69(3)(a)(i)) the employer under an actual or contingent legal obligation (without reference to the *source* of the funds, eg contributions under trust, employer assets, proceeds of annuities) ...

22. The accounting principles under SSAP24 recognises [sic] that an unfunded unapproved scheme is an ongoing annual liability and requires that provision is made in the company's balance sheet. The legislation envisages that employers account for the cost of such schemes on an ongoing basis.

13. I agree with para 11, but otherwise, and with respect, I regard the Ombudsman's reasoning as incorrect. In my view it involves a misinterpretation of what appears to me to be a perfectly straightforward piece of legislation.

14. I disagree with the suggestion in para 12 that the nature of the pension promise in an unfunded scheme is that, when the promise falls due, the employer is obliged 'to provide funds ... necessary to meet the pension liabilities of the member'. That is an artificial analysis. The employer's pension promise in such a scheme involves no more and no less than a promise to pay the member

a whatever is due to him when his benefits fall due for payment. There is no obligation 'to provide funds'.

15. As for para 13, I agree that ordinarily the payment of benefits under an unfunded scheme will be made out of the employer's assets available for his creditors generally. I disagree that such assets can properly be described as '[t]he funds of a scheme'. I do not understand the third sentence. I do not follow how
b an unfunded scheme can be established under trust, since a trust requires trust property and in the case of an unfunded scheme such as this one there is none: there is merely the employer's contractual promise. I regard the proposition that the funds of the suggested trust 'are (or include) the employer's promise to make payments to the scheme' as also wrong. The employer does not promise to make payments to the scheme. All he does is to promise to make payments to
c the members. I do not understand the fourth sentence of para 13: s 69(3)(a) does not use the word 'funds'. If the Ombudsman is here referring to the word 'resources', I disagree that the payments made by the hospital to members in satisfaction of its pension promise are 'resources'. Such payments will ordinarily be made out of the employer's general assets. For reasons I give below, those
d assets cannot be 'resources' within s 69(3).

16. I do not agree with para 14. I agree that '[the definition in] section 181 of the [1993 Act] does not expressly provide or mean that the *funds* must be provided by the Scheme'. All it does is to define that 'resources' means 'the funds out of which benefits provided by the scheme are payable from time to time'. But
e whilst s 181 says nothing about who has to provide such funds, s 69(3)(a) does and what it says is that Ch I only applies to schemes where such funds derive in whole or in part from payments the employer is legally obliged to make. Contrary to the Ombudsman's opinion, that shows that such funds cannot be the employer's assets generally available to its creditors, since such assets are not constituted by payments made by the employer. How *can* an employer make payments
f constituting them? He can only make payments out of what he has already got, which will either already be part of such general assets or else will be an untouchable trust fund. It is obvious that the funds—or resources—here referred to form a special class of assets that is (a) at least in part constituted by payments made out of the employer's general assets pursuant to his obligations under the pension scheme and (b) is set aside as a fund out of which the pension obligations
g will fall to be satisfied. I agree with the Ombudsman that all pension schemes must provide benefits to the members, since otherwise there would be no point in creating them. But I regard his observation that 'In this sense, schemes have resources whether they are funded or not' as wrong.

17. As for para 15, I interpret its thrust to be that payments made by an
h employer to a member in satisfaction of a pension promise given in an unfunded scheme will be 'resources' for the purposes of s 69(3). I disagree. 'Resources' in that subsection means, and means only, a fund to which the members are entitled to look for payment of their benefits, being a fund which has in whole or in part been constituted by payments made by the employer under a legal obligation.
j No such fund was intended to be established in this case and none was established. This scheme has no 'resources'. I fail to see how para 22 assists the argument either way.

18. In his submissions in support of the Ombudsman's decision, Mr Tidmarsh acknowledged that the Ombudsman's conclusion cannot be defended by an ordinary reading of s 69(3). But he said that the subsection is anyway somewhat

imprecisely drafted and therefore the court should be careful not to approach its construction in too literal a way. The point he had in mind was the inaccurate concept in it that 'resources *are* derived' in whole or part from 'payments ... *to be* made' (my emphasis). I follow the point, but if there is a blemish in the drafting it is of the most venial kind. The sense is clear. a

19. Mr Tidmarsh submitted that the premise of the opening words of s 69(3) is that *all* occupational pension—including unfunded schemes—have 'resources'. He said that the only question which the section then raises is whether the resources of an unfunded scheme derive in whole or in part from payments of the type referred to in s 69(3)(a)(i). His submission was that where there is a scheme comprising no more than a promise by an employer to pay pensions direct to an employee, that promise should be regarded as the 'resources' within the meaning of the section. He submitted that the opening words of s 69(3) should be construed as reading 'any occupational pension scheme whose resources *are or derive from*' payments made or to be made by the employer. b
c

20. It may be that, if the section had been so drafted, Mr Tidmarsh would have had an arguable point. But I see no warrant for interpreting it as if it had been so drafted. That would not be to interpret it, it would be to re-write it. Further, whilst I follow the semantic basis on which Mr Tidmarsh submits that the presumption of the opening words of s 69(3) is that all occupational pension schemes have 'resources', I regard the 'whose resources are derived' as meaning 'which has resources that are derived'. Even if that is wrong, I still cannot see how a wholly unfunded scheme can have 'resources' deriving in whole or in part from payments of the nature referred to in s 69(3)(a)(i). d
e

21. Mr Tidmarsh submitted next that it would be anomalous if Ch I did not also apply to unfunded schemes. He postulated a case in which an employer made an unfunded promise to pay pensions to his employees, but also agreed to pay premiums on death in service insurance policies. He said the latter feature would result in the scheme having 'resources' within s181 so that the preservation requirements would apply to the scheme as a whole. He submitted that, if they did, it would be odd if they did not also apply to wholly unfunded schemes. The Ombudsman may have had a like point in mind in what he said in para 13 of his determination. f

22. I do not find that submission compelling. Even accepting (which Mr Green was not prepared to) that the preservation requirements would apply to Mr Tidmarsh's example, his submission can be reduced to the following syllogism: (a) Ch I applies to wholly funded schemes; (b) it also applies to partially funded schemes; (c) therefore it applies to wholly unfunded schemes. The problem with that is that the conclusion does not follow from the premises. Their common feature is that an element of funding is essential for the application of the preservation requirements, whereas none is present in the example postulated in the conclusion. If Mr Tidmarsh's somewhat improbable example reveals any anomaly, it is not in the non-application of Ch I to wholly unfunded schemes, but in its suggested application to his example. g
h

23. Finally, Mr Tidmarsh drew attention to s 118 of the 1993 Act. That is headed 'Equal access requirements'. Subsections (1) to (3) provide, so far as material: i

'(1) Subject to section 153(3), the equal access requirements in relation to an occupational pension scheme are that membership of the scheme is open

a to both men and women on terms which are the same as to age and length of service needed for becoming a member.

(2) A rule does not contravene the equal access requirements only because it confers on the scheme's trustees or managers, or others, a discretion whose exercise may result in a person being more or less favourably treated than he otherwise would be, so long as it does not provide for the discretion to be exercised in any discriminatory manner as between men and women.

b (3) The equal access requirements have effect in relation to any occupational pension scheme whose resources are derived in whole or in part from ...'

c and then the subsection continues with wording identical to that of sub-paras (a) and (b) of s 69(3). Mr Tidmarsh submitted that, if the appellants are right, the equal access provisions would not apply to unfunded schemes. He said that this would mean that s 118 is inconsistent with the requirements of art 141 EC (formerly art 119 of the EC Treaty). On 17 May 1990 the Court of Justice of the European Communities had given its decision in *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1990] ECR I-1889 that benefits under contracted-out occupational pension schemes were 'pay' for the purposes of art 141 EC and so were required to be equal in relation to men and women for like work. Mr Tidmarsh submitted, rightly, that art 141 does not admit of a distinction between funded and unfunded schemes, and he also submitted that legislation such as s 118 should, so far as reasonably possible, be construed in a manner which is consistent with the United Kingdom's treaty obligations. He said this pointed to a construction of s 118 that extends it also to unfunded schemes. If it is so construed, then the identical language of s 69(3) should be construed in a like manner.

24. I do not find that submission a compelling one either. The origins of s 118 go back to s 53 of the Social Security Pensions Act 1975. Section 53 (and its related sections 54 to 56) came into force on 6 April 1978. Section 23 of, and Sch 5 to, the Social Security Act 1989 provided that every employment-related benefit scheme (as defined in para 7(a) of Sch 5) had to comply with the principle of equal treatment for men and women as set out in para 2(1) of Sch 5; and the 1989 Act also provided for the repeal of ss 53 to 56 of the 1975 Act on a day to be appointed. No such day was ever appointed, and s 118 of the 1993 Act ('an Act to consolidate certain enactments relating to pension schemes with amendments to give effect to recommendations of the Law Commission and the Scottish Law Commission') substantially re-enacted s 53. The 1993 Act provided for the repeal of s 53 of the 1975 Act and also of s 118 itself. The repeal of s 53 took effect on 6 February 1994, but the machinery for repealing s 118 was not operated. In the meantime, questions unanswered by *Barber's* case were answered by other decisions of the Court of Justice, including *Coloroll Pension Trustees Ltd v Russell* Case C-200/91 [1995] All ER (EC) 23, [1994] ECR-I 4389, and then on 19 July 1995 the Pensions Act 1995 was enacted. That provided for the repeal of s 118, which took effect on 1 January 1996, and also introduced a new 'equal treatment' code by ss 62 to 66 of the 1995 Act, which replaced the former 'equal access requirements' and came fully into force on 1 January 1996. Section 62 gives statutory effect to the requirements of art 141 EC in so far as it applies to occupational pension schemes and as explained in *Barber's* case. It applies to all occupational pension schemes and abandons the rather more selective language that was a feature of the 'equal access' provisions of s 53 of the 1975 Act and s 118 of the 1993 Act.

25. In the light of that history of the legislation, I feel unable to regard s 118 as shedding a light on the interpretation of s 69(3) that can be said to support the Ombudsman's decision. First, I anyway find it impossible to interpret s 118 as extending also to unfunded schemes. Secondly, the 1993 Act itself provided for the repeal of that section, a task which was eventually carried out by the 1995 Act, s 62 of which abandoned the language of s 118 and makes clear that the 'equal treatment' rule applies to all occupational pension schemes. I do not regard the repealed ss 53 and 118 as requiring me to adopt what I would regard as an unnatural, and wrong, interpretation of s 69(3) of the 1993 Act. a
b

26. I conclude that the Ombudsman was in error in his determination. I allow the appeal and will set aside his determination and the consequential directions that he gave.

Appeal allowed.

Celia Fox Barrister

a Bettison and another v Langton and others

[2001] UKHL 24

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HUTTON AND LORD SCOTT OF FOSCOTE

20, 21 FEBRUARY, 17 MAY 2001

Commons – Right of common – Common of grazing – Farm enjoying right of common of pasturage limited by levancy and couchancy – Right being registered in respect of fixed number of animals – Farm owner selling grazing rights to claimants – Defendants buying farm – Whether right of common of pasturage for fixed number of animals severable from land to which it was appurtenant – Whether registration capable of transforming non-severable right of pasturage into severable right – Law of Property Act 1925, s 187(1) – Commons Registration Act 1965, s 15.

- d The parties were in dispute over a right of common of pasturage which for many years had been appurtenant to a farm. That right had not originally been limited to a fixed number of animals. Rather, it had been a right to graze on the common the animals levant and couchant on the farm, ie a right to graze as many animals as the farm was capable of maintaining during the winter. At common law, such a right could not be severed from the land to which it was appurtenant. In the early 1970s the right appurtenant to the farm had been registered in respect of a fixed number of animals under the Commons Registration Act 1965. That registration was in compliance with s 15(1)^a of the Act which provided that where a right of common consisted of a right, not limited by number, to graze animals, it was to be treated, for the purposes of registration under the Act, as exercisable in relation to no more animals than a definite number. Section 15(3) provided that, once registration had become final, the right was to be exercisable in relation to animals not exceeding the number registered. By a conveyance in 1987 the owner of the farm sold the right of pasturage, but not the farm itself, to the claimants. In 1994 the bulk of the farm was purchased by the defendants. In subsequent proceedings, they contended that the right of pasturage could not be severed from the farm, that the conveyance to the claimants was therefore ineffective and that accordingly an apportioned part of the right had passed to them in 1994. In rejecting that contention, both the trial judge and the Court of Appeal held that, unlike a right of pasturage limited by levancy and couchancy, a right for a fixed number of animals could be severed at common law from the land to which it was appurtenant. That conclusion was challenged by the defendants on appeal to the House of Lords. Alternatively, they contended that even if such a right had been severable at common law, the law had been changed by s 187(1)^b of the Law of Property Act 1925. Section 187(1) provided that where an easement, right or privilege for a legal estate was created, it enured for the benefit of the land to which it was intended to be annexed. Finally, the defendants contended that s 15 of the 1965 Act should not be given effect so as to permit the severance from the dominant land of an appurtenant right which had previously been inalienable from it.

a Section 15 is set out at [31], below

b Section 187(1) is set out at [48], below

Held – (1) At common law, a right of pasturage appurtenant for a fixed number of animals was severable from the land to which the right was appurtenant. That conclusion was supported by the overwhelming weight of old authority and a wealth of academic and textbook comment. Moreover, there was no reason of principle why grazing rights appurtenant for a fixed number of beasts should not be alienable. The alienation of such rights could not prejudice the residual interest of the owner of the servient common. Nor did s 187(1) of the 1925 Act prevent the severability of appurtenant rights that were severable under the common law. The wording of that provision was obscure, and there was no reason for attributing to Parliament any intention to change the law as to the severance of profits (see [1], [19], [24]–[26], [36], [37], [46], [47], [50], below); *Daniel v Hanslip* (1672) 2 Lev 67 and *White v Taylor* (No 2) [1968] 1 All ER 1015 applied.

(2) (Lord Nicholls dissenting) Section 15(3) of the 1965 Act transformed, on registration, a right limited by levancy and couchancy into a right for a fixed number of animals. Moreover, since appurtenant grazing rights could, at common law, be severed from the land to which they were attached, and registration under s 15 transformed grazing rights limited by levancy and couchancy into grazing rights for a fixed number of animals, it followed that those registered rights, too, could be severed from the land to which they were attached. That consequence was not based upon a construction of s 15 that attributed to Parliament any intention at all about severance. Section 15 was not a provision dealing with severance. Rather, it dealt with the registration of common rights and the extent of those rights after registration. It was therefore the general law, when applied to the registered grazing rights produced by s 15, that impelled the conclusion that the rights were severable. It followed in the instant case that the appurtenant rights of grazing became severable on registration, and that the conveyance of those rights to the claimants in 1987 had been effective. Accordingly, the appeal would be dismissed (see [1], [24]–[27], [60], [63], [64], below).

Decision of the Court of Appeal [1999] 2 All ER 367 affirmed.

Notes

For quantification on registration of rights of common of pasture not limited by number and for limitation on, and severability of, such rights appurtenant, see 6 *Halsbury's Laws* (4th edn reissue) paras 552, 559–560.

For the Law of Property Act 1925, s 187, see 37 *Halsbury's Statutes* (4th edn) (1998 reissue) 351.

For the Commons Registration Act 1965, s 15, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 691.

Cases referred to in opinions

Baylis v Tyssen-Amhurst (1877) 6 Ch D 500.

Bunn v Channen (1813) 5 Taunt 244, 128 ER 683.

Carr v Lambert (1866) LR 1 Exch 168.

Chesterfield (Lord) v Harris [1908] 2 Ch 397, CA; *aff'd* [1911] AC 623, HL.

Daniel v Hanslip (1672) 2 Lev 67, 83 ER 452, sub nom *Leniel v Harslop* (1672) 3 Keb 66, 84 ER 597.

Drury v Kent (1603) Cro Jac 14, 79 ER 13.

Kirkness (Inspector of Taxes) v John Hudson & Co Ltd [1955] 2 All ER 345, [1955] AC 696, [1955] 2 WLR 1135, HL.

Pritchard v Briggs [1980] 1 All ER 294, [1980] Ch 338, [1979] 3 WLR 868, CA.

- Richards v Squibb* (1698) 1 Ld Raym 762, 91 ER 1384, NP.
a *White v Taylor (No 2)* [1968] 1 All ER 1015, [1969] 1 Ch 160, [1968] 2 WLR 1402.

Appeal

- The defendants, Wilfred Larry Penter and Heather Mary Penter, appealed with permission of the Appeal Committee of the House of Lords given on 26 July 1999
b from the decision of the Court of Appeal (Simon Brown, Ward and Robert Walker LJ) on 19 February 1999 ([1999] 2 All ER 367, [2000] Ch 54), dismissing their appeal from the order of Judge Anthony Thompson QC made at the Bodmin County Court on 22 January 1998 whereby he declared that the claimants, Stephen Anthony Bettison and Caroline Joyce Bettison, were the owners of rights of common to graze ten head of cattle and 30 sheep over the land
c comprised in unit number CL 127 of the Register of Common Land and were entitled to register the same. The first defendant, Jacqueline Barbara Langton, took no part in the proceedings before the Court of Appeal and the House of Lords. The facts are set out in the opinion of Lord Scott of Foscote.
- d *Vivian Chapman* (instructed by *Blake Laphorn*, agents for *Edward Harris & Son*, Swansea) for the Penters.
Leslie Blohm and *Alex Troup* (instructed by *Spouse Robinson le Grice*, St Ives) for the Bettisons.

- e Their Lordships took time for consideration.

17 May 2001. The following opinions were delivered.

LORD SLYNN OF HADLEY.

- [1] My Lords, I have had the advantage of reading in draft the opinion of my
f noble and learned friend, Lord Scott of Foscote. On the basis of the material to which he refers and which was considered by Robert Walker LJ it seems to me to be well established that at common law appurtenant rights of grazing for a fixed number of animals were severable and that s 187 of the Law of Property Act 1925 did not change that position. Despite the opinions expressed in the *Report of the Royal Commission on Common Land 1955–1958* (Cmnd 462 (1958)) I also consider it
g clear that the effect of s 15 of the Commons Registration Act 1965 was that on registration, rights of grazing formerly determined by levancy and couchancy became rights to graze a fixed number of animals. There is nothing in the section which requires or leads to the conclusion that the general rule is not to apply.
h The grazing rights in the present case thus became severable. Accordingly, for the reasons given by Lord Scott, I, too, would dismiss the appeal.

LORD NICHOLLS OF BIRKENHEAD.

- [2] My Lords, this appeal concerns the commons of England and Wales. Despite the continuing growth of towns and cities, ancient common lands still cover
j about 1.4m acres, over 4% of the total area of England and Wales. Some commons, such as Clapham Common, are now within built up areas. But the great bulk of common lands are in the countryside, notably the extensive hill commons in the north and south west of England and in Wales.

[3] For centuries many farmers whose lands adjoin the local common have enjoyed the right to put out their sheep and cattle to graze on the common. The animals wintered on the farms, but in the summer months they were let out

to graze on the open common. This appeal raises an important point concerning the ownership of these grazing rights. These rights have feudal origins, but this should not be allowed to obscure their continuing importance. What happens on the commons is of importance to the local farmers. What happens on the commons is also of wider importance. Commons have considerable amenity value. Increasingly, what happens on the commons is a matter of general public concern. They are the last reserve of uncommitted land in England and Wales. They are an important national resource.

[4] Traditionally grazing rights are an adjunct of the lands of the farmers who own the rights. The rights had their origin in actual or presumed grant, usually the latter. The law assumes that long continued use must have had a lawful origin. The number of animals that a farmer was entitled to depasture on the common was limited to the animals his land could support through the winter. The language was picturesque: the right was limited to the number of beasts 'levant and couchant' ('getting up and lying down') on the farmer's holding in the winter months. These rights could be passed on or sold, but only with the farm to which they were appurtenant. They were to be enjoyed by the occupier for the time being. They could not be sold separately, or 'severed', from the farm.

[5] Most grazing rights were governed by the principle of levancy and couchancy, but not always. Sometimes a grazing right might be for a fixed number of animals. Then the right, known as a right in gross, could be sold separately. Historically, grazing rights in gross are rare.

[6] The Bettisons' case is that all this was changed by the Commons Registration Act 1965. Under that Act the number of animals a farmer may pasture on the common in exercise of grazing rights is the number stated in the commons register. Levancy and couchancy, as a principle for quantifying a grazing right, has been overtaken. Accordingly, it is said, the 1965 Act has had the effect of transforming all grazing rights into rights in gross, which can be sold separately from the land to which they have been annexed for centuries. It is not suggested that in 1965 anyone anticipated or intended that the registration provisions should have this far-reaching effect. But, so it is said, as night follows day, that is the inevitable consequence of s 15 of the 1965 Act. Whether Parliament intended that result or not, that is what Parliament has done.

[7] My Lords, arguments of this nature are to be approached with circumspection. An Act of Parliament is to be interpreted having regard to its purpose. The court is looking for the intention of Parliament expressed in the language under consideration. The intention of Parliament is to be judged objectively. It is the intention which the court imputes to Parliament in using the words in question. If the statutory language is fairly susceptible of a meaning which gives effect to the parliamentary intention, the court will prefer that meaning.

The object of the 1965 Act

[8] So the starting point is to identify the purpose of the 1965 Act. This was important but limited. It is well summarised in Megarry and Wade *The Law of Real Property* (6th edn, 2000) p 1144. In 1965 there were many uncertainties about what land was subject to rights of common and what rights of common existed over these lands. The object of the 1965 Act was 'to lay a foundation for further legislation to govern the management and improvement of common land'. To this end that Act enacted provisions for ascertaining what rights were claimed to be still in existence, and for extinguishing others. The provisions of the Act are to be interpreted with this in mind.

a *The background to the 1965 Act*

[9] Next, the background to the legislation. The 1965 Act followed the *Report of the Royal Commission on Common Land 1955–1958* (Cmnd 462 (1958)). The Royal Commission was chaired by Sir Ivor Jennings QC. The overriding conclusion of the report was that common land ought to be preserved in the public interest. The commission recommended that certain local authorities should register claims that land is common land and claims by commoners to rights over common land. Any rights not registered should be held to have lapsed.

b [10] Paragraphs 271 to 275 of the report dealt specifically with grazing rights or, more formally, rights of common of pasture. The report noted that, under the commission's recommendations, a right of common of pasture would be registered either as attached to a holding (appurtenant) or, if unattached, in the name of the owner as a right in gross. A claimant should be free to register his grazing rights as rights in gross provided he could produce evidence that that is what they were. The onus of proof would be on him. Otherwise rights of pasture would be registered as appurtenant to the land to which they were attached. Changes in the ownership of rights in gross would be registrable, but changes in the ownership of a holding to which grazing rights were appurtenant would not. Particulars of rights appurtenant would only be altered in the register if the holding were split. Otherwise, barring compulsory acquisition, or the purchase of rights within an approved scheme of management, 'the rights would remain inseparable from the original holding' (see para 273 of the report). The commission added: 'The permanent registration of common rights attached to holdings as rights appurtenant should avert any danger of rights subsequently being alienated.'

e [11] Earlier in its report (at paras 30–31), the commission criticised levancy and couchancy as one of the old customs and practices which, if not totally forgotten, were often an indifferent guide in modern circumstances and tended to become discredited. So it was small wonder if each commoner shifted for himself and crowded as many sheep as he dared on the upland sheepwalk. As a result the sward was becomingly increasingly impoverished through overgrazing. But if levancy and couchancy was not a satisfactory way to determine the extent of registered grazing rights, some other method had to be found. After considering possible alternatives, the commission recommended that each claimant should be free to claim those rights of pasture which he believed he was entitled to (see para 274 of the report). A procedure was recommended for making and resolving objections which other commoners or the owner of the soil might have.

g [12] Thus, the commission made abundantly plain that, although it was recommending that grazing rights appurtenant to a farm should be quantified as fixed numbers, that was not intended to make the rights alienable from the farm. The commission envisaged that registration as an appurtenant right would suffice to maintain the appurtenant character of the right even though the right would be quantified. This intention was repeated in the commission's summary of its recommendations, in para 405(5):

j 'A right of common of pasture should be registered as appurtenant (i.e. attached) to the holding(s) of the claimant or, on proof by the claimant, as in gross (i.e. unattached to a holding) ... *Rights appurtenant should not be severable from land to which they appertain*, unless extinguished or transferred within an approved scheme of management and improvement.' (My emphasis.)

The wording of the 1965 Act

[13] I turn now to the 1965 Act. I can say at once that one looks in vain for any indication that Parliament intended to depart from the commission's recommendations relating to grazing rights. Indeed, a striking feature of that Act is that it implements all the relevant recommendations in every particular. Section 1 provides for the registration of rights of common over common land. The section further provides that after the end of a prescribed period no rights of common shall be exercisable over common land unless they are registered. Section 4 provides that objections to registrations shall be referred to a commons commissioner, and s 5 makes provision for the disposal of disputed items which are so referred. Section 7 makes provision for the finality of undisputed registrations. Section 19 provides that the minister may make regulations prescribing, among other matters, the form of the registers and of applications for registration.

[14] In exercise of this power the minister made the Commons Registration (General) Regulations 1966, SI 1966/1471. I should refer briefly to these regulations. Regulation 4(3) provided that the rights section of each register should contain particulars of the rights of common registered as exercisable over the common in question. The particulars were to include descriptions of the land, if any, to which the rights were attached. The prescribed form, form 3, contained a corresponding column, headed 'Particulars of the land (if any) to which the right is attached'. Regulation 29(1) made provision for the amendment of registered rights. Where a registered right was apportioned, varied, extinguished or released or, being or having become a right in gross, was transferred, application might be made for the amendment of the register. This regulation made no provision for amendment of the register when the ownership of the holding to which a right was attached changed hands. This was not an oversight. Note 1 of the notes to the prescribed form, form 19, stated:

'With regard to attached rights, it is important to remember that, so long as the land to which a right is attached remains a single holding, no case for amendment of the register arises, no matter how many times the holding may be sold or otherwise transferred, unless and until the right is apportioned. On the other hand, every transfer of the freehold ownership of a right held *in gross* should be recorded in the register.'

The reason for this distinction is not far to seek. The view was taken that in the case of rights which are attached to land, the register does not need to be amended because the ownership of the right will necessarily go hand in hand with the ownership of the land which is particularised on the register. This is in accordance with the Royal Commission's recommendation.

Section 15 of the 1965 Act

[15] In s 15 of the 1965 Act Parliament made provision for quantifying grazing rights. The sidenote reads 'Quantification of certain grazing rights'. Here also the statutory provisions conform wholly with the recommendations of the Royal Commission. Section 15(1) provides:

'Where a right of common consists of or includes a right, not limited by number, to graze animals or animals of any class, it shall for the purposes of registration under this Act be treated as exercisable in relation to no more animals, or animals of that class, than a definite number.'

a Thus, a grazing right is to be deemed ('be treated as') exercisable in relation to a definite number of animals 'for the purposes of registration under this Act'. Section 15(2) of the 1965 Act provides that an application for registration of such a right shall state the number of animals to be entered on the register. These two subsections are, necessarily, to be understood in the context of the whole Act. As already noted, an applicant who owns a right appurtenant to a holding must register it as such. These two subsections envisage that an applicant who owns a grazing right which is appurtenant to a holding, and who applies to register the right as attached to the holding, will himself specify the number of animals in respect of which the right is exercisable.

[16] Section 15(3) then states the consequence ('accordingly') of the registration when it becomes final:

c 'When the registration of such a right has become final the right shall accordingly be exercisable in relation to animals not exceeding the number or numbers registered or such other number or numbers as Parliament may hereafter determine.'

d Thus, the right which is appurtenant to a holding, and has been registered as such, shall in future be exercisable in relation to the registered number of animals. That was the intended consequence.

[17] In so providing Parliament cannot have intended that the mere fact of quantification should have the further effect of changing the nature of the right, so that what had been an appurtenant right, and registered as such, should automatically become a severable right. It was not intended that, up and down the country, rights which for centuries had been attached to particular farms should now immediately become alienable to the highest bidder who wanted to bring his sheep in lorries from many miles away. That would be a fundamental alteration in the character of these rights. It would go far beyond merely quantifying the right. There is nothing in the 1965 Act to suggest that quantification as part of the registration process was intended to make such a fundamental change. Such a change would, indeed, be inconsistent with the scheme of the legislation. The statutory scheme required appurtenant rights to be registered with particulars of the land to which they were attached. That would be pointless if they were alienable as rights in gross. And it would be extremely odd if the very process of registration rendered every appurtenant grazing right severable.

g [18] The preferable interpretation of the effect of s 15 is that the only change in a grazing right made by this registration legislation is that, when the registration becomes final, the grazing right is henceforward quantified by reference to the registered number. If, as was usually the case, the right was appurtenant to a particular holding, it would remain appurtenant to that holding as duly registered.

h [19] I accept, notwithstanding Mr Chapman's skilful efforts to argue the contrary, that at common law a grazing right for a fixed number was regarded as severable from the holding. On this I agree with the views expressed by Robert Walker LJ in his erudite judgment (see [1999] 2 All ER 367, [2000] Ch 54). But it by no means follows that, when Parliament provides for the quantification of a grazing right which is appurtenant to property, the right must become a right in gross. There is no reason in principle why Parliament should not provide that a grazing right which is appurtenant to a particular farm may remain so appurtenant even though its extent is for the future quantified as a fixed number. A grazing right appurtenant to particular land, but whose extent is quantified by

a
b
c
d
e
f
g
h
i
j
a fixed number, is not incoherent as a legal concept. The rationale underlying the common law principle is that when a grazing right is for a fixed number of animals, it is immaterial to the owner of the waste whether the animals are put on the common in respect of a holding or by a person who owns no land. But in the 1950s the Royal Commission was concerned with wider issues than the position of the owner of the common. The commission envisaged that appurtenant rights should remain appurtenant after quantification by registration. In the 1965 Act Parliament gave effect to the commission's recommendation on this point. The common law principle which governed severability is not apt as a guide in the context of this registration scheme.

[20] This interpretation does not strike at the foundations of the law relating to appurtenant grazing rights. It means only that, unlike quantification by agreement, quantification by registration under the 1965 Act does not have the consequence that an appurtenant right becomes severable. It does not have that consequence, because registration is a statutory system, and when establishing this system Parliament did not intend that registration should have this consequence. The 1965 Act is to be construed accordingly.

[21] Nor does this construction of the 1965 Act give rise to practical difficulties. A grazing right which was appurtenant to a holding before 1965 was required to be registered as an appurtenant right. That is how it is recorded in the commons register. There is no scope for future uncertainty.

[22] I am fortified in the conclusion I have reached by noting that recent publications concerned with the future of commons speak with one voice in drawing attention to the undesirable effects of grazing rights being severed from their traditional holdings: see, for instance, the *Good Practice Guide on Managing the Use of Common Land*, published by the Department of the Environment, Transport and the Regions (June 1998). Severance of grazing rights from the associated holdings off the common can reduce the long term viability of these holdings. It can also make co-operative grazing management more difficult. Needless to say, the soundness or otherwise of the points raised in these publications is not a matter for this House acting in its judicial capacity. But these publications do underline the public importance of the question whether commons grazing rights should remain attached to the local farms. More directly in point is a comment in a research report made to the department in July 1998 by the Countryside and Community Research Unit of the Cheltenham and Gloucester College of Higher Education, in para 7.9: 'severance detaches the rights from the land forever and this was clearly not the intention ... when the registers were created in 1965-70.'

[23] I agree. I would allow this appeal. The argument based on s 15 of the 1965 Act appears to have been presented differently in the Court of Appeal, because Robert Walker LJ did not deal specifically with the point I have discussed above. I would hold that the grazing rights over Tawna Down attached to Sina Farm, Mount, near Bodmin, Cornwall, remained so attached after they were registered as a right to graze ten cattle and 30 sheep. Mrs Langton's purported conveyance of these grazing rights alone to the respondents Mr and Mrs Bettison in April 1987 was ineffectual.

LORD STEYN.

[24] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scott of Foscote. For the reasons he has given I would also dismiss the appeal.

LORD HUTTON.

a [25] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Scott of Foscote. The arguments in support of the conclusion that the appeal should be allowed are powerfully set out in the speech of Lord Nicholls. However, on balance, I have reached the conclusion that the appeal should be dismissed for the reasons set out

b in the speech of Lord Scott.

[26] I have formed this view because it is clear from the authorities cited by Lord Scott that the common law recognised a right appurtenant to dominant land to pasture a fixed number of animals on common land and that such a right could be severed from the dominant land and alienated. As this was the rule of

c common law I agree with the opinion of Lord Scott that as s 15 of the Commons Registration Act 1965 transformed a levant and couchant grazing right into a right to graze the fixed number of animals noted in the register, it follows that in accordance with the common law such a right can be severed from the dominant land and alienated to a third party.

d [27] Whatever may have been the intention with which the Royal Commission made the recommendation upon which s 15 of the Act is based, I do not consider that s 15 can be read as operating to restrict the common law rule that the right to pasture a fixed number of animals on common land can be severed from the dominant land. To come to this conclusion is not to hold that Parliament in

e enacting s 15 intended that the fact of quantification of the number of animals which the dominant owner could graze should have the effect that a right which was not severable should become severable—rather it is to hold that the words of s 15 cannot be read as restricting the pre-existing and well-established common law rule. Accordingly I would dismiss the appeal.

f LORD SCOTT OF FOSCOTE.

[28] My Lords, rights of common appurtenant are rights of common which are attached to land. They may be acquired either by grant or by prescription. The right of common with which this case is concerned is a right of pasturage, that is to say, a right to graze beasts on a common. The common in question

g is Tawna Down on the edge of Bodmin Moor in Cornwall. It is not in dispute that Tawna Down is a common and that rights of common of pasturage are exercisable over it. Nor is it in dispute that Mrs Langton, who purchased Sina Farm, near Bodmin, on 16 September 1985, thereby became proprietor of the right to graze ten head of cattle and 30 sheep over Tawna Down. Her right of

h pasturage was appurtenant to Sina Farm.

[29] Mrs Langton's right of pasturage had begun its life, long before she had become owner of Sina Farm, as a right for the owners of Sina Farm to graze on Tawna Down the animals levant and couchant on the farm. In Gadsden *The Law of Commons* (1988) p 101 (para 3.128) the following explanation of levancy and

j couchancy is given:

‘... From early days it has been understood that *levant* and *couchant* means “so many of the cattle that the land, to which the common is appurtenant, may maintain in the winter,” that is to say “if my land to which I claim common belonging, can yield me stover [feed] to find a hundred cattell in winter, then I shall have common in summer for a hundred cattell.”’

[30] And in *Carr v Lambert* (1866) LR 1 Exch 168 at 175 levancy and couchancy was described as a 'measure of the capacity of the land to keep cattle out of artificial or natural produce grown within its limits'. a

[31] The Commons Registration Act 1965 required all commons and all rights over commons to be registered. Tawna Down was duly registered as a common. The registration became final on 17 December 1971. The right of pasturage appurtenant to Sina Farm, too, was duly registered. The application for registration and the registration itself had to comply, and did comply, with s 15(1) and (2) of the 1965 Act. I shall have more to say later about sub-s (3) but it is convenient at this point to set out the section in full: b

'(1) Where a right of common consists of or includes a right, not limited by number, to graze animals or animals of any class, it shall for the purposes of registration under this Act be treated as exercisable in relation to no more animals, or animals of that class, than a definite number. c

(2) Any application for the registration of such a right shall state the number of animals to be entered in the register or, as the case may be, the numbers of animals of different classes to be so entered.

(3) When the registration of such a right has become final the right shall accordingly be exercisable in relation to animals not exceeding the number or numbers registered or such other number or numbers as Parliament may hereafter determine.' d

[32] The pasturage right appurtenant to Sina Farm, being a right limited by levancy and couchancy, was 'a right, not limited by number'. So the registration application had to state the number of animals for which the right was claimed (sub-s (2)), and the registration of the right had to treat the right as exercisable in relation to a definite number of animals (sub-s (1)). e

[33] The applicants for registration were Mr and Mrs May, predecessors in title of Mrs Langton. The registration recorded their right to graze ten head of cattle and 30 sheep over Tawna Down and that the right was attached to Sina Farm. Accordingly, the right to which Mrs Langton became entitled, although originally limited by levancy and couchancy, had become a right 'exercisable in relation to animals not exceeding' ten head of cattle and 30 sheep (sub-s (3)). f

[34] By a conveyance dated 6 April 1987 Mrs Langton sold to Mr and Mrs Bettison (the respondents to this appeal) her right of pasturage over Tawna Down. She retained the ownership of Sina Farm. In 1988 Mrs Langton mortgaged Sina Farm to Midland Bank plc and, by a conveyance dated 22 September 1994, the bank, as mortgagee, sold the bulk of Sina Farm to Mr and Mrs Penter (the appellants). g

[35] The appellants contend that it was not in law possible for Mrs Langton to have severed the right of pasturage from the land to which the right was appurtenant. The conveyance of 6 April 1987 was, they contend, ineffective. The right of pasturage remained vested in Mrs Langton and, by virtue of s 62(1) of the Law of Property Act 1925, an appropriately apportioned part of the right of pasturage passed to them under the conveyance of 22 September 1994. So the issue between the parties is whether the conveyance of 6 April 1987 was effective to do what it purported to do, namely, to transfer the Sina Farm right of pasturage to Mr and Mrs Bettison, thereby severing it from the farm and transforming it from a right appurtenant to a right in gross. h

[36] It is not in dispute that, at common law, a right of pasturage limited by levancy and couchancy could not be severed from the land to which the right was j

a appurtenant. Nor is it in dispute that, at common law, a right of common of pasturage for a fixed number of animals could be created in gross, that is to say without being attached to any land, and, if so created for an estate in fee simple, could be freely assigned. It is, however, in dispute whether a right of pasturage appurtenant not limited by levancy and couchancy but for a fixed number of animals could be severed from the land to which the right was appurtenant. In
 b my opinion, the overwhelming weight of old authority is in favour of such a right being severable. It was so decided both by Judge Anthony Thompson QC at first instance and by the Court of Appeal ([1999] 2 All ER 367, [2000] Ch 54). The leading judgment in the Court of Appeal was given by Robert Walker LJ. I must pay an admiring tribute to his scholarly judgment with which, on this issue, I am in complete agreement. It is only out of respect for the arguments put before
 c your Lordships by counsel on this appeal, and the suspicion that, as often happens, the arguments may have been slightly different from those addressed to the courts below, that I propose to examine the issue myself rather than simply to content myself by adopting the judgments and reasoning below.

[37] In Hall *Treatise on the Law relating to Profits à Prendre and Rights of Common* (1871) the author cites (at p 249) a dictum attributed in YB 26 Hen 8 TT, p 4, c 15 (1679) to Fitzherbert J: '... for one can create common appurtenant at this day, and one can alienate it, and sever it from the land to which it is appurtenant ...' The author comments (at p 250) that 'the passage ... must be understood as applying only to common appurtenant for a certain number'. In *Drury v Kent* (1603) Cro Jac 14, 79 ER 13 it was held that 'he could not grant it over, for he
 e hath it *quasi sub modo*, viz., for the beasts levant & couchant ... but common appurtenant for beasts certain may be granted over'. According to the report of *Daniel v Hanslip* (1672) 2 Lev 67, 83 ER 452:

'In this case Hale Chief Justice said, that if a man hath common appurtenant
 f to a messuage and land for certain number of beasts, he may alien the same; *aliter* if it be common for all his beasts levant and couchant upon the land, he cannot by his alienation sever that from the land.'

[38] A more detailed report of what seems to be the same case under the title *Leniel v Harslop* is to be found in (1672) 3 Keb 66, 84 ER 597. This report records that it was held:

'... a common appurtenant may be severed and granted, because nothing
 g restrains it to cattle used on the land also if it be for cattle levant and couchant it may be granted; with the land and not without it ...'

[39] Coming to modern times, Buckley J in *White v Taylor (No 2)* [1968] 1 All ER 1015 at 1031, [1969] 1 Ch 160 at 190 gave the following summary of the law:

'But a right to depasture a fixed number of beasts differs significantly from
 h a right for beasts levant and couchant. It is not confined to enjoyment by beasts levant and couchant on the dominant land and may be enjoyed by beasts that do not come from the tenement to which the right is appurtenant: *Richards v. Squibb* ((1698) 1 Ld Raym 762, 91 ER 1384). It may be aliened so as to become a right in gross, severed from the property of the alienor (*Daniel v. Hanslip* ((1672) 2 Lev 67, 83 ER 452), *Leniel v. Harslop* ((1672) 3 Keb 66, 84 ER 597), *Drury v. Kent* ((1603) Cro Jac 14, 79 ER 13), and see *Bunn v. Channen* ((1813) 5 Taunt 244, 128 ER 683), and COOKE ON ENCLOSURES (4th edn, 1864, p 21) because its enjoyment is not restricted to cattle on the land of the alienor and
 j

severance of the right from the land cannot increase the burden on the servient tenement.’ a

[40] The view of the law as permitting severability of appurtenant rights of pasturage provided they were not limited by levancy and couchancy but were for a fixed number of animals is supported by a wealth of academic and textbook comment, from the anonymous treatise *The Law of Commons and Commoners* in 1698 to 6 *Halsbury's Laws* (4th edn reissue) in 1991. *The Law of Commons and Commoners* (at 18) says that ‘The Common Appurtenant be the same, after a manner as Common Appendant; yet it differs in several particulars. As ... 4. This sort of Common may be severed from the Land to which it is Appurtenant ...’ b

[41] In Woolrych *A Treatise on the Law of Rights of Commons* (1824) p 67 the author says: ‘But a common appurtenant for beasts certain may be granted over, for such a grant has no reference to connexion of tenure.’ He cites *Drury v Kent* and *Daniel v Hanslip* as authority. c

[42] Elton *A Treatise on Commons and Waste Lands* (1868) p 81 contains the statement that— d

‘where the right is a common of pasture appurtenant for a certain number of beasts, it may be granted over to a stranger, and so converted into a common in gross, because the severance is no prejudice to the owner of the waste, the number of the cattle being the same in either case ...’

[43] The same point is made in Joshua Williams QC *Rights of Common and other Prescriptive Rights* (1880) p 184: ‘It is held to be immaterial to the owner of the waste, when the right is fixed and stinted to a certain given number of cattle, whether those cattle are put on in respect of a tenement, or by a person who owns no land.’ And also in Scriven *A Treatise on the Law of Copyholds* (7th edn, 1896) p 378. e

[44] Both in 5 *Halsbury's Laws* (3rd edn) para 773, and in 6 *Halsbury's Laws* (4th edn reissue) para 560, it is stated that a common of pasture appurtenant for a fixed number of animals may be severed from the land and the appurtenancy thereby destroyed. f

[45] Against this deluge of judicial and academic opinion favouring the severability of appurtenant rights to pasture a fixed number of animals, Mr Chapman, counsel for the Penters, relied on *Baylis v Tyssen-Amhurst* (1877) 6 Ch D 500 and *Lord Chesterfield v Harris* in the Court of Appeal [1908] 2 Ch 397, and in the House of Lords [1911] AC 623. Both these cases were concerned not with the severability of appurtenant rights but with the acquisition of them by prescription. In *Baylis v Tyssen-Amhurst* it was held that, in order to acquire by prescription a right of pasture appurtenant to land, there had to be some relation between the enjoyment of the right and the enjoyment of the land in question. The number of animals for the pasturing of which the right was claimed was not, however, a fixed and certain number nor a number limited by levancy and couchancy. It was said to be a number dependent on the value of the dominant land relative to the value of the other tenements in respect of which pasturage rights were being claimed ‘according to a scale fixed by the homage of the manor’. Jessel MR ((1877) 6 Ch D 500 at 506) began his judgment by saying: ‘I confess I know of no such right as is alleged here.’ *Lord Chesterfield v Harris* concerned a claim to an unlimited right of fishing said to be vested in the freehold tenants of the manor and to have been acquired by prescription. Nothing said in the judgments either in the Court g
h
j

a of Appeal or in this House is, in my view, of any assistance on the question of severability of appurtenant rights of pasture for a fixed number of animals.

[46] In addition, and more cogently, Mr Chapman relied on passages in *Gadsden*, published in 1988. Chapter 6 deals with severance of appurtenant grazing rights and in it the author examines each of the cases to which I have referred, and several others, in which statements in favour of the severability of grazing rights b limited to a fixed number of animals are to be found. He points out that the statements in question are all obiter dicta and accompanied by very little in the way of explanation or analysis. He speculates that the fixed number grazing rights, although pleaded in the cases as rights appurtenant, may have been really rights in gross (para 6.08). He dismisses the academic and textbook statements on the ground that 'there was a general acceptance in agricultural practice that rights c appurtenant to land could not be severed, so in legal circles the matter was not one of much significance' (para 6.09) and comments that 'the odd remark in the books of London lawyers obviously had little effect in the Shires' (para 6.12). There is, however, no reason of principle offered to explain why grazing rights for a fixed number of beasts, as opposed to rights limited by levancy and d couchancy, should not be alienable whether or not they are rights appurtenant. As Buckley J pointed out in *White v Taylor*, and as is pointed out in a number of the old textbooks, the alienation of grazing rights for a fixed number of beasts cannot prejudice the residual interest of the owner of the servient common. Whoever the grazing right belongs to, the number of beasts that can be grazed e upon the common pursuant to the right will remain constant. Mr Chapman argued that, so long as the right remained appurtenant, changes in the nature of the dominant land might reduce the number of beasts that could be grazed. So that, if a reservoir were constructed on the dominant tenement, or if it were developed as a housing estate, or if it otherwise lost its character as an agricultural unit, the appurtenant right of grazing, being no longer capable of benefiting the f dominant land, would be lost. This might indeed be the consequence if the right were limited by levancy and couchancy, for the land would no longer be capable of supporting any animals at all (but see *Carr v Lambert* (1866) LR 1 Exch 168), but where the right is for a fixed number I can see no reason whatever why a change in the character of the dominant tenement should make any difference and no g authority, in case law or textbooks, including *Gadsden*, suggests the contrary.

[47] Accordingly, in my opinion, your Lordships, in dealing with this appeal, should proceed on the footing that, at common law, appurtenant rights of grazing for a fixed number of animals were severable.

[48] Mr Chapman submitted, next, that even if that were the common law, h the law had been changed by s 187(1) of the Law of Property Act 1925, which reproduced s 23 of the Law of Property Act 1922. Section 187(1) provides: 'Where an easement, right or privilege for a legal estate is created, it shall enure for the benefit of the land to which it is intended to be annexed.' According to *Wolstenholme and Cherry's Conveyancing Statutes* (13th edn, 1972) vol 1, p 312: 'This section is new. Subs. (1) ... shows that, as heretofore, when a legal easement is j created ... it should be made appurtenant to some land. There can be no such thing as an easement in gross.'

[49] There can, however, be such a thing as a profit in gross and it is common ground that grazing rights can be created and can exist not only as rights appurtenant to some land, but also, if exercisable by a fixed number of beasts, as rights in gross.

[50] Robert Walker LJ, after noting that neither the purpose nor the effect of s 187(1) of the 1925 Act had been elucidated by any reported case, said this about it: a

‘I find it a very obscure provision. I think it likely that it must have been intended to clarify some supposed doubt or to fill some supposed gap in the law, but the precise nature of the doubt or gap is a matter of conjecture ... But whatever the true explanation is, I find it inconceivable that Parliament intended by those obscure words (directed as they are primarily to easements rather than profits) to change the law as to the severance of profits ...’ (See [1999] 2 All ER 367 at 382, [2000] Ch 54 at 72.) b

I agree. I can see no reason for attributing any such intention to Parliament. The subsection, in my opinion, does not prevent the severability of appurtenant rights that under the common law are severable. c

[51] Mr Chapman’s final point was that, although s 15 of the 1965 Act requires grazing rights formerly limited by levancy and couchancy to be registered as rights exercisable for a fixed number of animals, that legislative change should not be given an effect so as to permit an appurtenant right previously inalienable from the dominant land to be severed from that land. d

[52] This point, of course, only arises if, as is my opinion, Mr Chapman is wrong in submitting that appurtenant grazing rights for a fixed number of animals cannot be severed from the land to which the rights are appurtenant.

[53] In support of his argument as to the effect of s 15 of the 1965 Act, Mr Chapman placed strong reliance on policy considerations. He drew attention to the *Report of the Royal Commission on Common Land 1955–1958* (Cmnd 462), published in July 1958. He pointed out that the 1965 Act represented a partial, and first stage, implementation of the recommendations in the report. e

[54] Paragraph 270 of the report recommended that ‘rights of common other than those of pasture should invariably be registered as attached (appurtenant) to the holding of the claimant ... There should be no possibility of commercial exploitation.’ As to rights of pasture, para 271 said: ‘Rights of common of pasture have never been so closely restricted as other rights to the requirements of particular holdings, and it would cause unnecessary hardship to impose such a limitation today.’ And para 272 recommended that rights of common of pasture ‘be registered either as attached to a holding (appurtenant), or, if unattached, in the name of the owner as a right in gross’. A note to para 272 expresses the commissioners’ view that ‘The permanent registration of common rights attached to holdings as rights appurtenant should avert any danger of rights subsequently being alienated’. f

[55] In para 273 the commissioners make some recommendations regarding amendment of the registered particulars of rights of common: g

‘From the date of registration of a claim to common rights the particulars shown in the Register would stand (i.e. the rights would be held to be attached to the claimant’s tenement or vested in gross) unless on objection it was determined otherwise ... Particulars of rights appurtenant (attached to a holding) would only be altered in the Register if the holding were split up and a person acquiring ownership of a part of it could then show that all or some of the rights had been conveyed to him with his part of the holding. Otherwise, barring compulsory acquisition and extinguishment, or the purchase of rights within an approved scheme of management and improvement, the rights would remain inseparable from the original holding.’ h

a [56] As to registration of rights limited by levancy and couchancy, the report said (at paras 274–275):

b *‘We recommend that each claimant should be free to claim those rights of pasture which he believes he is entitled to ... Under modern conditions to attempt a definition according to the winter carrying capacity of the farm—a revival, that is, of the old rule of levancy and couchancy—or according to the valuation of the farm as a pastoral unit would often be more a test of the capabilities of the farmer than of the capacity of his land ... The impossibility of making an objective definition leaves only one alternative—to allow the commoner in his claim to rights of common of pasture to define them himself; in other words, to allow him to claim whatever he believes he is entitled to.’*

c

d [57] The 1965 Act was a partial implementation of the Royal Commission’s recommendations. It was, at the time that Act was passed, envisaged that the reform of commons and the law of commons would be completed by a second enactment to complement the first. Unfortunately this second enactment has never emerged, although the Access to the Countryside Act 2001 has now implemented some of the Royal Commission’s recommendations about public access to common land.

e [58] It is plain enough from the report that the commissioners, while willing to accept the continuing exercise over commons of existing rights of pasture in gross, were opposed to any increase in the number of these rights. They contemplated that appurtenant rights of pasture would, once registered, continue to be appurtenant and would not, in general, be alienable from the land to which they were attached.

f [59] Section 15 of the 1965 Act did not, however, provide for their inalienability. It required, by sub-ss (1) and (2), that levancy and couchancy rights be registered as rights in respect of a fixed number of animals and, by sub-s (3), enacted that upon registration ‘the right shall accordingly be exercisable in relation to animals not exceeding the number or numbers registered or such other number or numbers as Parliament may hereafter determine.’

g [60] The conclusion is, in my opinion, inescapable that sub-s (3) transformed the right, on registration, from being a right limited by levancy and couchancy to being a right for a fixed number of animals. That had been the intention of the Royal Commission whose recommendation to that effect was implemented by s 15. I am unable to accept Mr Chapman’s argument that s 15(3) of the 1965 Act simply imposed a cap on the number of animals levant and couchant that could be grazed. If that were right, the levancy and couchancy limitation would, subject to the cap, have remained. Whatever else s 15 may or may not have done, it plainly, in my opinion, got rid of levancy and couchancy as a measure of the number of animals that, post registration, could be grazed.

h

j [61] So, if registration under s 15 transformed a levant and couchant grazing right into a right to graze the fixed number of animals noted in the register, what were the other consequences of the registration? An inevitable consequence, in my opinion, was that changes in the character of the dominant tenement, the land to which on the register the grazing was said to be attached, became irrelevant to the continued enjoyment of the grazing right as registered. Any application to have the registered number of animals reduced because the land had ceased to be an agricultural unit would have to be rejected. Once levancy and couchancy as the measure of the grazing rights has gone, the capacity of the dominant land to support animals and its character as an agricultural unit loses its relevance to the exercise of

the grazing rights. The owner of a sugar beet farm, or of a farm consisting of nothing but set-aside land, or of land that has become a reservoir, can derive the same economic benefit from the right to graze 50 sheep on a common as can the owner of a sheep farm. The only real difference is that the latter owner is likely to have more convenient facilities for shearing, dipping, marketing and the like.

[62] As to the severability of appurtenant grazing rights that were formerly limited by levancy and couchancy but have become, on registration, rights for a fixed number of beasts, it may be that the commissioners were under the impression that appurtenant rights, of whatever character, were not severable from the dominant land. And it may be that the draftsman of the 1965 Act shared that belief. But, in relation to appurtenant grazing rights for a fixed number of animals, that belief was, in law, wrong. In *Kirkness (Inspector of Taxes) v John Hudson & Co Ltd* [1955] 2 All ER 345 at 353, [1955] AC 696 at 714 Viscount Simonds said that 'the beliefs or assumptions of those who frame Acts of Parliament cannot make the law'. The passage was cited by Goff LJ in *Pritchard v Briggs* [1980] 1 All ER 294 at 313, [1980] Ch 338 at 398 when considering s 186 of the 1925 Act which, he concluded, had been passed by Parliament under the misapprehension that pre-emption rights over land were interests in land.

[63] If, as I think, appurtenant grazing rights for a fixed number of animals can, at common law, be severed from the land to which they are attached and if, as I also think, registration under s 15 of the 1965 Act has transformed grazing rights limited by levancy and couchancy into grazing rights for a fixed number of animals, it must follow, in my opinion, that these registered rights, too, can be severed from the land to which they are attached. This consequence is not based upon a construction of s 15 that attributes to Parliament any intention at all about severance. Section 15 is not a provision dealing with severance. It is dealing with the registration of common rights and the extent of those rights after registration. It is the general law, established by the authorities to which I have referred, that, when applied to the registered grazing rights produced by s 15, impels the conclusion that the rights are severable. If Parliament wishes to make these, and any other, appurtenant grazing rights incapable of severance it can, of course, do so. In considering whether to do so it will place what weight, if any, it thinks proper on the policy considerations expressed in the various publications to which Mr Chapman referred your Lordships. It is not for this House to pre-empt Parliament in deciding what, if anything, should be done. The present law is that appurtenant rights of grazing for a fixed number of animals are severable. Section 15 of the 1965 Act turned Mrs Langton's appurtenant grazing rights into rights for a fixed number of animals. So Mrs Langton's appurtenant rights of grazing became severable and the conveyance of those rights to Mr and Mrs Bettison in 1987 was effective.

[64] In my opinion, Judge Anthony Thompson QC and the Court of Appeal were correct on all points and I would dismiss this appeal.

Appeal dismissed.

Celia Fox Barrister.

a **R v Secretary of State for the Home
Department, ex parte Daly**
[2001] UKHL 26

HOUSE OF LORDS

b LORD BINGHAM OF CORNHILL, LORD STEYN, LORD COOKE OF THORNDON, LORD HUTTON
AND LORD SCOTT OF FOSCOTE
24 APRIL, 23 MAY 2001

c *Prison – Letters – Prisoner's letters – Correspondence with legal adviser – Secretary of
State introducing new policy on searching of cells – Policy requiring prison officers to
examine prisoner's legal correspondence in absence of prisoner – Whether policy
unjustifiably infringing prisoners' common law right to confidentiality in legal
correspondence and right to respect for correspondence under human rights convention
– Prison Act 1952, s 47(1) – Human Rights Act 1998, Sch 1, Pt I, art 8(1).*

d In 1995 the Secretary of State introduced a new policy governing the searching of
cells occupied by convicted and remand prisoners in closed prisons in England
and Wales. Under that that policy, no prisoner was allowed to be present during
a search of living accommodation, and cell search staff were required, in the
e absence of the prisoner, to examine legal correspondence to ensure that it was
bona fide correspondence between the prisoner and a legal adviser. The lawfulness
of that policy was challenged by D, a long-term prisoner, who contended that such
a policy was not authorised by s 47(1)^a of the Prison Act 1952, which empowered
the Secretary of State to make rules for the regulation of prisons and for their
discipline and control of prisoners. The Court of Appeal held that the policy
f represented the minimum intrusion into the rights of prisoners consistent with
the need to maintain security, order and discipline in prisons. D appealed to the
House of Lords, contending that the blanket policy of requiring prisoners to be
absent during the examination of legally privileged correspondence infringed, to
an unnecessary and impermissible extent, a basic right recognised both at
common law and under art 8(1)^b of the European Convention for the Protection
g of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the
Human Rights Act 1998) (the convention), and that the general terms of s 47
authorised no such infringement, either expressly or impliedly.

h **Held** – The Secretary of State's policy was unlawful and void in so far as it
provided that prisoners always had to be absent when privileged legal
correspondence, held by them in their cells, was examined by prison officers.
Although any prisoner who attempted to intimidate or disrupt a search of his cell,
or whose past conduct showed that he was likely to do so, could properly be
excluded even while his privileged correspondence was examined, no justification
j had been shown for routinely excluding all prisoners, whether intimidatory or
disruptive or not, while that part of the search was conducted. The infringement

a Section 47, so far as material, provides: '(1) The Secretary of State shall make rules for the regulation and management of prisons, remand centres ... and for the classification, treatment, discipline and control of persons required to be detained therein ...'

b Article 8, so far as material, provides: '1. Everyone has the right to respect for ... his correspondence ...'

of the prisoners' rights to maintain the confidentiality of their privileged legal correspondence was greater than had been shown to be necessary to maintain security, order and discipline in prisons and to prevent crime. The degree of intrusion into the privileged legal correspondence of prisoners violated their common law rights. Section 47(1) of the 1952 Act did not authorise such excessive intrusion, and the Secretary of State accordingly had no power to lay down or implement the policy in its present form. The same result was achieved by reliance on a prisoner's right to respect for his correspondence under art 8(1) of the convention. While interference with that right by a public authority might be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interfered with a prisoner's exercise of his right under art 8(1) to an extent much greater than necessity required. Accordingly, the appeal would be allowed (see [19], [21], [23], [24], [29], [33], [34], [36], below); *R v Secretary of State for the Home Dept, ex p Simms*, *R v Governor of Whitemoor Prison, ex p Main* [1999] 3 All ER 400 disapproved.

Per curiam. Although there is an overlap between the traditional grounds of review and the approach of proportionality applicable where convention rights are at stake, the intensity of review is somewhat greater under the proportionality approach. The differences in approach may sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. That does not mean that there has been a shift to merits review. The respective roles of judges and administrators are fundamentally distinct and will remain so. Moreover, even in cases involving convention rights, the intensity of review will depend on the subject matter in hand (see [23], [27]–[29], [35], [37], below).

Notes

For correspondence between a prisoner and his legal adviser, see 36(2) *Halsbury's Laws* (4th edn reissue) para 606.

For the Prison Act 1952, s 47, see 34 *Halsbury's Statutes* (4th edn) (1997 reissue) 702.

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 524.

Cases referred to in opinions

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Campbell v UK (1993) 15 EHRR 137, ECt HR.

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.

Leech v Secretary of State for Scotland 1991 SLT 910, Ct of Sess (OH); *aff'd* 1993 SLT 365, Ct of Sess (IH).

Lustig-Prean and Beckett v UK (1999) 29 EHRR 548, ECt HR.

R (Mahmood) v Secretary of State for the Home Dept [2001] 1 WLR 840, [2001] 2 FCR 63, CA.

R v Hull Board of Visitors, ex p St Germain, *R v Wandsworth Prison Board of Visitors, ex p Rosa* [1979] 1 All ER 701, [1979] QB 425, [1979] 2 WLR 42, CA.

R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.

R v Secretary of State for the Home Dept, ex p Anderson [1984] 1 All ER 920, [1984] QB 778, [1984] 2 WLR 725, DC.

R v Secretary of State for the Home Dept, ex p Isiko [2001] 1 FCR 633, CA.

- a* *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198, [1993] 3 WLR 1125, CA.
- R v Secretary of State for the Home Dept, ex p Pierson* [1997] 3 All ER 577, [1998] AC 539, [1997] 3 WLR 492, HL.
- R v Secretary of State for the Home Dept, ex p Samaroo* (20 December 2000, unreported).
- b* *R v Secretary of State for the Home Dept, ex p Simms, R v Governor of Whitemoor Prison, ex p Main* [1998] 2 All ER 491, [1999] QB 349, [1998] 3 WLR 1169, CA, *rvsd* [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
- Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1, [1982] 2 WLR 465 HL.
- Smith and Grady v UK* (1999) 29 EHRR 493, ECt HR.

Appeal

- c* George Daly, a prisoner, appealed with permission of the Appeal Committee of the House of Lords given on 10 July 2000 from the order of the Court of Appeal (Kennedy, Otton and Waller LJ) on 25 May 1999 dismissing his application for judicial review of the continuing decision of the respondent, the Secretary of State for the Home Department, to apply a policy of cell searches in all closed
- d* prisons which involved prison staff in searching prisoners' legally privileged correspondence in their absence from the cell. The facts are set out in the opinion of Lord Bingham of Cornhill.

- e* Timothy Owen QC and Phillipa Kaufmann (instructed by Bhatt Murphy) for Mr Daly.
Ian Burnett QC and Steven Kovats (instructed by the Treasury Solicitor) for the Secretary of State.

Their Lordships took time for consideration.

- f* 23 May 2001. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

- g* [1] My Lords, on 31 May 1995 the Home Secretary introduced a new policy (the policy) governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. The policy was expressed in the security manual as an instruction to prison governors in these terms:

'17.69 Staff must accompany all searches of living accommodation in closed prisons with a strip search of the resident prisoner.

- h* 17.70 Staff must not allow any prisoner to be present during a search of living accommodation (although this does not apply to accommodation fabric checks).

17.71 Staff must inform the prisoner as soon as practicable whenever objects or containers are removed from living accommodation for searching, and will be missing from the accommodation on the prisoner's return.

- j* 17.72 Subject to paragraph 17.73, staff may normally read legal correspondence only if the Governor has reasonable cause to suspect that their contents endanger prison security, or the safety of others, or are otherwise of a criminal nature. In this case the prisoner involved shall be given the opportunity to be present and informed that their correspondence is to be read.

17.73 But during a cell search staff must examine legal correspondence thoroughly in the absence of the prisoner. Staff must examine the

correspondence only so far as necessary to ensure that it is bona fide correspondence between the prisoner and a legal adviser and does not conceal anything else. a

17.74 When entering cells at other times (eg when undertaking accommodation fabric checks) staff must take care not to read legal correspondence belonging to prisoners unless the Governor has decided that the reasonable cause test in 17.72 applies.' b

[2] Mr Daly is a long-term prisoner. He challenges the lawfulness of the policy. He submits that s 47(1) of the Prison Act 1952, which empowers the Secretary of State to make rules for the regulation of prisons and for the discipline and control of prisoners, does not authorise the laying down and implementation of such a policy. But on this appeal to the House Mr Daly confines his challenge to a single aspect of the policy: the requirement that a prisoner may not be present when his legally privileged correspondence is examined by prison officers. He contends that a blanket policy of requiring the absence of prisoners when their legally privileged correspondence is examined infringes, to an unnecessary and impermissible extent, a basic right recognised both at common law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention), and that the general terms of s 47 authorise no such infringement, either expressly or impliedly. c
d

The origin of the policy e

[3] On 9 September 1994 six category A prisoners, classified as presenting an exceptional risk, escaped from the Special Security Unit at HMP Whitemoor. An inquiry led by Sir John Woodcock, formerly HM Chief Inspector of Constabulary, was at once set up. The report of the inquiry (Cm 2741), presented to Parliament in December 1994, revealed extensive mismanagement and malpractice at Whitemoor. The escape had been possible only because prisoners had been able, undetected, to gather a mass of illicit property and equipment. This in turn had been possible because prisoners' cells and other areas had not been thoroughly searched at frequent but irregular intervals, partly because officers seeking to make such searches had been intimidated and obstructed by prisoners, partly because relations between officers and prisoners had in some instances become unacceptably familiar so that staff had been manipulated or 'conditioned' into being less vigilant than they should have been in security matters. f
g

[4] In its report the inquiry team made a number of recommendations. One of these was that cells and property should be searched at frequent but irregular intervals. Following a strip search, each prisoner was to be excluded from his cell during the search, to avoid intimidation. The inquiry team gave no consideration at any stage to legal professional privilege or confidentiality. The policy was introduced to give effect to the inquiry team's recommendation on searching of cells. h

The legal background j

[5] Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person

- a confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but free-standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.
- b

[6] These propositions rest on a solid base of recent authority. In *R v Hull Board of Visitors, ex p St Germain*, *R v Wandsworth Prison Board of Visitors, ex p Rosa* [1979] 1 All ER 701 at 716–717, [1979] QB 425 at 455 Shaw LJ made plain that—

- c ‘despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration ... An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise.’
- d

[7] *Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1 arose from the action of a prison governor who blocked a prisoner’s application to a court. The House of Lords affirmed that—

- e ‘under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication ...’ (See [1982] 1 All ER 756 at 759, [1983] 1 AC 1 at 10.)

Section 47 was held to be quite insufficient to authorise hindrance or interference with so basic a right as that of access to a court. To the extent that rules were made fettering a prisoner’s right of access to the courts and in particular his right to institute proceedings in person they were ultra vires.

- f
- [8] In *R v Secretary of State for the Home Dept, ex p Anderson* [1984] 1 All ER 920, [1984] QB 778 the prisoner’s challenge was directed to a standing order which restricted visits by a legal adviser to a prisoner contemplating proceedings concerning his treatment in prison when he had not at the same time made any complaint to the prison authorities internally. Reiterating the principle that a prisoner remains invested with all civil rights which are not taken away expressly or by necessary implication, Robert Goff LJ, giving the judgment of the Queen’s Bench Divisional Court, said:
- g

- h ‘At the forefront of those civil rights is the right of unimpeded access to the courts; and the right of access to a solicitor to obtain advice and assistance with regard to the initiation of civil proceedings is inseparable from the right of access to the courts themselves.’ (See [1984] 1 All ER 920 at 926, [1984] QB 778 at 790.)

- j The standing order in question was held to be ultra vires. The court observed:

‘As it seems to us, a requirement that an inmate should make ... a complaint as a *prerequisite* of his having access to his solicitor, however desirable it may be in the interests of good administration, goes beyond the regulation of the circumstances in which such access may take place, and does indeed constitute an impediment to his right of access to the civil

courts.' (Robert Goff LJ's emphasis (see [1984] 1 All ER 920 at 928, [1984] QB 778 at 793–794).)

[9] *Campbell v UK* (1993) 15 EHRR 137 concerned the compatibility with the convention of r 74(4) of the Prison (Scotland) Rules 1952, SI 1952/565, which provided that—

'every letter to or from a prisoner shall be read by the Governor ... and it shall be within the discretion of the Governor to stop any letter if he considers that the contents are objectionable.'

This rule had earlier been upheld as valid by the Court of Session (see *Leech v Secretary of State for Scotland* 1991 SLT 910). The European Court of Human Rights held that the interference with the applicant's correspondence violated art 8 of the convention. The court said (at 161 (para 48)):

'Admittedly, as the Government pointed out, the borderline between mail concerning contemplated litigation and that of a general nature is especially difficult to draw and correspondence with a lawyer may concern matters which have little or nothing to do with litigation. Nevertheless, the Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8. This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused.'

[10] That decision was applied in *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198. This case concerned r 33(3) of the Prison Rules 1964, SI 1964/388, which was in terms similar, although not identical, to r 74(4) of the 1952 rules. The decision is important for several reasons. First, it restated the principles that every citizen has a right of unimpeded access to the court, that a prisoner's unimpeded access to a solicitor for the purpose of receiving advice and assistance in connection with a possible institution of proceedings in the courts forms an inseparable part of the right of access to the courts themselves and that s 47(1) of the 1952 Act did not authorise the making of any rule which created an impediment to the free flow of communication between a solicitor and a client about contemplated legal proceedings. Legal professional privilege was described as an important auxiliary principle serving to buttress the cardinal principles of unimpeded access to the court and to legal advice. Secondly, it was accepted that s 47(1) did not expressly authorise the making of a rule such as r 33(3), and the court observed that a fundamental right such as the common law

- a right to legal professional privilege would very rarely be held to be abolished by necessary implication (see *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539 at 550, [1994] QB 198 at 212). But the court accepted that s 47(1) should be interpreted as conferring power to make rules for the purpose of preventing escapes from prison, maintaining order in prisons, detecting and preventing offences against the criminal law and safeguarding national security.
- b Rules could properly be made to permit the examining and reading of correspondence passing between a prisoner and his solicitor in order to ascertain whether it was in truth bona fide correspondence and to permit the stopping of letters which failed such scrutiny. The crucial question was whether r 33(3) was drawn in terms wider than necessary to meet the legitimate objectives of such a rule. As it was put:

- c 'The question is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of prolixity and objectionability.' (See [1993] 4 All ER 539 at 550, [1994] QB 198 at 212.)

- d The court concluded that there was nothing which established objectively that there was a need in the interests of the proper regulation of prisons for a rule of the width of r 33(3). While s 47(1) of the 1952 Act by necessary implication authorised some screening of correspondence between a prisoner and a solicitor, such intrusion had to be the minimum necessary to ensure that the correspondence was in truth bona fide legal correspondence: since r 33(3) created a substantial impediment to exercise by the prisoner of his right to communicate in confidence with his solicitor, the rule was drawn in terms which were needlessly wide, and so was held to be ultra vires.

- e [11] In the light of the decisions in *Campbell v UK* (1993) 15 EHRR 137 and *Ex p Leech*, a new prison rule was made, now r 39 of the Prison Rules 1999, SI 1999/728.
- f It provides, so far as material:

- (1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule.

- g (2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to believe that it contains an illicit enclosure and any such enclosures shall be dealt with in accordance with the other provision of these Rules.

- h (3) Correspondence to which this rule applies may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.

- (4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or any enclosure is to be read or stopped.'

- j This rule, it is accepted, applies only to correspondence in transit from prisoner to solicitor or vice versa. The references to opening and stopping make plain that it has no application to legal correspondence or copy correspondence received or made by a prisoner and kept by him in his cell.

[12] The Court of Appeal decision in *Ex p Leech* was endorsed and approved by the House of Lords in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115, which arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they

claimed, been wrongly convicted, save on terms which precluded the journalists from making professional use of the material obtained during such visits. The House considered whether the Home Secretary's evidence showed a pressing need for a measure which restricted prisoners' attempts to gain access to justice, and found none. The more substantial the interference with fundamental rights, the more the court would require by way of justification before it could be satisfied that the interference was reasonable in a public law sense. In this as in other cases there was applied the principle succinctly stated by Lord Browne-Wilkinson in *R v Secretary of State for the Home Dept, ex p Pierson* [1997] 3 All ER 577 at 592, [1998] AC 539 at 575:

'From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'

The argument

[13] The ambit of the present argument is very narrow. In the face of a compelling statement by Mr Narey, the Director General of HM Prison Service, Mr Daly accepts the need for random searches of prisoners' cells for the purpose of security, preventing crime and maintaining order and discipline. He accepts that such searches may properly be carried out in the absence of the resident prisoner. He accepts the need for prison officers to examine legal correspondence held by prisoners in their cells to make sure that it is bona fide legal correspondence and that such correspondence is not used as a convenient hiding place to secrete drugs or illicit materials of any kind, or to keep escape plans or any records of illegal activity. Thus he does not claim that privileged legal correspondence is immune from all examination. He contends only that such examination should ordinarily take place in the presence of the prisoner whose correspondence it is.

[14] The Home Secretary for his part accepts that prison officers may not read a prisoner's privileged legal correspondence during a cell search carried out in the absence of the prisoner. But he relies on the statement of Mr Narey, who regards the right to examine such correspondence as necessary and regards the absence of the prisoner during the examination as a necessary feature of the policy. Mr Narey states:

'The aim of the search procedure is to prevent the concealment of material likely to endanger prison security, or the safety of others or which would contribute to criminal activity within the prison. These searches must be carried out in the absence of the prisoner in order to discourage prisoners from using intimidatory or conditioning tactics to prevent officers carrying out a full search of possessions. By "conditioning tactics" I mean action by which prisoners seek to influence the future behaviour of prison officers. For example, a prisoner might create a scene whenever a particular item was searched, intending to cause prison officers not to search it in future on the ground that searching it was more trouble than it was worth. The policy also prevents prisoners from becoming familiar with searching techniques generally and those of individual officers.'

a Mr Narey goes on to state that alternative procedures have been considered within the prison service and rejected and states:

‘The difficulty is that the prisoner’s presence would compromise the policy’s aims of preventing prisoners from intimidating or conditioning officers and from gaining familiarity with general and individual search techniques.’

b He goes on to say:

c ‘The respondent [Secretary of State], the Prison Service and its staff, are mindful that the distinction between the examination of legal documents to confirm that they are bona fide and do not conceal anything illicit and the reading of legal documents (which current instructions expressly preclude other than by authority of a governor acting on received intelligence), is a fine one. However, anything of an illicit nature such as records of key codes or drug dealing can with ease be disguised as brief notations on what in every other respect is a legitimate legal document. It is the considered opinion of

d the respondent, of the Prison Service generally, and my own view, that the unreliability of current intelligence systems in prisons makes it unavoidable that we maintain the current position in an effort to deter concealments of this nature and the resultant threat to security and good order and discipline.’

e A record of illicit property found during cell searches year by year since 1993, appended to Mr Narey’s statement, shows that the number of finds per year has very greatly increased since 1995, although the number of items which could be concealed in legal correspondence is relatively very small.

[15] It is necessary, first, to ask whether the policy infringes in a significant way Mr Daly’s common law right that the confidentiality of privileged legal

f correspondence be maintained. He submits that it does for two related reasons: first, because knowledge that such correspondence may be looked at by prison officers in the absence of the prisoner inhibits the prisoner’s willingness to communicate with his legal adviser in terms of unreserved candour; and secondly, because there must be a risk, if the prisoner is not present, that the officers will stray beyond their limited role in examining legal correspondence,

g particularly if, for instance, they see some name or reference familiar to them, as would be the case if the prisoner were bringing or contemplating bringing proceedings against officers in the prison. For the Home Secretary it is argued that the policy involves no infringement of a prisoner’s common law right since his privileged correspondence is not read in his absence but only examined.

h [16] I have no doubt that the policy infringes Mr Daly’s common law right to legal professional privilege. This was the view of two very experienced judges in *R v Secretary of State for the Home Dept, ex p Simms*, *R v Governor of Whitemoor Prison, ex p Main* [1998] 2 All ER 491, [1999] QB 349, against which decision the present

j appeal is effectively brought. Kennedy LJ said:

‘In my judgment legal professional privilege does attach to correspondence with legal advisers which is stored by a prisoner in his cell, and accordingly such correspondence is to be protected from any unnecessary interference by prison staff. Even if the correspondence is only inspected to see that it is what it purports to be that is likely to impair the free flow of communication between a convicted or remand prisoner on the one hand and his legal

adviser on the other, and therefore it constitutes an impairment of the privilege.’ (See [1998] 2 All ER 491 at 505, [1999] QB 349 at 366.)

Judge LJ was of the same opinion. He said:

‘Prisoners whose cells are searched in their absence will find it difficult to believe that their correspondence has been searched but not read. The governor’s order will sometimes be disobeyed. Accordingly I am prepared to accept the potential “chilling effect” of such searches.’ (See [1998] 2 All ER 491 at 511, [1999] QB 349 at 373.)

In an imperfect world there will necessarily be occasions when prison officers will do more than merely examine prisoners’ legal documents, and apprehension that they may do so is bound to inhibit a prisoner’s willingness to communicate freely with his legal adviser.

[17] The next question is whether there can be any ground for infringing in any way a prisoner’s right to maintain the confidentiality of his privileged legal correspondence. Plainly there can. Some examination may well be necessary to establish that privileged legal correspondence is what it appears to be and is not a hiding place for illicit materials or information prejudicial to security or good order.

[18] It is then necessary to ask whether, to the extent that it infringes a prisoner’s common law right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. Mr Daly’s challenge at this point is directed to the blanket nature of the policy, applicable as it is to all prisoners of whatever category in all closed prisons in England and Wales, irrespective of a prisoner’s past or present conduct and of any operational emergency or urgent intelligence. The Home Secretary’s justification rests firmly on the points already mentioned: the risk of intimidation, the risk that staff may be conditioned by prisoners to relax security and the danger of disclosing searching methods.

[19] In considering these justifications, based as they are on the extensive experience of the prison service, it must be recognised that the prison population includes a core of dangerous, disruptive and manipulative prisoners, hostile to authority and ready to exploit for their own advantage any concession granted to them. Any search policy must accommodate this inescapable fact. I cannot, however, accept that the reasons put forward justify the policy in its present blanket form. Any prisoner who attempts to intimidate or disrupt a search of his cell, or whose past conduct shows that he is likely to do so, may properly be excluded even while his privileged correspondence is examined so as to ensure the efficacy of the search, but no justification is shown for routinely excluding all prisoners, whether intimidatory or disruptive or not, while that part of the search is conducted. Save in the extraordinary conditions prevailing at Whitemoor before September 1994, it is hard to regard the conditioning of staff as a problem which could not be met by employing dedicated search teams. It is not suggested that prison officers when examining legal correspondence employ any sophisticated technique which would be revealed to the prisoner if he were present, although he might no doubt be encouraged to secrete illicit materials among his legal papers if the examination were obviously very cursory. The policy cannot in my opinion be justified in its present blanket form. The infringement of prisoners’ rights to maintain the confidentiality of their privileged legal

a correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified. I accept Mr Daly's submission on this point.

[20] I am fortified in reaching this view by four considerations, all of some importance in my opinion: (1) Following a complaint to him about the policy by a prisoner other than Mr Daly in November 1995, the Prisons Ombudsman carried out a full inquiry and reported in November 1996. In his report the

b Ombudsman said:

c 'I entirely support the main thrust of Woodcock's recommendations regarding cell searching. It is apparent that prisoner intimidation was precluding the effective searching of prisoner accommodation in many establishments, and that this searching, which is essential for the safety and security of both staff and prisoners, is carried out far more effectively when the prisoner is absent. This procedure has also been assisted by the introduction of the volumetric control of prisoners' in-possession property. However, the legal privilege which must protect the confidentiality of correspondence between a solicitor and his client is too important to be sacrificed for the sake of expediency; whilst it would undoubtedly be easier for staff to search a prisoner's legal documents in his absence, this allows legal privilege to be compromised to an unacceptable degree. It is clear that, in complaining about the Prison Service's cell searching policy, [the prisoner] has raised a matter which has far-reaching consequences. I believe that his complaint is a valid one and that, in searching prisoners' legal papers in their absence, the Prison Service is compromising the legal privilege which ensures that correspondence between a solicitor and his client will remain confidential. I therefore uphold [the prisoner's] complaint. Security Group has previously drafted a revised version of section 68.3 of the Security Manual. This revised version allows the prisoner to remain in the cell while his legal documents are being searched, after which the documents are sealed in a box or bag, thus avoiding any possible compromise of legal privilege. I consider that the Security Manual should be amended to incorporate this revised method of cell searching.'

(2) The Ombudsman's investigations revealed that, following a complaint by a prisoner confined in HMP Full Sutton, a procedure had been developed in that prison to meet the wishes of prisoners who objected to the searching of their legal documents in their absence. The procedure was that—

g 'if the prisoner objects to his legal documents being searched in his absence DST [dedicated search team] staff place the documents in a bag, seal the bag using a numbered reception seal and give the prisoner a copy of the seal number. The bag is left in the prisoner's cell while the search is being carried out. When the prisoner returns, he checks the seal on the bag to ensure that it has not been tampered with and the documents are searched in his presence.'

j It does not appear that this procedure gave rise to difficulty in practice. (3) The current standing order covering cell searches in Scotland provides that 'When a cell is searched, this should be done by at least two officers, in the prisoner's presence'. It is pointed out that the prison population in Scotland is small compared with that of England and Wales, there are very few high-risk prisoners and escape is rare. No doubt the problem of control is less acute in Scotland than in England and Wales. But the Scottish experience does suggest that a policy

which generally permits a prisoner to be present during the examination of his privileged legal correspondence, unless there are, or are reasonably believed to be, good reasons for excluding him, is not unworkable in practice. (4) While cell searches in recent years have led to the finding of very many more items of illicit property than in earlier years, only two such items have been identified as having been found among legal documents and the great majority of items found could not have been concealed in that way. It does not appear that legal files or bundles have been regarded by prisoners as a highly favoured hiding place for materials they are not permitted to hold

[21] In *Ex p Main* [1998] 2 All ER 491, [1999] QB 349 and again in the present case, the Court of Appeal held that the policy represented the minimum intrusion into the rights of prisoners consistent with the need to maintain security, order and discipline in prisons. That is a conclusion which I respect but cannot share. In my opinion the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners. Section 47(1) of the 1952 Act does not authorise such excessive intrusion, and the Home Secretary accordingly had no power to lay down or implement the policy in its present form. I would accordingly declare paras 17.69 to 17.74 of the Security Manual to be unlawful and void in so far as they provide that prisoners must always be absent when privileged legal correspondence held by them in their cells is examined by prison officers.

[22] Although, in response to a request by the House during argument, counsel for Mr Daly proffered a draft rule which might be adopted to govern the searching of privileged legal correspondence, it would be inappropriate for the House to attempt to formulate or approve the terms of such a rule, which would call for careful consideration and consultation before it was finalised. It is enough to indicate that any rule should provide for a general right for prisoners to be present when privileged legal correspondence is examined, and in practice this will probably mean any legal documentation to avoid time-wasting debate about which documents are privileged and which are not. But the rule must provide for the exclusion of the prisoner while the examination takes place if there is or is reasonably believed to be good cause for excluding him to safeguard the efficacy of the search, and the rule must permit the prison authorities to respond to sudden operational emergencies or urgent intelligence.

[23] I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. But the same result is achieved by reliance on the convention. Article 8(1) gives Mr Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr Daly's exercise of his right under art 8(1) to an extent much greater than necessity requires. In this instance, therefore, the common law and the convention yield the same result. But this need not always be so. In *Smith and Grady v UK* (1999) 29 EHRR 493, the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under art 8 of the convention because the threshold of review had been set too high. Now, following the incorporation of the convention by the Human Rights Act 1998 and the bringing of that Act fully

a into force, domestic courts must themselves form a judgment whether a convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy. On this aspect of the case, I agree with and adopt the observations of my noble and learned friend Lord Steyn which I have had the opportunity of reading in draft.

b
LORD STEYN.

[24] My Lords, I am in complete agreement with the reasons given by Lord Bingham of Cornhill in his speech. For the reasons he gives I would also allow the appeal. Except on one narrow but important point I have nothing to add.

c [25] There was written and oral argument on the question whether certain observations of Lord Phillips of Worth Matravers MR in *R (Mahmood) v Secretary of State for the Home Dept* [2001] 1 WLR 840 were correct. The context was an immigration case involving a decision of the Secretary of State made before the Human Rights Act 1998 came into effect. The Master of the Rolls nevertheless approached the case as if the Act had been in force when the Secretary of State reached his decision. He explained the new approach to be adopted. The Master of the Rolls concluded (at 857 (para 40)):

e ‘When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention. When considering the test of necessity in the relevant context, the court must take into account the European jurisprudence in accordance with section 2 of the 1998 Act.’

f These observations have been followed by the Court of Appeal in *R v Secretary of State for the Home Dept, ex p Isiko* [2001] 1 FCR 633 and by Thomas J in *R v Secretary of State for the Home Dept, ex p Samaroo* (20 December 2000, unreported).

g [26] The explanation of the Master of the Rolls in the first sentence of the cited passage requires clarification. It is couched in language reminiscent of the traditional *Wednesbury* ground of review (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), and in particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights as formulated in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554 per Sir Thomas Bingham MR. There is a material difference between the *Wednesbury* and *Ex p Smith* grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake.

h [27] The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675 the Privy Council adopted a three-stage test. Lord Clyde observed that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

j “whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.” (See [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684.)

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach (see Professor Jeffrey Jowell QC 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671; Craig *Administrative Law* (4th edn, 1999) pp 561–563; Professor David Feldman 'Proportionality and the Human Rights Act 1998' in *The Principle of Proportionality in the Laws of Europe* (1999) pp 117, 127 et seq). The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Ex p Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969 (the convention)) (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v UK* (1999) 29 EHRR 493. The court concluded (at 543 (para 138)):

'the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.'

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

[28] The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell has pointed out, the respective roles of judges and administrators are fundamentally distinct and will remain so (see [2000] PL 671 at 681). To this extent the general tenor of the observations in *R (Mahmood) v Secretary of State for the Home Dept* [2001] 1 WLR 840

- a are correct. And Laws LJ (at 847 (para 18)) rightly emphasised in *Mahmood*'s case 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving convention rights. In law context is everything.

LORD COOKE OF THORNDON.

- b [29] My Lords, having had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, I am in full agreement with them. I add some brief observations on two matters, less to supplement what they have said than to underline its importance.

- c [30] First, while this case has arisen in a jurisdiction where the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) applies, and while the case is one in which the convention and the common law produce the same result, it is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining
d legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the convention. Rights similar to those in the convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than
e creating them.

- [31] To essay any list of these fundamental, perhaps ultimately universal, rights is far beyond anything required for the purpose of deciding the present case. It is enough to take the three identified by Lord Bingham: in his words, access to a court; access to legal advice; and the right to communicate
f confidentially with a legal adviser under the seal of legal professional privilege. As he says authoritatively from the Woolsack, such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment. The point that I am emphasising is that the common law goes so deep.

- g [32] The other matter concerns degrees of judicial review. Lord Steyn illuminates the distinctions between 'traditional' (that is to say in terms of English case law, *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223)) standards of judicial review and higher standards under the convention or the common law of human rights. As he indicates, often the results are the same. But the view that the standards are
h substantially the same appears to have received its quietus in *Smith and Grady v UK* (1999) 29 EHRR 493 and *Lustig-Prean and Beckett v UK* (1999) 29 EHRR 548. And I think that the day will come when it will be more widely recognised that the *Wednesbury* case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of
j unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.

- [33] I, too, would therefore allow the present appeal.

LORD HUTTON.

[34] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn. I am in full agreement with the speech of Lord Bingham and for the reasons which he gives I would also allow this appeal. a

[35] I am also in agreement with the general observations made by Lord Steyn on *R (Mahmood) v Secretary of State for the Home Dept* [2001] 1 WLR 840. b

LORD SCOTT OF FOSCOTE.

[36] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Bingham of Cornhill. I am in complete agreement with the reasons he has given for allowing the appeal.

[37] I am also in agreement with the remarks made by my noble and learned friend, Lord Steyn about *R (Mahmood) v Secretary of State for the Home Dept* [2001] 1 WLR 840. I, too, would allow the appeal. c

Appeal allowed.

Dilys Tausz Barrister.

a **R (on the application of Bulger) v Secretary
of State for the Home Department and
another**

[2001] EWHC Admin 119

b QUEEN'S BENCH DIVISION, DIVISIONAL COURT
ROSE LJ, SULLIVAN AND PENRY-DAVEY JJ
15, 16 FEBRUARY 2001

c *Judicial review – Application for judicial review – Application for permission to apply
for judicial review – Standing of claimant – Sufficient interest – Ten-year-old boys
murdering claimant's infant son – Lord Chief Justice setting tariff for boys – Claimant
seeking to challenge tariff in judicial review proceedings – Whether member of victim's
family having standing to apply for judicial review of Lord Chief Justice's decision on
appropriate tariff for juvenile detainees.*

d The claimant, B, was the father of a two-year-old boy who was murdered by two
ten-year-old boys in 1993. The boys were sentenced to detention during Her
Majesty's pleasure, and the then Lord Chief Justice made a tariff recommendation
of ten years. That figure was increased by the then Secretary of State to 15 years,
e but his decision was quashed by the House of Lords. Subsequently, the European
Court of Human Rights held that the fixing of the tariff by the Secretary of State
constituted a breach of the European Convention for the Protection of Human
Rights and Fundamental Freedoms 1950. As a result of that judgment, the
Secretary of State announced that, pending the introduction of new legislation,
f the Lord Chief Justice would review the tariffs of juvenile detainees, including the
killers of B's son. In the course of that review, the Lord Chief Justice invited
the victim's family to make representations on the impact of the murder on them.
B duly made written representations. In October 2000 the Lord Chief Justice set
a tariff expiring on the day of his decision. In giving his reasons, he stated that ten
years would probably have been the appropriate tariff at the time of sentencing,
g but that figure had to be reduced to take into account the progress made by the
boys during their detention. B sought to challenge the tariff in judicial review
proceedings, contending, inter alia, that mitigating factors during time in custody
were not relevant to the determination of the tariff. On B's application for
permission to apply, the issue arose as to whether he had standing to challenge
h the tariff.

Held – The members of a victim's family had no standing to bring judicial review
proceedings challenging a decision by the Lord Chief Justice on the appropriate
tariff of a juvenile detainee. Although the threshold for standing in judicial review
had generally been set at a low level, that was because of the importance in public
j law that someone should be able to call decision makers to account, lest the rule
of law break down and private rights be denied by public bodies. In criminal
proceedings the traditional and invariable parties, namely the Crown and the
defendant, were both able to challenge those judicial decisions which were
susceptible to judicial review. It followed that in such cases there was no need for
a third party to seek to intervene to uphold the rule of law. Nor would such
intervention generally be desirable. A proper discharge of judicial functions in

relation to sentencing required the judge to take into account the impact of the offence and the sentence on the public generally, and on individuals including the victim, the defendant and their respective families. The nature of that impact, however, was properly channelled through the only proper parties, the Crown and the defendant. Moreover, the invitation, in the instant case, for B to make representations did not thereafter give him sufficient interest in the matter to bring judicial review proceedings challenging the tariff. It was not an invitation to indicate views on the appropriate tariff. At best, therefore, B had only limited standing to enable him to challenge any failure to have regard to the impact of the offence on him personally. In any event, the challenge was unsustainable on the merits. In fixing the tariff, the court had to take into account matters known in relation to rehabilitation at the date when the tariff was fixed or reviewed. It followed that the Lord Chief Justice had been right to take into account events since the trial. Nor were there any other grounds for impugning his decision. Accordingly, permission to apply for judicial review would be refused (see [20]–[23], [35], [48], [49], [55], [59], below.)

R v Secretary of State for the Home Dept, ex p Venables, R v Secretary of State for the Home Dept, ex p Thompson [1997] 3 All ER 97 considered.

Notes

For the requirement of sufficient interest in judicial review proceedings, see 1(1) *Halsbury's Laws* (4th edn reissue) para 66.

Cases referred to in judgments

Doody v Secretary of State for the Home Dept [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, [1993] 3 WLR 154, HL.

Hussain v UK (1996) 22 EHRR 1, [1996] ECHR 21928/93, ECt HR.

R v Criminal Injuries Compensation Board, ex p A [1999] 2 AC 330, [1999] 2 WLR 974, HL.

R v Manchester Crown Court, ex p Williams [1990] Crim LR 654, DC.

R v Newham London BC, ex p Begum [2000] 2 All ER 72.

R v Nunn [1996] 2 Cr App R (S) 136, CA.

R v Perks [2000] Crim LR 606, CA.

R v Secretary of State for the Home Dept, ex p Furber [1998] 1 All ER 23, DC.

R v Secretary of State for the Home Dept, ex p Khawaja [1983] 1 All ER 765, [1984] AC 74, [1983] 2 WLR 321, HL.

R v Secretary of State for the Home Dept, ex p Venables, R v Secretary of State for the Home Dept, ex p Thompson [1997] 3 All ER 97, [1998] AC 407, [1997] 3 WLR 23, HL.

Racal Communications Ltd, Re [1980] 2 All ER 634, [1981] AC 374, [1980] 3 WLR 181, HL.

Thynne v UK (1990) 13 EHRR 666, [1990] ECHR 11787/85, ECt HR.

V v UK (1999) 30 EHRR 121, [1999] ECHR 24888/94, ECt HR.

Cases also cited or referred to in skeleton arguments

Browne v The Queen [2000] 1 AC 45, [1999] 3 WLR 1158, PC.

IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93, [1982] AC 617, HL.

McCourt v UK (1992) 15 EHRR CD 110, E Com HR.

Pierson v Secretary of State for the Home Dept [1997] 3 All ER 577, [1998] AC 539, HL.

R v Easterbrook [1990] 12 Cr App R (S) 331, CA.

State v O'Brien (1973) IR 50, Ir SC.

a Application for permission to apply for judicial review

The claimant, Ralph Bulger, applied for permission to apply for judicial review of (i) the decision of the second defendant, the Lord Chief Justice of England and Wales, on 26 October 2000 ([2001] 1 All ER 737) recommending the tariffs in the cases of Jon Venables and Robert Thompson, the two boys who in 1993 had been sentenced to be detained during Her Majesty's pleasure for the murder of the claimant's son, and (ii) the adoption by the first defendant, the Secretary of State for the Home Department, of the Lord Chief Justice's recommendation. The facts are set out in the judgment of Rose LJ.

Alan Newman QC, Hugo Keith (instructed by *E R Makin & Co*, Liverpool) and *Robin Makin* of that firm for the claimant.

c *Philip Sales* (instructed by the *Treasury Solicitor*) for the Lord Chief Justice.

David Pannick QC and *Mark Shaw* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Edward Fitzgerald QC (instructed by *Bhatt Murphy & Co*) for Venables.

d *Brian Higgs QC* and *Julian Nutter* (instructed by *Lloyd Lee Dures*, Liverpool) for Thompson.

ROSE LJ.

[1] There is before the court an application by the father of James Bulger seeking permission to challenge the decision of the Lord Chief Justice (Lord Woolf) fixing the tariff term to be served by those who murdered his son. Turner J rightly ordered that the application be heard orally.

e [2] The events leading to this application must be known to almost every adult in this country. It is therefore sufficient to describe those events in the barest outline.

[3] James Bulger was not quite three-years-old. On 12 February 1993, a video camera, whose image is seared in the minds of those who saw it, recorded him being led away from Strand Shopping Precinct, in Bootle. Two and a half miles away, by a railway line, Robert Thompson and Jon Venables, who then were both ten and a half, and therefore just of the age of criminal responsibility, battered him to death and placed his body on the line, where it was mutilated further by a passing train. In November 1993, when they were both 11, a jury at Preston convicted them of a murder which the trial judge, Morland J, described as 'an act of unparalleled evil and barbarity'. He imposed, under s 53(1) of the Children and Young Persons Act 1933, the mandatory sentence of detention during Her Majesty's pleasure, and recommended to the Secretary of State that they should serve eight years to meet the requirements of retribution and general deterrence. Lord Taylor of Gosforth, then Lord Chief Justice, recommended ten years. The then Home Secretary fixed the tariff at 15 years, and so notified them in July 1994.

h [4] In June 1997, the House of Lords, as reported in *R v Secretary of State for the Home Dept, ex p Venables*, *R v Secretary of State for the Home Dept, ex p Thompson* [1997] 3 All ER 97, [1998] AC 407, quashed that decision. In March 1999, their applications were referred to the European Court of Human Rights to which, on behalf of James Bulger's father, the present claimant, written and oral submissions were made.

j [5] In December 1999, in *V v UK* (1999) 30 EHRR 121, [1999] ECHR 24888/94, the European Court of Human Rights held that the fixing of the tariff by the Secretary of State gave rise to a breach of art 6(1) of the European Convention for

the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), as it was a sentencing exercise not by an independent and impartial tribunal. The court also held that, in the absence of review of their continued detention by a court, there was a breach of art 5(4) of that convention.

[6] In consequence of the European Court's decision, and to procure compliance with it, the present Secretary of State announced to the House of Commons on 13 March 2000 (346 HC Official Report (6th series) cols 21–24) that he would be introducing legislation whereby in future the tariff for defendants under 18 would, as in the case of adults subject to a discretionary life sentence, be set in open court by the trial judge, subject to appeal by the defendant or, if it were unduly lenient, by the Attorney General. As to existing juvenile detainees, such as Thompson and Venables, their tariffs would be reviewed by the Lord Chief Justice, and the Secretary of State announced that it would be open to them to make new representations to the Lord Chief Justice, whose recommendation as to tariff he (the Secretary of State) would adopt. Indeed, he said he was bound to accept the Lord Chief Justice's recommendation.

[7] Following the Secretary of State's statement, on 27 July 2000, Lord Woolf CJ issued a practice statement reported in [2000] 4 All ER 831, [2000] 1 WLR 1656 in relation to life sentences for murder. This stated that Lord Woolf CJ would invite written representations from detainees' legal advisers and from the Director of Public Prosecutions, who could include representations on behalf of victims' families. The statement indicated that, for adults, the usual length of tariff (that is the punitive term for retribution and general deterrence) would be 14 years. Aggravating and mitigating features, including age and remorse, were identified. Lord Woolf CJ stated that, after taking into account any representations he received, he would announce the reasons for his recommendation to the Home Secretary in open court.

[8] In the present case written representations were made on behalf of Thompson and Venables, and by James Bulger's mother and, following several extensions of time by Lord Woolf CJ, by the claimant. Lord Woolf CJ announced his recommendation and reasons on 26 October 2000 ([2001] 1 All ER 737). In relation to both Thompson and Venables, who are now 18, he recommended a tariff expiring on that date, which meant a tariff of seven years and eight months. He did so by starting from the ten year figure fixed by Lord Taylor CJ, which he said he would probably have chosen, and reducing that figure by two years to reflect the welfare and progress of the offenders, which he was now required to take into account by virtue of the decision of the House of Lords in *Exp Venables*. This would have resulted in a tariff expiring on 21 February 2001 and, as they are 18, a transfer from their separate secure units to young offender institutions, which Lord Woolf CJ did not think would help their welfare or be in the public interest. He therefore fixed the tariff so that it expired on 26 October, thereby enabling the Parole Board to start its task of deciding whether, and how, Thompson and Venables should be released.

[9] Before turning to the issues arising on this application, it is necessary to rehearse several other developments giving rise to the present position in relation to the respective roles of the Lord Chief Justice, the Secretary of State, and the Parole Board. At the time of trial, the Criminal Justice Act 1967 provided for the release of prisoners detained under s 53 of the 1933 Act in the terms of s 61 of the 1967 Act which, omitting immaterial words, reads as follows:

a '(1) The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person ... detained under section 53 ... but shall not do so in the case of a person sentenced to ... detention during Her Majesty's pleasure ... except after consultation with the Lord Chief Justice of England together with the trial judge if available.'

b [10] As a result of the judgment of the European Court in *Thynne v UK* (1990) 13 EHRR 666, [1990] ECHR 11787/85, Parliament introduced a distinction between the treatment of discretionary life prisoners and mandatory life prisoners sentenced for murder. In respect of murderers sentenced to the mandatory term, the Secretary of State retained the duty to decide whether, and if so when, it was appropriate to release them on life licence. Section 35(2) of the Criminal Justice Act 1991 provided:

c 'If recommended to do so by the Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not a discretionary life prisoner.'

d [11] A young person convicted of murder and sentenced to detention during Her Majesty's pleasure was within the scope of s 35(2) of the 1991 Act because s 43(2) of that Act so provided.

e [12] The relevant provisions of the 1991 Act were repealed and replaced by ss 28 to 34 of the Crime (Sentences) Act 1997 with effect from 1 October 1997. That Act introduced a change in relation to a young offender under the age of 18 convicted of murder and sentenced to detention during Her Majesty's pleasure because in *Hussain v UK* (1996) 22 EHRR 1, [1996] ECHR 21928/93, the European Court held that such a person was entitled, post-tariff, to periodic access to a court to assess whether he was suitable for release. The 1997 Act therefore amended the law so that after such an offender has served the tariff set by the Secretary of State, it is the responsibility of the Parole Board and not the Secretary of State to decide whether he should be released on life licence. But the Secretary of State retained the power to decide on the tariff for those detained during Her Majesty's pleasure, this not having been the subject of any ruling in *Hussain v UK*.

g [13] Section 60 of the Criminal Justice and Court Services Act 2000 introduces into the Powers of Criminal Courts (Sentencing) Act 2000 a new section, s 82A, in relation to sentences passed after 30 November 2000. This provides that the court imposing a sentence of detention during Her Majesty's pleasure on a young offender convicted of murder shall order that s 28(5) to (8) of the 1997 Act shall apply to an offender as soon as he has served the tariff part of his sentence. In other words, the court fixes the tariff; the Parole Board can direct release so long as confinement is no longer necessary for the protection of the public; and the Secretary of State must act on the Parole Board's direction. The first question which can conveniently be considered on this application is whether the decision of Lord Woolf CJ is susceptible to judicial review. It is common ground that the use of the prerogative writs of what used to be called certiorari, mandamus and prohibition, which afford relief by way of judicial review, were developed over many years by the courts to control decision-making by inferior courts, tribunals and other bodies. Such review has never been possible in relation to the decisions of High Court judges sitting as such (see *Re Racal Communications Ltd* [1980] 2 All ER 634 at 640, 641, [1981] AC 374 at 384, 386, per Lord Diplock and Lord Salmon respectively). That principle applies even when the High Court judge is not

actually sitting in court, if his decision is made as a High Court judge, for example, when giving leave to prefer a voluntary bill of indictment (see *R v Manchester Crown Court, ex p Williams* [1990] Crim LR 654). a

[14] Parliament has recognised that this is so, for example, by the terms of s 29(3) of the Supreme Court Act 1981 in relation to the Crown Court. But is Lord Woolf CJ in making a tariff recommendation sitting as a High Court judge? On his behalf, Mr Sales submits that he is. He is not acting merely in a private or advisory capacity, but, in accordance with the European Court's judgment in *V v UK*, as an independent and impartial judicial figure, sitting in open court as a judge and giving his reasons for complying with the art 6 rights of Thompson and Venables. In that capacity also, submits Mr Sales, he issued the practice statement to which I have referred. b

[15] In *R v Secretary of State for the Home Dept, ex p Furber* [1998] 1 All ER 23, on which Mr Newman QC for the claimant relies, Simon Brown LJ (at 27) referred to the Lord Chief Justice 'in this context is acting not as an unreviewable judge of the High Court but rather as an adviser in an administrative process crystallising in a reviewable ministerial decision'. c

[16] Mr Sales distinguishes that authority on the basis that, at that time and in that case, the Lord Chief Justice, in accordance with the then statutory scheme under s 34 of the 1991 Act, was acting only in an advisory capacity to the Home Secretary and not, as he is now, as a judge in a primary decision-making capacity. d

[17] For my part, I see much force in Mr Sales' submission. But rather than express any final view because, as will emerge, the present application can be decided on other grounds, I would prefer to leave the matter open for determination if a case arises during the interim arrangements (which the present case is not) where either the offender or the Attorney General on behalf of the public seeks to challenge the severity or leniency (as the case may be) of the tariff fixed. Once the legislative arrangements which provide a right of appeal to an offender and the Attorney General have been enacted, the question of judicial review in relation to the tariff is unlikely to arise. In any event, for present purposes, the question of the reviewability of Lord Woolf CJ's decision is academic because the Secretary of State has adopted that decision, and the Secretary of State's decision is undoubtedly susceptible to judicial review. Accordingly, if Lord Woolf CJ's decision is flawed, so also must be that of the Secretary of State. e

[18] The second question which, to my mind, arises is whether the claimant has standing to challenge the tariff which Lord Woolf CJ has fixed. This is not a point which initially any counsel (save Mr Fitzgerald QC to a limited extent) sought to take against the claimant. But it is a point which the court took because it appears to be of considerable potential importance. In his reasons, Lord Woolf CJ said that he had invited representations from the family as to the impact of the death on them but this 'is not an invitation for the family to indicate their views as to what they would regard as an appropriate tariff'. f

[19] This approach is entirely in accordance with the decisions of the Court of Appeal, Criminal Division in *R v Nunn* [1996] 2 Cr App R (S) 136, and *R v Perks* [2000] Crim LR 606. The reasons were explained by Judge J (as he then was) giving the court's judgment in *R v Nunn*: g

'We mean no disrespect to the mother and sister of the deceased, but the opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. h

a If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise cases with identical feature[s] would be dealt with in widely differing ways leading to improper and unfair disparity, and even in this particular case, as the short judgment has already indicated, the views of the members of the family of the deceased are not absolutely identical. If carried to its logical conclusion b the process would end up by imposing unfair pressures on the victims of crime or the survivors of a crime resulting in death, to play a part in the sentencing process which many of them would find painful and distasteful. This is very far removed from the court being kept properly informed of the anguish and suffering inflicted on the victims by the crime.’ (See [1996] 2 Cr App R (5) 136 at 140.) c

[20] It is true, as Mr Newman submits, that the threshold for standing in judicial review has generally been set by the courts at a low level. This, as it seems to me, is because of the importance in public law that someone should be able to call decision-makers to account, lest the rule of law break down and private rights be denied by public bodies (see, for example, the discussion in Wade and Forsyth *Administrative Law* (8th edn, 2000) pp 667–688). But in the present matter the traditional and invariable parties to criminal proceedings, namely the Crown and the defendant, are both able to, and do, challenge those judicial decisions which are susceptible to judicial review as, for example, the many authorities on the meaning of the words ‘relating to trial on indictment’ in s 29(3) of the 1981 Act d e amply illustrate.

[21] It follows that in criminal cases there is no need for a third party to seek to intervene to uphold the rule of law. Nor, in my judgment, would such intervention generally be desirable. If the family of a victim could challenge the sentencing process, why not the family of the defendant? Should the Official Solicitor be permitted to represent the interests of children adversely affected by the imprisonment of their mother? Should organisations representing victims or offenders be permitted to intervene? In my judgment, the answer in all these cases is that the Crown and the defendant are the only proper parties to criminal proceedings. A proper discharge of judicial functions in relation to sentencing g requires that the judge take into account (as Lord Woolf CJ said he did in this case) the impact of the offence and the sentence on the public generally, and on individuals, including the victim and the victim’s family and the defendant and the defendant’s family. The nature of that impact is properly channelled through prosecution or defence.

h [22] The question which then arises in the present case is whether, as Mr Newman submits, the claimant, having been invited by Lord Woolf CJ to make representations, thereafter has a sufficient interest in the matter within s 31(3) of the 1981 Act to bring proceedings for judicial review which challenge the tariff figure fixed by Lord Woolf CJ.

j [23] In my judgment, he has not. The invitation extended to him to make representations as to the impact of the offence on him was not an invitation to indicate views as to the appropriate tariff. As I have said, the new statutory scheme contemplated by the Secretary of State’s announcement in March 2000 will confer a right of appeal on a defendant and on the Attorney General, but not on the victim’s family. It would be surprising if the interim scheme could properly be regarded as conferring additional rights on them. For my part, in the

exercise of this court's discretion, I would regard the claimant as having at best only limited standing to enable him to challenge any failure to have regard to the impact of the offence on him personally. But I would not regard him as having standing to challenge the appropriate tariff. a

[24] That said, in view of the exceptional public interest in this case, I would not regard it as appropriate to dismiss this application without considering the merits of the challenge to the decisions of Lord Woolf CJ and the Secretary of State. To this I now turn. b

[25] I bear in mind all the terms of Lord Woolf CJ's decision. But the crucial passage following his references to the law, to the history of the matter and to the circumstances of the case appears at paras 18 and 19 which I now recite:

'... If I had been called on to set their tariff after they had been sentenced, I would probably have selected ten years as being appropriate, as did Lord Taylor CJ. Today it is clear, as was not clear then, that it is necessary when fixing the tariff to take into account the welfare of the children concerned. In addition, when reviewing a tariff in the case of children I am required to take into account the progress which they have made since they have been in detention. In the case of both of these young men the information before me makes it clear that they have done all that is open to them to redeem themselves. While their crime remains horrendous, they are entitled to credit for this. Because of their behaviour they are entitled to a reduction in the tariff to eight years, which happens to be the figure determined by the trial judge ... An eight-year tariff would expire on 21 February 2001. I have already pointed out that it would not be in their or the public's interest for these two young men to be transferred to a young offender institution. In all probability, if the tariff period expired today, it is likely that it would be after February 2001 before the parole board could decide whether they should be released and, if so, for the necessary arrangements to be made to enable this to happen. I therefore set a tariff which will expire today. This will enable the very difficult task of deciding *if* and how these young men should return to society to begin. I emphasise that the final decision as to whether they should be released and conditions for release are the responsibility of the board and nothing I have said is to interfere with the board's discretion.' (See [2001] 1 All ER 737 at 742.) c
d
e
f
g

[26] Mr Newman's broad submission is that rehabilitation, which was not referred to in the practice statement, has no part to play in altering the tariff or penal element, and that remorse or contrition can only relate to the time of sentencing at trial, not to subsequent events. Although Lord Woolf CJ said that it was of real value to have information as to the impact of the death on the family, the tariff fixed was so low that there was no room for that impact to have been taken into account at all. Mr Newman does not challenge the ten-year starting point, but, he says, the final recommendation was irrationally low and he invited this court either to remit the matter for reconsideration by Lord Woolf CJ or to substitute a figure of ten years. h

[27] Mr Newman makes two principal complaints: first, undue weight was placed on rehabilitation; no weight should have been attached to it; secondly, new material produced to the court this week in relation to Thompson means that Lord Woolf CJ's assertion in para 10 of his decision ([2001] 1 All ER 737 at 740) that 'neither has shown any aggression or propensity for violence during his period of detention' is erroneous. Mr Newman sought sustenance for his first j

a complaint from *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, and the speech of Lord Mustill, in particular [1993] 3 All ER 92 at 97–98, [1994] 1 AC 531 at 550–551, where distinction is drawn between the penal and risk elements of a life sentence. It is to be noted, as Mr Newman accepts, that that case dealt with sentences on adults under s 61 of the 1967 Act. It was also decided before the incorporation into English law of the convention.

b [28] Mr Newman submitted that mitigating factors occurring during time in custody are pertinent to the Parole Board's consideration in relation to release, but not to determination of the tariff. Mr Newman also took us to *R v Secretary of State for the Home Dept, ex p Venables*, *R v Secretary of State for the Home Dept, ex p Thompson* [1997] 3 All ER 97, [1998] AC 407, and in particular to the minority speeches of Lord Goff of Chieveley and Lord Lloyd of Berwick ([1997] 3 All ER 97 at 111–112, 135, [1998] AC 407 at 487, 513, respectively), and to paras 119 and 120 of the European Court's decision in *V v UK* (1999) 30 EHRR 121 at 188, [1999] ECHR 24888/94. He accepted that the majority in the House of Lords held that, in the light of s 44 of the 1933 Act, the welfare of juveniles has to be considered when setting the tariff. But, he submitted, that only applies at the time of trial and sentence and not where the tariff is set years later. He submitted that all that the European Court decided was that, provided the tariff of a juvenile is set judicially and not by the executive, there is no need for that tariff to be reviewed in the light of subsequent events.

e [29] In my judgment, that submission is wholly unarguable. In *Ex p Venables* [1997] 3 All ER 97 at 121, [1998] AC 407 at 497–498, Lord Browne-Wilkinson, who was one of the majority, identified what the case was about in these terms:

f 'It is not necessary in this case to consider how far the 1993 policy (which precludes consideration of matters occurring after the date of the offence such as prison record and personal circumstances) is lawful in relation to adult life prisoners. In this appeal, your Lordships are only concerned with the lawfulness of the policy as applied to children sentenced to be detained during Her Majesty's pleasure. In relation to such children, the question is whether it is lawful to adopt a policy which, *even in exceptional circumstances*, treats as irrelevant the progress and development of the child who has been detained. This is plainly the effect of the inflexible 1993 policy. The answer to that question must depend upon the character of a sentence of detention during Her Majesty's pleasure. If such a sentence requires the Secretary of State to have regard not only to those factors relevant in considering an adult life prisoner (retribution, deterrence and risk) but also to the progress and development of the child whilst detained, it seems to me clear that the policy is unlawful since it excludes from consideration, even in exceptional circumstances, a factor relevant to the decision whether or not to release the child.'

g [30] He went on:

j 'Why did Parliament in 1908 introduce for child murderers a mandatory sentence of indefinite duration instead of a sentence of detention for life? Lord Steyn and Lord Hope of Craighead have set out the history of the legislation which shows that since 1908 Parliament has adopted a different policy towards child offenders from that adopted towards adults. In particular, in the case of child offenders the courts have to have regard not

only to retribution, deterrence and prevention of risk but also to the welfare of the child offender himself. This has been made demonstrably clear since 1933 by s 44(1) of the 1933 Act ... That subsection is still part of the law of England: it cannot just be ignored. It provides that in dealing with a child or young person the court shall have regard to the welfare of the child. In the face of that clear statutory provision it seems to me inescapable that, in adopting a sentence of detention during Her Majesty's pleasure, the legislature have in mind a flexible approach to child murderers which, whilst requiring regard to be had to punishment, deterrence and risk, adds an additional factor which has to be taken into account, the welfare of the child.' (See [1997] 3 All ER 97 at 122, [1998] AC 407 at 498.)

[31] Lord Browne-Wilkinson then refers to arts 3(1) and 40(1) of the United Nation's Convention on the Rights of the Child (New York, 20 November 1989; TS 44 (1992); Cm 176), and said:

'Therefore the Secretary of State in exercising his discretion as to the duration of the detention of the child must at all times be free to take into account as one of the relevant factors the welfare of the child and the desirability of reintegrating the child into society. The extent to which this is possible must depend, in the case of a young child at least, on the way in which that child is maturing through his formative years. If the child is making exceptional progress and it is clear that his welfare would be improved by release from detention, that is one of the factors the Secretary of State must take into account and balance against the other relevant factors of retribution, deterrence and risk. The child's welfare is not paramount: but it is *one* of the factors which must be taken into account.' (See [1997] 3 All ER 97 at 123, [1998] AC 407 at 499–500.)

[32] Similar passages occur in the speech of Lord Hope of Craighead who, in addition, said:

'The absence of any reference in the decision letters to a recognition by the Secretary of State of the duty to keep the progress and development of the children under review shows that he has proceeded upon an unlawful policy.' (See [1997] 3 All ER 97 at 155, [1998] AC 407 at 535.)

[33] Then he said:

'This statement is consistent with the view that the tariff period has fixed the penal element of the sentence. But it clearly has nothing to do with the question of keeping the period of detention under review in order to take account of the applicants' progress while in custody.' (See [1997] 3 All ER 97 at 155–156, [1998] AC 407 at 535.)

[34] Lord Hope said:

'The tariff as applied to them fails to recognise that the welfare of the child, in the light of progress and development while in custody, may require consideration of his case by the Parole Board at an earlier date than would otherwise be indicated by the application to his case of a fixed period in respect of the penal element. The contrast between the flexibility which regard for the protection and welfare of the child requires and the rigidity of the policy indicates the reason for regarding the policy, as it was applied in this case, as unlawful.' (See [1997] 3 All ER 97 at 156, [1998] AC 407 at 536.)

- a [35] In my judgment, it is plain beyond peradventure on the English and European authorities that, in relation to a child, the court fixing a tariff not only can, but must, take into account matters known in relation to rehabilitation at the date when the tariff is fixed or reviewed. Where, as in the present case, the tariff, unusually, and for the reasons given earlier, was fixed not soon after the trial but nearly eight years after, events during those eight years should be taken into account.
- b It follows that Lord Woolf CJ was right to take those matters into account.

[36] It is also, in my judgment, impossible to argue (as Mr Newman somewhat faintly did in the alternative) that too much weight was placed by Lord Woolf CJ on rehabilitation. Weight is a matter for the decision-maker.

- c [37] As to the new material which was not before Lord Woolf CJ, and which was placed before this court this week, it is of two kinds. First, in relation to an alleged incident on 16 January 1997, the claimant relied on two documents purporting to be a record of an incident about 3 p m that day involving Thompson and another boy at the secure unit where they then were. The documents were trumpeted by the Sunday People newspaper in an item in last Sunday's edition as proof that Thompson was involved 'in a danger fight'.

- d [38] Uninhibited investigative journalism is one of the hallmarks of democracy and the public interest is often well served by the media's discovery of facts which would otherwise have remained undiscovered. But often what appear to be facts are the subject of dispute. The pages of a newspaper are not always an ideal place for evaluating fairly whether facts exist or how they fit in with other facts. Very often the aim and instinct of a newspaper is, very properly, to campaign. But campaigns involve taking sides, and almost all campaigns involve distortion. Calm analysis of competing accounts of events and the conflicting arguments to which they give rise, unprompted by any agenda, and leading to a balanced conclusion is not always the stuff which sells newspapers.
- e

- f [39] By the time of his reply, Mr Newman did not resist the suggestion that the two documents on which in this part of his submissions he relied are forgeries. That is because the other boy said to have been involved in the incident, John Howells, contacted the unit on the day the press report appeared, deeply upset because a false report had been published.

- g [40] Mr Newman's concession was further based on the results of an investigation carried out at the unit. Those results bear rehearsal almost in full. They are set out in a letter to the Prison Service dated 13 February 2001:

- h 'Although the forms seem to be genuine, we do not believe that the information contained is in any way factual. We believe that information to be totally fabricated and in support of this belief I would like to highlight a number of points: 1. I have looked back throughout copies of the accident and dangerous occurrence book and cannot find any reference to any incident concerning the two boys in question. Although reference to accidents both before and after pertaining to other individuals could be found, no reference to this alleged incident could be found either at the unit or at our central record department. 2. I have looked at Robert Thompson's running sheet on the day in question and again there is no reference to any kind of incident. 3. The management team at the unit has looked at the signatures on both documents and does not recognise them. 4. The reference that we will be "waiting for a response from the Home Office" is not one we would use on this document as it is a health and safety document and not used as part of a disciplinary procedure in any way. Also, at the time,
- j

John Howells was still on remand and would not fall under the jurisdiction of the Home Office, so why would we be waiting for their response? 5. The unit log book for this date shows that John Howells left for court at 8 am and did not return until 6.30 pm on the day of the alleged incident. John left at this time every day of his trial, which lasted for three weeks, and did not return until after 6 pm, yet the time of the incident is stated to be 3 pm.'

[41] In the light of those matters there is no reason whatever to regard the material in relation to events in March 1997 as in any way undermining the decision of Lord Woolf CJ.

[42] The other new material consists of a statement by another youth called Scott Walker, which he made on 8 February 2001, after he had been visited by the press in January 2001. It purports to give an account of an incident between him and Thompson in March 1999 when the two were in the same secure unit. The statement claims that Thompson, for no good reason, among other things punched Walker and tried to strangle him with an electric flex. It was not a matter about which he complained to the police, although he went home two weeks later. Mr Higgs QC for Thompson denies the accuracy of Walker's account. The statement from Mr Morris at prison headquarters, dated 13 February 2001, which is before the court, casts a completely different light on the incident. In particular, it was regarded as minor. It was Walker, not Thompson, who was the protagonist, and it was he who subjected Thompson to extreme and prolonged provocation, initially verbally, and then by throwing a plant pot at him. Walker also armed himself with a pool cue with which, had he not been restrained, it seems he would have attacked Thompson further. Thompson's response in the assessment of the staff responsible for him, was 'restrained, reasonable and [he] behaved as a normal adolescent'. There was also another incident in March 1999 when Walker taunted Thompson.

[43] The independent psychiatrist and psychologist, whose reports were before Lord Woolf CJ, had had extensive discussions with a significant number of the staff at the unit where these incidents occurred. Thompson's psychiatrist, whose report was also before Lord Woolf CJ, would have been aware of these incidents. The report from the unit referred to Thompson as having had some difficulties with one fellow detainee.

[44] In these circumstances, in my judgment, there is nothing in Scott Walker's statement which can possibly be said to undermine Lord Woolf CJ's decision. *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, [1999] 2 WLR 974, *R v Secretary of State for the Home Dept, ex p Khawaja* [1983] 1 All ER 765, [1984] AC 74, and *R v Newham London BC, ex p Begum* [2000] 2 All ER 72, on which Mr Newman relies, were all very different cases. As Mr Pannick QC submits, there was no obligation, as it seems to me, on the Secretary of State to report to Lord Woolf CJ every incident during the many years of Thompson's period in custody. Those responsible for discipline in the unit, and the psychiatrist, were entitled to take the view that the events in March 1999 were not worth commenting on.

[45] I should make it clear that there is nothing before this court to support Mr Newman's suggestion that any matter has been 'swept under the carpet' by the Home Office. In any event, if any further investigation of events in March 1999 is thought to be necessary or appropriate, that can be carried out by the Parole Board upon whom rests the responsibility of determining whether or not it is safe for either of these youths to be released.

a [46] Mr Newman made subsidiary complaints about Lord Woolf CJ's reference to the corrosive atmosphere of young offender institutions, the desirability that what had been achieved in Thompson and Venables' upbringing should not be wasted, and to the fact that the two when released would be permanently on licence. In my judgment, there is no substance in any of those complaints.

b [47] Finally, Mr Newman is critical of the Secretary of State for, as he submits, improperly fettering his own discretion by agreeing to accept the view on tariff of Lord Woolf CJ. In my judgment, this is an impossible contention. The interim scheme put in place by the Secretary of State was an entirely appropriate response to the decision of the European Court. In agreeing to follow Lord Woolf CJ, he was recognising that the decision on tariff for juveniles must be made judicially and not by the executive. There is nothing to my mind in s 28(4) of the Crime (Sentences) Act 1997 to preclude such a course, and the Secretary of State was obliged under the Human Rights Act 1998 to carry out his duties in compliance with the convention.

d [48] Accordingly, despite Mr Newman's valiant efforts, it seems to me that there is no arguable ground for challenging the decisions of either Lord Woolf CJ or the Secretary of State and in consequence, for my part, I would refuse permission.

SULLIVAN J.

e [49] I agree that this application for permission to apply for judicial review should be refused. The claimant's first submission that Lord Woolf CJ in his recommendations ([2001] 1 All ER 737) gave disproportionate weight to rehabilitation and insufficient weight to the requirements of retribution and deterrence; alternatively, that Lord Woolf CJ was not entitled to have any regard to rehabilitation and should have confined his consideration to the requirements of retribution and deterrence, is not arguable for the following reasons.

f [50] If a consideration is relevant for the purposes of making a recommendation, whether that recommendation is made by the Lord Chief Justice to the Home Secretary or by an inspector to the Secretary of State for the Environment, the weight to be attributed to that consideration is a matter for the person making the recommendation and the decision-taker. This is an application for permission to apply for judicial review. It is not an appeal on the merits. A submission that undue or insufficient weight has been given to a relevant factor does not raise any arguable error of law.

g [51] Thus, the claimant has to establish that Lord Woolf CJ was not entitled to have any regard to rehabilitation because it is not a relevant factor in setting the tariff for juvenile offenders. That submission flies in the face of s 44 of the Children and Young Persons Act 1933, and is contrary to the speeches of the majority in the House of Lords in *R v Secretary of State for the Home Dept, ex p Venables*, *R v Secretary of State for the Home Dept, ex p Thompson* [1997] 3 All ER 97, [1998] AC 407, cited by Rose LJ.

j [52] There is a further reason why the submission is not arguable. The claimant lays stress upon the non-statutory nature of the interim procedure under which the Home Secretary referred the cases of Venables and Thompson to Lord Woolf CJ for his recommendation. References to 'setting the tariff' are a convenient shorthand, but it must be remembered that it is not a statutory expression and there is no statutory definition of the factors that may be considered in 'fixing the tariff'.

[53] In giving his response on 12 June 1997 to the House of Lords' decision in *Ex p Venables*, the Home Secretary made it clear that 'the balance between the

public interest in punishment and the public interest in the offenders' welfare' will be 'at the heart of the decision on the proper length of the initial tariff'. a

[54] Lord Woolf CJ's practice statement ([2000] 4 All ER 831, [2000] 1 WLR 1655) does not exclude rehabilitation as a relevant consideration. To do so would have been in breach of s 44 of the 1933 Act. The practice statement makes it clear that the list of 'mitigating features' is not comprehensive, but it does include: (1) 'age' and (8) 'hard evidence of remorse or contrition'. As to the former, the younger the offender the more weight is likely to be given to his or her welfare, as opposed to considerations of retribution and deterrence. As to the latter, remorse is but one aspect of rehabilitation. b

[55] As with any other case where a matter has to be redetermined following the quashing by the courts of an earlier determination, the decision-maker will be redetermining the matter in the light of all relevant material that is available as at the date of redetermination. In the present case that material included the fact that it is now clear that in fixing tariffs for juveniles it is necessary to take into consideration their welfare, and the information as to the progress of Venables and Thompson whilst in custody. The weight to be accorded to that new material was a matter for Lord Woolf CJ. c

[56] The submission that Lord Woolf CJ's recommended tariff of seven years eight months is so low as to be irrational is founded upon the erroneous proposition that he was not entitled to have regard to this new material, since it was accepted on behalf of the claimant that Lord Woolf CJ was entitled to adopt ten years as his starting point as at the date of sentence, before moving on to consider the position on the material available today. A reduction to eight years on the basis of this new material could not possibly be said to be irrational. It was, indeed, the figure adopted by the trial judge. d

[57] The further reduction so that the tariff expired on 26 October 2000, rather than 21 February 2001, was well within the bounds of rationality for the reasons that are out in para 19 of the recommendations (see [2001] 1 All ER 737 at 742). e

[58] As to the remaining submissions advanced on behalf of the claimant, I have nothing to add to what has been said by Rose LJ. f

PENRY-DAVEY J.

[59] I agree with both judgments.

Application refused.

Dilys Tausz Barrister.

a

R v Togher and others

COURT OF APPEAL, CRIMINAL DIVISION

LORD WOOLF CJ, STEEL AND BUTTERFIELD JJ

b

10–13 OCTOBER, 9 NOVEMBER 2000

Criminal law – Appeal – Unsafe conviction – Approach to be adopted in determining whether conviction unsafe – Criminal Appeal Act 1968, s 2 – Human Rights Act 1998, Sch 1, Pt I, art 6.

c

The appellants, T, D and P, were charged with a drug offence (the first offence). T and D were also charged, on the same indictment, with another drug offence (the second offence) which was tried separately for case management reasons. They were convicted of the second offence, and subsequently pleaded guilty,

d

together with P, to the first offence. Before tendering their guilty pleas to the first offence, T and D had given notice of appeal against their convictions on the second offence. Their appeal was allowed by the Court of Appeal which ordered a retrial of the second offence. Subsequently, T and D applied for the retrial to be stayed on the grounds of abuse of process, relying, inter alia, on non-disclosure by the prosecution of matters which went to the credibility of its witnesses. They

e

had not been aware of that non-disclosure at the time of their guilty pleas to the first offence. The judge granted the applications for a stay of the retrial of the second offence, holding that the prosecution's conduct had deprived the defence of its strategic ability to mount a challenge to the integrity of the prosecution case, that a retrial could not be conducted fairly in those circumstances and that

f

a retrial would be unfair to T and D. In subsequent appeals against their guilty pleas to the first offence, the appellants contended that the judge's conclusion applied equally to that offence, and that accordingly they should not have been required to plead to it. That contention required the Court of Appeal to consider the correct approach to determining whether a conviction was 'unsafe' within

g

the meaning of s 2(1)^a of the Criminal Appeal Act 1968. In particular, it was required to choose between two conflicting approaches—the so-called narrower approach, which confined the court's intervention after a guilty plea to cases where, on the admitted facts, the defendant could not in law have been convicted of the offence charged; or the broader approach, which treated a conviction as unsafe if it resulted from a trial which should never have taken place. That in turn

h

required the court to consider the impact of the Human Rights Act 1998 in view of a decision of the European Court of Human Rights that, in the absence of any inquiry into the issue of fairness, a finding by the Court of Appeal that a conviction was safe did not mean that the defendant had received a fair trial for the purposes of art 6^b of the European Convention for the Protection of Human

j

Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act).

a Section 2, so far as material, provides: '(1) ... the Court of Appeal—(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss an appeal in any other case ...'

b Article 6, so far as material, provides: '1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...'

Held – Where a defendant had been denied a fair trial, it would be almost inevitable that the conviction would be regarded as unsafe, and for that reason the broader approach was to be preferred to the narrower approach. Thus, if it would have been right to stop a prosecution as an abuse of process, but the defendant had nevertheless been convicted, the Court of Appeal would be most unlikely to conclude that the conviction should not be set aside. Neither the use of the word ‘unsafe’ in s 2 of the 1968 Act nor the previous cases compelled an approach inconsistent with that of the European Court of Human Rights. The requirement of fairness in the criminal process had always been a common law tenet of the greatest importance. Fairness was not concerned with technicalities. If a defendant had not had a fair trial and an injustice had occurred as a result, it would be extremely unsatisfactory if the powers of the Court of Appeal were not wide enough to rectify that injustice. If, contrary to the court’s expectations, that had not previously been the position, then that was a defect capable of rectification under the 1998 Act which emphasised the desirability of a broader rather than a narrower approach. In the instant case, the failures on the part of the prosecution did not amount to the category of misconduct which had to exist before it was right to stay a prosecution, and did not justify interfering with the appellants’ freely entered pleas of guilty. The appellants had never been ignorant of any evidence which went directly to their innocence or guilt. Rather, they had only been unaware of material which could, but for their pleas, have been used in order to attack the credibility of the prosecution witnesses. Ignorance of that nature did not justify reopening the pleas of guilty. While there had been an irregularity in their trial for the second offence, the appellants’ pleas to the first offence were independent of that irregularity. Accordingly, the appeals would be dismissed (see p 472 f to p 473 b, p 477 c and h to p 478 a, post).

R v Mullen [2000] QB 520 approved.

R v Chalkley, R v Jeffries [1998] 2 All ER 155 disapproved.

Condon v UK (2000) 8 BHRC 290 considered.

Notes

For the right to a fair trial and for unsafe convictions, see respectively 8(2) *Halsbury’s Laws* (4th edn reissue) para 124 and 11(2) *Halsbury’s Laws* (4th edn reissue) para 1388.

For the Criminal Appeal Act 1968, s 2, see 12 *Halsbury’s Statutes* (4th edn) (1997 reissue) 375.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury’s Statutes* (4th edn) (1999 reissue) 523.

Cases referred to in judgments

Bennett v Horseferry Road Magistrates’ Court [1993] 3 All ER 138, [1994] 1 AC 42, [1993] 3 WLR 90, HL.

Condon v UK (2000) 8 BHRC 290, ECt HR.

Edwards v UK (1992) 15 EHRR 417, ECt HR.

McIntosh, Petitioner 2001 JC 78, HC of Just; *rvsd* sub nom *McIntosh v Lord Advocate* [2001] UKPC D1, [2001] 2 All ER 638, [2001] 3 WLR 107.

R v Blackledge [1996] 1 Cr App R 326, CA.

R v Chalkley, R v Jeffries [1998] 2 All ER 155, [1998] QB 848, [1998] 3 WLR 146, CA.

R v Davis [2000] Crim LR 584, CA.

R v Forde [1923] 2 KB 400, [1923] All ER Rep 477, CCA.

R v Francom [2000] Crim LR 1018, CA.

- a* R v Graham [1997] 1 Cr App R 302, CA.
 R v Latif, R v Shahzad [1996] 1 All ER 353, [1996] 1 WLR 104, HL.
 R v MacDonald [1998] Crim LR 808, CA.
 R v Mullen [2000] QB 520, [1999] 3 WLR 777, CA.
 R v Preston (1992) 95 Cr App R 355, CA; *affd* [1993] 4 All ER 638, [1994] 2 AC 130, [1993] 3 WLR 891, HL.
- b* R v Rajcoomar [1999] Crim LR 728, CA.

Appeals against conviction

- Kenneth Togher, Brian Peter Doran and Robert Parsons appealed against their convictions, on pleas of guilty, before Judge Foley at the Crown Court at Bristol on 29 and 30 April 1997 for an offence of assisting in the commission outside the United Kingdom of an offence punishable under the provisions of corresponding law in force in that place contrary to s 20 of the Misuse of Drugs Act 1971. Togher was refused leave to appeal by Popplewell J on 22 January 1998, but his appeal was referred to the Court of Appeal by the Criminal Cases Review Commission on 4 October 1999. Doran appealed with leave of Jackson J granted on 23 July 1999. Parsons appealed with leave of Steel and Brian Smedley JJ granted on 5 October 1999. The facts are set out in the judgment of the court.

- c* Paul Marshall (instructed by Keith Dyson & Co, Manchester) for Togher.
 Dorian Lovell-Pank QC and Christopher Campbell-Clyne (instructed by Marks & Co) for Doran.
- e* Michael Boardman (instructed by Andrew Keenan & Co) for Parsons.
 Andrew Mitchell QC and Kennedy Talbot (instructed by the Solicitor for Customs & Excise) for the Crown.

- On 13 October 2000 the court announced that the appeals would be dismissed for reasons to be given later.

9 November 2000. The following judgment of the court was delivered.

1. LORD WOOLF CJ.

- g* 2. These are our reasons for dismissing the appeals against conviction in these cases. We announced the result on 13 October 2000.
3. On 29 April 1997 at the Crown Court at Bristol, Brian Peter Doran and Robert Parsons pleaded guilty to an offence of assisting in the commission outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place, contrary to s 20 of the Misuse of Drugs Act 1971. The offence related to 33 kilos of cocaine which was seized by the Spanish police at a hotel in Madrid. Mr Doran was sentenced to nine years' imprisonment and Mr Parsons was sentenced to eight years' imprisonment.
- h* 4. On 30 April 1997 Mr Togher pleaded guilty to the same offence and was also sentenced to nine years' imprisonment. In addition, a confiscation order was made requiring Mr Doran to pay £2,091,084 and Mr Togher to pay £2,410,281. These sums were payable within five years. In default of payment, a sentence of ten years' imprisonment consecutive was imposed. Mr Doran and Mr Togher were also charged with other offences which had been tried separately. The offence to which they pleaded guilty therefore became known as the 'Madrid Indictment'. However, strictly speaking, there was only one indictment the counts in which had been ordered to be tried separately.

5. It is not disputed that the pleas of guilty of the three appellants were unequivocal and entered after they had each received legal advice. However, Mr Doran and Mr Parsons were given leave to appeal by Jackson J, and Mr Togher appeals following a reference to this court by the Criminal Cases Review Commission.

6. Mr Parsons appeals with the leave of the full court. He has already succeeded on an appeal against sentence. On 23 March 1999, this court (Roch LJ, Mitchell J, and Judge Colston QC) reduced Mr Parsons' sentence to seven years' imprisonment. Mr Parsons has already served that sentence.

7. Prior to pleading guilty to the Madrid indictment, on 19 March 1997 at the same court before the same judge, Judge Foley, Mr Doran and Mr Togher, together with three co-accused, were convicted of being knowingly concerned in a fraudulent evasion of the prohibition on importation of 309 kilos of cocaine, a class A controlled drug. This was on a retrial, which lasted some four months. This indictment became known as the 'Frugal Indictment'. 'Frugal' was the name of the boat, which had transported the drugs from the Caribbean to the Sussex coast where the drugs were seized. Mr Doran and Mr Togher were sentenced to 25 years' imprisonment on the Frugal indictment. The sentences imposed on the Madrid indictment were concurrent with those imposed on the Frugal indictment.

8. On their appeals the appellants are separately represented. They contend their convictions on the Madrid indictment are unsafe, because either the manner in which the prosecution was conducted was an abuse of process, or because at the time of their pleas of guilty, there was a failure to inform them and their legal advisers of information which would have significantly improved their prospects of successfully avoiding conviction if they had contested their guilt. The assumption being that if there had been disclosure, they would not have pleaded guilty. Mr Togher also relies on a number of additional grounds which are not relied on by the commission. We have considered these additional grounds and conclude they are manifestly totally lacking in any merit and would not justify leave to appeal.

9. Mr Doran and Mr Togher had given notice of appeal against their conviction on the Frugal indictment prior to their pleading guilty on the Madrid indictment. Their appeal was allowed by this court (Hutchison LJ, Ognall and Sullivan JJ) and on 2 November 1998 a retrial was ordered. On 6 July 1999, Turner J gave a judgment in which he ordered a stay of the prosecution of the retrial on the grounds that:

'The prosecution, viewed as a single entity, have, by means which are at least arguably unlawful, deprived the defence of its strategic ability to mount the challenge to the integrity of the prosecution case when looked at in the round.'

10. The appellants contend, and this has not been disputed, (in the words of Mr Lovell-Pank QC, who appears on behalf of Mr Doran) that it is only for case management reasons that the Madrid indictment was to be tried separately from the Frugal indictment and the decision of Turner J applies equally to the Madrid indictment. This being the position, the appellants argue before us that the Madrid indictment was therefore an indictment to which the appellants should not have been required to plead.

11. The appeal raises issues of considerable importance: (a) as to the test which this court should apply in determining whether an appeal should be allowed; and (b) as to the extent of the right of appeal after a plea of guilty.

12. *The legal issues*

- a 13. It is convenient to start by examining the case of *R v Chalkley*, *R v Jeffries* [1998] 2 All ER 155, [1998] QB 848. This is because the appellants recognise that the judgment of this court in that case constitutes an impediment to a successful outcome in their appeals. The background to the decision is not unlike the background to the present appeals. The appellants in that case had pleaded guilty.
- b In that case, as in this, there were covert tape recordings of conversations involving the appellants which it was alleged had been obtained unlawfully. There are, however, differences between the two cases. In that case, the prosecution intended to rely on the tape recordings as evidence, while in this case the position of the prosecution is that they would only rely on the tape recordings in rebuttal of evidence given by the defence. More significantly, the present appeal can be
- c distinguished from that case, because in this case the appellants had pleaded guilty from the outset and they now seek to go behind their pleas because of the stay ordered by Turner J of the Frugal indictment. In *R v Chalkley*, the appellants only pleaded guilty when the judge overruled the submission of the defendants that the tapes were inadmissible. In that case, the judge came to the conclusion
- d that the police had not acted in bad faith, but there had been breaches of the provisions of the Police and Criminal Evidence Act 1984 and/or of the ordinary common law and of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) in the seizure of one of the appellant's cars, in making a copy of a key to effect a trespass to an appellant's house, in the installation of a 'bugging' device and in making two clandestine visits to renew the device's
- e battery.

14. In his judgment on behalf of the court in *R v Chalkley*, Auld LJ considered the effect of the pleas of guilty. He succinctly, and with admirable clarity, analysed the previous authorities, including a judgment of mine in *R v Preston*
- f (1992) 95 Cr App R 355 at 381, where it was indicated that the court, after a plea of guilty, might be able to interfere where the plea of guilty was 'founded upon' a material irregularity. This Auld LJ described ([1998] 2 All ER 155 at 165, [1998] QB 848 at 860) as a broad approach in contrast to a narrower approach, according to which the court's intervention is confined, after a plea of guilty, to situations—

- g 'where, in the light of the admitted facts, the erroneous ruling left the defendant at trial with no legal basis for a verdict of not guilty. Put the other way round on appeal when the error is corrected, it is "that upon the admitted facts" the appellant "could not in law have been convicted of the offence charged". That is how the test was seen in the early part of this
- h century by Avory J in *R v Forde* ([1923] 2 KB 400 at 403–404, [1923] All ER Rep 477 at 479).'

15. Having examined the authorities, Auld LJ concluded that the narrower approach was correct. He summarised the position in the following terms:

- j 'In appeals against conviction following a plea of guilty, the somewhat mechanical test of whether a change of plea to guilty was "founded upon" a particular feature of the trial, namely a wrong direction of law or material irregularity, gives way to the more direct question whether, given the circumstances prompting the change of plea to guilty, the conviction is unsafe. However, even when put that way, the good sense of preferring the narrower interpretation, which we have identified, of the expression

"founded upon" lingers on. Thus, a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstances would normally be regarded as an acknowledgement of the truth of the facts constituting the offence charged. We qualify the above proposition with the word "normally", because there remains the basic rule that the court should quash as unsafe a conviction where the plea was mistaken or without intention to admit guilt of the offence charged.' (See [1998] 2 All ER 155 at 169, [1998] QB 848 at 864.)

16. In adopting the narrower approach to the court's power to intervene, Auld LJ was influenced by the effects of the amendments to s 2 of the Criminal Appeal Act 1968 made by the Criminal Appeal Act 1995. Prior to the amendment, s 2(1) of the 1968 Act provided that the Court of Appeal should allow an appeal against conviction if they thought the conviction was: (a) 'unsafe or unsatisfactory', (b) that the judgment of the court of trial should be set aside on the ground of 'a wrong decision of any question of law', or (c) 'that there had been a material irregularity in the course of the trial'. This was subject to the proviso that the court could dismiss the appeal if they were satisfied that no miscarriage of justice had occurred. The effect of the substituted subsection was to confine the grounds of appeal to situations where the conviction was 'unsafe'.

17. The appellants contend that this amendment did not alter the situation. It merely provides a comprehensive test of lack of safety which applies across the board, and lack of safety is a sufficiently wide test to cover all the situations previously covered by s 2 in its unamended form. The court in *R v Chalkley* rejected this approach. They indicated clearly ([1998] 2 All ER 155 at 174, [1998] QB 848 at 869–870) that after the amendment, the court could not, for example, interfere in circumstances such as those that existed in *R v Blackledge* [1996] 1 Cr App R 326. In that case, the defendants had pleaded not guilty at a preliminary hearing as it was their case that in practice there was no prohibition on the export of goods to Iraq, with which they were charged. This was because the government had decided to turn a blind eye to such exports. The defendants sought a stay of prosecution on the grounds that the proceedings were an abuse of process because the prosecution had failed to produce relevant witnesses and to disclose relevant documents. The application was rejected, and having received hints of sympathetic consideration, and a suspended sentence, the appellants changed their pleas to guilty. The Court of Appeal held that there had been a failure of disclosure on the part of the prosecution which was a material irregularity and as the pleas of guilty were 'founded upon' the material irregularity, the conviction was unsafe and the appeal would be allowed.

18. Auld LJ, in support of his approach, relied on the views expressed in *Archbold's Criminal Pleading, Evidence and Practice* (1997 edn) para 7-46a. These were that there could be a material irregularity at a trial, but if there was no doubt as to the defendant's guilt, the irregularities of procedure could be ignored. While adopting a robust approach in *R v Chalkley*, Auld LJ ([1998] 2 All ER 155 at 173, [1998] QB 848 at 868) recognised that this was 'subject to what the court will make of art 6(1) of the European Convention on Human Rights, entitling everyone charged with a criminal offence to a fair trial, when it becomes part of our

- a domestic law'. Accordingly, in that case the appellants having by their pleas admitted guilt, their convictions were not unsafe. The court in *R v Chalkley* also made it clear that, in their view, the determination of the fairness or otherwise of admitting evidence under s 78 of the 1984 Act was distinct from deciding whether to stay criminal proceedings as an abuse of process. The appeal was therefore dismissed in that case.
- b 19. *R v Chalkley* could be said to be distinguishable from this case. This is because here the appellants contend that in relation to the separate proceedings, Turner J had come to the conclusion that there had been an abuse of process, which justified a stay of those proceedings. While the appellants accept that those proceedings involved a different trial to that from which the present appeal arises, they say this is an unreal distinction since the two sets of proceedings were based
- c in general terms on very similar evidence. The appellants argue that if Turner J was right to stay the other proceedings as an abuse of process, then these proceedings must be an abuse of process as well. The appellants point out that the conduct which constituted the abuse had already occurred when they pleaded guilty. If they had been aware of this conduct prior to their pleas they
- d would not have pleaded and would have made an application for a stay in these proceedings as well. If that application had also been successful, there would have been no need for them to plead guilty as they did. Whilst, therefore, there are undoubted distinctions between *R v Chalkley* and this case, the position remains that the approach adopted to the application of the test of lack of safety in *R v Chalkley* is a substantial impediment to the appellants' success on this appeal.
- e 20. The approach of the court in *R v Chalkley* has to be compared with the approach of this court in the later case of *R v Mullen* [2000] QB 520, [1999] 3 WLR 777. The facts in *R v Mullen* were that the appellant's deportation to this country had been obtained in disregard of available extradition procedures. He appealed on the
- f ground that no trial should have taken place because of the prosecution's abuse of process prior to the trial. The case did not involve a plea of guilty. It involved, rather, a failure to make proper disclosure of the circumstances which made the appellant's deportation to this country unlawful. It was a case where the defence were not able to make an application for a stay at the outset of the trial because they did not then have available to them the information which would enable this to be done.
- g 21. The importance of the case for present purposes is that the court came to the conclusion that the meaning of 'unsafe' in s 2 of the 1968 Act, as amended, was ambiguous, so it was a case where the court was permitted to refer to *Hansard*, from which the court concluded that it was apparent that the amended form of s 2 was intended to restate the practice of the Court of Appeal prior to the
- h amendment. Accordingly, the meaning was broad enough to permit the quashing of the conviction on the ground that it was unsafe because of abuse of process prior to trial. In particular, a conviction could be unsafe even if there was no doubt that the defendant had committed the offence of which he had been found guilty.
- j 22. In view of the facts on which the appeal in *R v Mullen* was based, in giving the judgment of the court, Rose LJ examined the authorities starting with decisions relating to abuse of process. He referred to the decision of the House of Lords in *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42. That decision is the clearest authority for the proposition that if a defendant is brought within our jurisdiction in disregard of proper procedures to which our own 'police, prosecuting or other executive authorities have been a

knowing party' this constitutes an abuse of process (see [1993] 3 All ER 138 at 151, 155, [1994] 1 AC 42 at 62, 67). Rose LJ referred to the speech of Lord Lowry where he said:

'... the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused.' (See [1993] 3 All ER 138 at 162, [1994] 1 AC 42 at 76.)

23. Rose LJ also referred to the decision of the House of Lords in *R v Latif, R v Shahzad* [1996] 1 All ER 353, [1996] 1 WLR 104 where, Lord Steyn said:

'*Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.' (See [1996] 1 All ER 353 at 361, [1996] 1 WLR 104 at 112–113.)

24. Rose LJ then went on to consider the meaning of 'unsafe'. He referred to the article of Sir John Smith QC 'Appeals against conviction' [1995] Crim LR 920, which Lord Bingham CJ described in *R v Graham* [1997] 1 Cr App R 302 at 308, as being a 'penetrating analysis'. Rose LJ summarised the effect of that article by saying that the amendment to s 2 of the 1968 Act was intended to codify the previous provisions and that parliamentary debates provide clear evidence that the new provision is intended to re-state the prior practice. The effect of the amendment, in Sir John's words, is simply to concentrate the mind on the real issue of every appeal from the outset.

25. When examining the facts in *R v Mullen*, Rose LJ ([2000] QB 520 at 536, [1999] 3 WLR 777 at 790) came to the important conclusion that 'the stark fact remains that the appellant was denied any opportunity to challenge deportation under the Act by judicial review ...' He then went on to emphasise the distinction between abuse of process and all other cases where an exercise of judicial discretion is called for. He pointed out that:

'It arises not from the relationship between the prosecution and the defendant, but from the relationship between the prosecution and the court. It arises from the court's need to exercise control over executive involvement in the whole prosecution process, not limited to the trial itself ...' (See [2000] QB 520 at 537, [1999] 3 WLR 777 at 791.)

26. Rose LJ then summarised his conclusion with regard to that part of the case by saying:

a 'Having regard to these considerations, namely the combined effect of lack of disclosure at trial and the special nature of *Bennett*-type abuse, we do not consider that failure to seek the trial judge's ruling on abuse is fatal to the appeal.'

b 27. Rose LJ then turned to consider the case of *R v Chalkley* and pointed out that *Bennett*'s case was not referred to. He then mentioned a later decision of this court in which Auld LJ presided, namely *R v MacDonald* [1998] Crim LR 808. Auld LJ indicated in that case:

c 'It may be that a conviction in a trial which should never have taken place is to be regarded as unsafe for that reason. It may be that, despite the statutory basis of the court's jurisdiction, it has also some inherent or ancillary jurisdiction basis for intervening to mark abuse of process by quashing a conviction when it considers that the court below should have stayed the proceeding. Or it may be that the recent amendment to the 1968 Act has removed the supervisory role of this court over abuse of criminal process where the affront to justice, however outrageous, has not so prejudiced the defendant

d in his trial as to render his conviction unsafe. All that is for decision by another court in an appropriate case.'

28. In view of these observations by Auld LJ, in *R v Mullen*, this court commented that *R v Chalkley* could not be regarded as being the final word on the subject.

e 29, 30. At the end of his judgment ([2000] QB 520 at 540, [1999] 3 WLR 777 at 793–794), Rose LJ summarised the views of the court in these terms:

f '... for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed the *Oxford English Dictionary* gives the legal meaning of "unsafe" as "likely to constitute a miscarriage of justice." Sir John Smith's article does not deal with "unsafe" in relation to abuse ... But, for the reasons which we have given, we agree with his 1995 conclusion that "unsafe" bears a broad meaning and one which is apt to embrace abuse of process of the *Bennett* or any other kind.'

g 31. The broad approach laid down in *R v Mullen* has since been adopted in other cases. However, so has the approach in *R v Chalkley*. Before examining the domestic decisions further, it is helpful to refer to the case of *Condron v UK* (2000) 8 BHRC 290. The applicants in that case contended that they had not been granted a fair trial, inter alia, because the jury had not been given a satisfactory

h direction as to when it is appropriate for a jury to draw an adverse inference as to an accused's credibility under s 34 of the Criminal Justice and Public Order Act 1994 on the ground that he failed to mention any fact relied on in his defence. There had been a previous appeal to the Court of Appeal relying on the same ground, which appeal had been dismissed. The European Court of Human Rights referred to *R v Chalkley* and the approach which this court adopted to the question

i of the safety of a conviction in that case. The European Court then stated (at 306–307):

'65. The court must also have regard to the fact that the Court of Appeal was concerned with the safety of the applicants' conviction, not whether they had in the circumstances received a fair trial. In the court's opinion, the question whether or not the rights of the defence guaranteed to an accused

under art 6 of the convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness. In *Edwards v UK* (1992) 15 EHRR 417 (para 35) the Court of Appeal considered in detail the impact of the information withheld from the defence. It was able to assess for itself the probative value of that information in the light of the arguments of the defence which was by that stage in possession of the information and to determine whether the availability of that information at trial would have disturbed the jury's verdict ... Accordingly, the rights of the defence were secured by the review conducted on appeal. 66. However, in the case at issue it was the function of the jury, properly directed, to decide whether or not to draw an adverse inference from the applicants' silence. Section 34 of the 1994 Act specifically entrusted this task to the jury as part of a legislative scheme designed to confine the use which can be made of an accused's silence at his trial. In the circumstances the jury was not properly directed and the imperfection in the direction could not be remedied on appeal. Any other conclusion would be at variance with the fundamental importance of the right to silence, a right which, as observed earlier, lies at the heart of the notion of a fair procedure guaranteed by art 6. On that account the court concludes that the applicants did not receive a fair hearing within the meaning of art 6(1) of the convention.'

32. Now that the convention is part of our domestic law, it would be most unfortunate if the approach identified by the European Court and the approach of this court continued to differ unless this is inevitable because of provisions contained in this country's legislation or the state of our case law.

33. As a matter of first principles, we do not consider that either the use of the word 'unsafe' in the legislation or the previous cases compel an approach which does not correspond with that of the European Court. The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance. The common law approach has been enhanced by legislation and in particular, the 1984 Act and the codes of practice made thereunder (ss 66 and 67 of that Act). Fairness in both jurisdictions is not an abstract concept. Fairness is not concerned with technicalities. If a defendant has not had a fair trial and as a result of that injustice has occurred, it would be extremely unsatisfactory if the powers of this court were not wide enough to rectify that injustice. If, contrary to our expectations, that has not previously been the position, then it seems to us that this is a defect in our procedures which is now capable of rectification under s 3 of the Human Rights Act 1998. The 1998 Act requires primary legislation and subordinate legislation to be read and given effect to in a way which is compatible with convention rights. Section 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a convention right and a court is a public authority for the purposes of s 6 (s 6(3)). The 1998 Act emphasises the desirability of taking a broader rather than a narrower approach as to what constitutes an unsafe conviction. In *R v Davis* [2000] Crim LR 584, this court acknowledged that there could still be a distinction between its approach and the approach of the European Court. However, in the later case of *R v Francom* [2000] Crim LR 1018, this court indicated, in a judgment which I gave on behalf of the court, that we would expect, in the situation there being considered, that the approach of this court applying the test of lack of safety would produce the same result as the

a approach of the European Court applying the test of lack of fairness. We would suggest that, even if there was previously a difference of approach, that since the 1998 Act came into force, the circumstances in which there will be room for a different result before this court and before the European Court because of unfairness based on the respective tests we employ will be rare indeed. Applying the broader approach identified by Rose LJ, we consider that if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe. For this reason we endorse the approach of Rose LJ in *R v Mullen* and prefer the broader approach to the narrower approach supported by Auld LJ. Certainly, if it would be right to stop a prosecution on the basis that it was an abuse of process, this court would be most unlikely to conclude that if there was a conviction despite this fact, the conviction should not be set aside.

c 34. This brings into focus the particular feature of these appeals, namely the pleas of guilty that were entered by the appellants. It was strongly argued on their behalf that if Turner J's decision was right, the same decision would have been reached in their cases on the Madrid indictment as was reached on the Frugal indictment. They were not aware of the matters upon which a stay of the other indictment was ordered until after they pleaded guilty. This meant they were not in a position to make an application to stay the Madrid indictment.

d 35. Here it is relevant to refer to the decision in *R v Rajcoomar* [1999] Crim LR 728, of which we have a transcript dated 18 February 1999. In that case, Rajcoomar was alleging abuse of process, entrapment and unfairness. However, the judge investigated the allegations fully, including holding a voir dire. He concluded that there was no unfairness and no abuse of process. Rajcoomar then pleaded guilty. On his appeal, Richards J, in giving the judgment of the court, referred to *R v Chalkley* and cited one part of a passage from the judgment of Auld LJ ([1998] 2 All ER 155 at 169, [1998] QB 848 at 864) which is excerpted in para 15 above.

e 36. We would not wish to question this passage in the judgment of Auld LJ. However, it cannot be applied to the situation which exists here, where the defendants were unaware of the material matters alleged to amount to an abuse of process. If they could establish an abuse, then this court would give very serious consideration to whether justice required the conviction to be set aside. We would, however, emphasise that the circumstances where it can be said that the proceedings constitute an abuse of process are closely confined. The reason for this is that the majority of improprieties in connection with bringing proceedings can be satisfactorily dealt with by the court exercising its power of control over the proceedings. It has to be a situation where it would be inconsistent with the due administration of justice to allow the pleas of guilty to stand.

h 37. *The judgment of Turner J*

j 38. We now turn to the judgment of Turner J. The first section of the judgment deals with the question of delay. Here the judge rejected the application for a stay, because the Court of Appeal had already dealt with the question of delay when they ordered a retrial.

39. Turner J then turned to the allegation of abuse of process. He pointed out that the defendants only advanced this argument on the second day of the hearing before him. He 'condensed' the submissions into the proposition that material had been made available by the prosecution to the defence teams, but this was not until after the order for retrial was made by the Court of Appeal. The material did not relate to any issue of fact in the trial which had taken place—

'but it was submitted, was so intricately bound up with matters that went essentially to the issue of the credits of the extensive surveillance and investigation which lay behind the prosecution, that it was capable of throwing into doubt its very integrity.'

40. The judge records that the submissions were advanced on the basis that—

'before, during and after the trial, and continuing up to date, there had been a serious misleading of all the defence teams by not only Customs and Excise but also the Crown prosecution team (or at least individual members of it) and even by the trial judge himself.'

41. Turner J explains that the non-disclosure related to the generation of 57 tape recordings of conversations of certain of the defendants covertly recorded by Customs and Excise in the course of their surveillance in connection with the facts which were the subject of the Madrid proceedings. The tapes were not made available to the defence until mid-way through the second Frugal trial.

42. After the tapes had been revealed the judge records the defence made an application to be permitted to see the guidelines issued by Customs and Excise which cover the use of electronic evidence gathering equipment. The defence required the guidelines in order to ascertain whether the appropriate internal authority had been granted for the surveillance. In addition the defence wanted to investigate whether or not the hotels at which the surveillance operations were conducted had given permission for those operations. As Turner J stated:

'In short, the defence claimed to be entitled to ascertain the legality of those activities of Customs and Excise, with a view to showing that they had been illegally conducted, to the knowledge of responsible officials conducting "Operation Steeler" [the name given to the surveillance operation], whose overall credit could thereby be impugned.'

43. Turner J described the action which should have been taken if authority had been properly given in accordance with the guidelines. He pointed out that if the guidelines are not observed there is an unchecked exercise of executive power which infringes the liberty of the person.

44. As to the hotel where the surveillance had taken place, the judge records that there was no written authorisation produced emanating from the hotels. The only written documents relied upon were letters written by Customs and Excise to the hotels thanking them for their assistance. These 'letters of gratitude' did not refer to the use of covert listening and recording equipment.

45. Basing himself upon the material which was placed before him, Turner J concluded that there was no evidence that any valid authorisation was ever issued and no evidence that the Customs and Excise obtained any permission for electronic surveillance equipment to be deployed and for surveillance to take place at the various hotels. (In fact this overstates the position since it was always the prosecution's case that oral permission had been given.)

46. The judge then referred to the various public interest immunity applications which were heard by Judge Foley. Customs and Excise were not then represented by the counsel who appears on their behalf on this appeal. In particular, he referred to submissions made by junior counsel on behalf of the prosecution, the effect of which Turner J could justifiably conclude indicated that counsel was in fact giving assurances to Judge Foley both at hearings at which the defendants were and were not represented that permission had been obtained orally although

a there was no written confirmation. In addition, the same counsel assured the judge that the appropriate authorisation required by the Home Office guidelines had been obtained by Customs and Excise.

b 47. In addition, Turner J referred to Judge Foley's indication that he had been provided 'with the documentation which authorises these tapes' and the same junior counsel's unsupported confirmation that this was right. It was, as Turner J stated, 'highly unfortunate' that this should happen. Turner J added: 'The defence were thus deprived of a point which they were entitled to make as part of a broad attack on the character of the conduct of the investigation.'

c 48. The ability to attack the prosecution was particularly important to Mr Togher because it was his case that Customs and Excise had framed him by planting damning evidence upon him. He said they did so, for example, by inserting Caribbean map co-ordinates in his personal organiser.

d 49. This point was also important to Mr Doran's case. He wished to attack the credit of a customs officer named Beer 'who was the officer in the case'. It was her evidence (disputed by Mr Doran) that she had seen Mr Doran at the Tate Gallery in London in the company of a man whose presence would be inconsistent with Mr Doran's innocent explanation as to why he was there.

50. However, the officer's evidence of identification was already open to challenge because it was clear that it had 'improved' in the course of the prosecution.

e 51. Turner J had before him a memorandum from the junior counsel who had given the assurances to the judge. In that memorandum, counsel took personal responsibility for the deficiencies which had occurred. However, as Turner J pointed out, counsel was not in a position to explain why counsel had only been provided with the Home Office and not the Customs and Excise guidelines. Furthermore, as Turner J pointed out, the counsel gave no explanation for his failure to appreciate that there was no proper documentation of the authorisation.

52. Based on this Turner J stated:

f '... the only reasonable inference is that he was most imperfectly instructed in regard to a matter which, so far as the prosecution were concerned, was not just sensitive in the terms of immunity, but also potentially embarrassing to the integrity of their case.'

g 53. Turner J then referred to a memorandum signed for counsel of the new prosecuting team. This states: 'It is not and never has been the prosecution case that any of the hotels gave any written authorisation for surveillance by Customs and Excise.'

54. To this the judge says:

h 'This is in direct conflict with pronouncements made by the judge in open court and not controverted by or on behalf of any member of the team of Crown counsel. It may be stretching the limits of credulity to accept that no person within the team of those instructing counsel was aware, or was subsequently made aware, of the striking and uncorrected inaccuracy of the judge's pronouncement. If so, it demonstrates, at first reading, a degree of incompetence in regard to such an important and delicate area of modern criminal process that is hard to comprehend.'

j 55. Having said that the judge rejected the suggestion that the grave failings meant that counsel and the judge and Customs and Excise were involved in an unlawful conspiracy. He indicated that he accepted the truth of what counsel had written and the belief expressed by the judge. He regarded the

conspiracy allegation as wild and far-fetched. Turner J then went on to say that the officers who were in charge at the operational level and their superiors had the responsibility for honest and complete instructions being provided to their legal team. He then added: 'On the material placed before me, there has to be serious doubt that either of them or their superiors complied with the obligation of honesty and integrity, by which they were and are bound.'

56. Finally, with regard to the facts Turner J referred to evidence of an identification by another officer called Dick. The judge says, he was informed, without contradiction, that Dick could not in fact have made the identification.

57. Turner J then referred to the relevant authorities on abuse of process and relied particularly upon the decision in *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42.

58. Having done so, he concluded that:

'... by abuse of executive authority, the prosecution, viewed as a single entity, have, by means which are at the least arguably unlawful, deprived the defence of its strategic ability to mount the challenge to the integrity of the prosecution case when looked at in the round.'

59. Turner J added:

'If this trial were to be allowed to continue on the state of present disclosure, the defence would, in my judgment, have withheld from it the opportunity properly and effectively to challenge the integrity of the three witnesses whom I have identified, but there may well be others. In this situation, where challenge has been made to the legality of conduct and the response has been the self serving assertion "I was authorised", it is not sufficient, without some explanation which has not been forthcoming, that there has been no disclosure by way of statement or document to verify that authority has in fact been given, or at least, properly given ... What has happened has had a significant impact on the ability of the defendants properly to defend themselves, and to that extent, and as a matter of probability, they have been seriously prejudiced in the conduct of their defence. The prosecution witnesses, whom I have identified, as well as those others who may exist, have been accorded an unfair advantage by the protection of their credibility and integrity which the conduct in withholding disclosure has achieved. These are not matters which by proper judicial control of the trial process can be mitigated, let alone avoided. This, in my judgment, is one of the "cases few" referred to by Lord Lowry (*Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 at 163, [1994] 1 AC 42 at 77) ... It is in these circumstances that I hold that no retrial can be fairly conducted, and further that it would be unfair that the defendants should be retried.'

60. *Additional evidence*

61. During the hearing of these proceedings, the prosecution sought leave to adduce fresh evidence. It was contended that the effect of that evidence was to show that although the guidance laid down by Customs and Excise at the relevant time had not been strictly complied with, everything that happened has been authorised informally both by Customs and Excise and by the hotels at which the surveillance took place. Leave was not granted for this evidence to be given. Surprisingly, in view of the history, the application bore all the hallmarks of being prepared at the last minute. It was not in the correct form and was made late. In any event the evidence should have been adduced before Turner J. We did,

a however, refer to the report of the inquiry into the prosecution of these proceedings by Gerald Butler QC. We used the report only as background material. We did not rely on the conclusions to which he came. Nor did we rely on the evidence he received since the appellants were not involved in the inquiry.

62. Conclusions

b 63. The present appeals are not appeals of the decision of Turner J and we do not suggest that he was not entitled to come to the conclusions which he did. However, in order to decide the present proceedings, it is necessary to form our own judgment as to what should have been the result of the application before Turner J. Having examined very carefully the reasoning of this very experienced judge, it is the view of this court that failures on the part of the prosecution did not amount to the category of misconduct which has to exist before it is right to stay a prosecution.

c 64. This court does not condone what happened at the previous trial. However, the judge was being asked to stop a retrial ordered by this court. As Turner J recognised, on the authorities which he cited it is only in very exceptional circumstances that it is right to order a stay. The matters relied upon before Turner J could, in our judgment, be dealt with by the trial judge on the retrial by taking the action which was appropriate. It was undesirable for Turner J to seek to decide the issues on the basis of submissions of counsel and written material. Evidence from the officers who were in charge of the prosecution was required before adverse comments about the motivation of the prosecution could be made, counsel having accepted responsibility for what had happened. That evidence was not tendered to Turner J. However, in fairness to the prosecution, it has to be said that as the application was being made primarily on the ground of delay, they could reasonably assume the application was not one on which oral evidence would be required. Oral evidence would more appropriately be given at the retrial on a voir dire. Oral evidence was essential before a proper assessment of an alleged improper motive on the part of the prosecution could be made. Without hearing that evidence on the material before Turner J we do not consider it would be right to do more than say that there had been regrettable muddle and confusion and incompetence on the part of the prosecution and shortcomings on the part of the trial judge. In our opinion, it could not be said at that stage that a fair trial would not be possible. The defendants had not lost the ability 'properly to defend themselves' at a retrial when they would be well aware of the failures on the part of the prosecution. The failures, as Turner J acknowledged, went only to the credit of the prosecution witnesses. The defendants could, if they were prepared to take the possible consequences of so doing, exploit the earlier non-disclosure to challenge the bona fides of the officers in charge of the prosecution or the prosecution 'viewed as a single entity'.

g 65. The shortcomings on the part of the prosecution are not of the category of misconduct which would justify interfering with the defendants' freely entered pleas of guilty. We see this case as being in a wholly different category from the exceptional case Lord Lowry was considering in his speech in *Bennett's case*. j When the appellants pleaded guilty they were not aware of the matters relied upon before Turner J for obtaining a stay of the retrial, but they were aware that they were appealing against their conviction. They therefore should have appreciated that the appeal against their conviction might succeed. If this had happened they would still be bound by their pleas of guilty. They were never ignorant of any evidence which went directly to their innocence or guilt. They were only unaware

of material which could, but for their pleas, have been used in order to attack the credibility of the prosecution witnesses. Ignorance of this nature does not justify reopening their pleas of guilty. While there was an irregularity in their trial on the Frugal indictment, the appellants' pleas to the Madrid indictment were not 'founded upon' and were independent of that irregularity. a

66. It is for these reasons that we dismiss the appeals against conviction.

67. We have already given our reasons for dismissing the appeals against sentence. Subsequent to our doing so, further representations were made on behalf of Mr Doran and Mr Togher. It is submitted that the fact that they spent a substantial period on bail means that the dismissal of their appeals against sentence will involve a harsher penalty than would have been the case if they had not been granted bail. In particular, reliance is placed upon the fact that because these appellants were on bail for longer than anticipated they lost the opportunity of being released on parole. However, the appellants having decided to seek and to take advantage of bail, they are not entitled to suggest that they should have perfectly appropriate sentences reduced because of the adverse consequences which inevitably flow from the fact that they were on bail. They made their choice and they must stand by it. There is nothing in the subsequent submissions on sentence which would justify our altering our previous decision. b
c
d

68. As to the appeals against the confiscation orders which were made, we have also already given our decision. However, here the appellants rely on the recent decision of the High Court of Justiciary in *McIntosh*, *Petitioner* 2001 JC 78^c. There are other cases now before this court raising the same point. We understand the decision is to be the subject of an appeal to the Privy Council. If this is the case, then if, when the outcome is known, it is appropriate to do so, we would be prepared to consider allowing our decision as to confiscation to be reopened. Subject to this, our decision on confiscation stands. e

Appeals dismissed. f

Kate O'Hanlon Barrister.

^c Editor's Note: the Privy Council allowed the appeal in this case on 5 February 2001. See *McIntosh v Lord Advocate* [2001] UKPC D1, [2001] 2 All ER 638, [2001] 3 WLR 107.

Practice Note

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR

4 JULY 2001

Court of Appeal – Practice – Civil Division – Hear-by dates and listing windows.

LORD PHILLIPS OF WORTH MATRAVERS MR gave the following direction at the sitting of the court.

1. The hear-by dates for different classes of appeal were last revised and published in the Court of Appeal's consolidated *Practice Direction* [1999] 2 All ER 490, [1999] 1 WLR 1027 which has since been superseded by CPR Pt 52 and its supplemental Practice Direction. In the review of the legal year 1999–2000 it was announced that the hear-by dates for certain appeals, which had previously stood at 15 months would, from November 2000, be reduced to 12 months. The table overleaf sets out further reductions in hear-by dates reflecting the very substantial progress made by the court in improving the service it offers litigants. The longest hear-by date will now be 10 months and most considerably less. These dates will apply to all appeals filed on or after 1 October 2001.

2. In the exercise of its case management responsibilities the court will strive to ensure that appeals are generally heard within their listing windows, many of which have now been enlarged. Applications for an expedited hearing will continue to be determined by a single Lord Justice or the Master in accordance with the principles set out in *Unilever plc v Chefaro Proprietaries Ltd* [1995] 1 All ER 587, [1995] 1 WLR 243. Applications for permission for a hearing date to be fixed beyond a hear-by date will likewise be determined by a single Lord Justice or the Master, but will only be granted only for the most compelling reasons.

Kate O'Hanlon Barrister.

TYPE OF APPEAL		Listing Window	
		Start Window for Appeal	Hear-By Date, End Window for Appeal
Family	Child cases	3 mths	4 mths
	Financial and other	6 mths	9 mths
Administrative Court Cases	Immigration Appeals, Interlocutory and Education appeals	4 mths	6 mths
	Other Administrative Court final orders	6 mths	8 mths
High Court	CPR Pt 24	4 mths	6 mths
	Other interlocutory orders	4 mths	8 mths
	Bankruptcy and Directors' Disqualification cases	4 mths	6 mths
	Preliminary issues	4 mths	6 mths
	Final orders	6 mths	10 mths
	Possession	4 mths	6 mths
County Court	Interlocutory orders	4 mths	8 mths
	Possession	4 mths	6 mths
	Preliminary issues	4 mths	6 mths
	Final orders	6 mths	10 mths
Tribunals	Other than Immigration & Social Security appeals	6 mths	10 mths
	Social Security Appeals	6 mths	9 mths

**R v Secretary of State for the Home
Department, ex parte Gunn**

**R (on the application of Kelly) v Secretary
of State for the Home Department**

**R (on the application of Khan) v Secretary of
State for the Home Department**

[2001] EWCA Civ 891

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS MR, PILL AND KEENE LJJ

16 MAY, 14 JUNE 2001

Community legal service funding – Unassisted person's costs out of community legal service fund – Jurisdiction – Whether proper for trial court to determine in principle whether costs order should be made against commission – Whether court having jurisdiction to make costs order against commission in favour of other body financed from public funds – Whether it could be just and equitable to make order against commission in favour of government department – Access to Justice Act 1999 – Community Legal Service (Costs) Regulations 2000 – Community Legal Service (Cost Protection) Regulations 2000, reg 5(3).

In applications by the Legal Services Commission (the commission) (the successor to the Legal Aid Board), the Court of Appeal was requested to consider the lawfulness of orders for costs adverse to the commission, made in three cases where funded litigants had brought unsuccessful proceedings for judicial review against the Secretary of State for the Home Department. In all three cases, applications for permission to apply for judicial review had been refused, and fresh applications had then been made to the Court of Appeal, either in the form of a renewed application for judicial review or an application for permission to appeal against the decision of the court below. Those applications were heard after 1 April 2000, the day on which the legal aid scheme was replaced by community legal service funding under Pt I of the Access to Justice Act 1999, and a new regulatory regime had come into force under the Community Legal Service (Costs) Regulations 2000 (the costs regulations) and the Community Legal Service (Cost Protection) Regulations 2000 (the cost protection regulations). In each case, the application was refused, costs orders were made against the applicant and provision was made for the commission to pay the costs of the Court of Appeal hearing on the grounds that it was 'just and equitable' for it to do so. Those orders were consistent with the practice, both in the Court of Appeal and courts of first instance, that the court hearing the substantive application would direct, where appropriate, that costs were to be awarded against the commission. However, under reg 5(3)^a of the cost protection regulations, the costs judge or district judge had to be satisfied that it was just and equitable that provision for costs should be made 'out of public funds' and, in respect of proceedings at first

^a Regulation 5 is set out at [16], below

instance, that the non-funded party would suffer severe financial hardship unless the order was made. The Court of Appeal therefore considered what role, if any, the court trying the substantive dispute had in determining whether an order for costs should be made against the commission. In particular, it considered the Secretary of State's submission that it was proper for the court hearing the substance of the matter to continue to fulfil the role of determining whether, in principle, an order for costs should be made against the commission. The court was also required to consider (i) whether there was jurisdiction to make an order for costs against the commission in favour of a body, such as a government department, that was financed from public funds, and (ii) the principles governing the test of whether it was 'just and equitable' that costs should be paid out of public funds. The commission contended that there was no such jurisdiction, submitting that it was implicit in reg 5(3) of the cost protection regulations that an order could only be made for the purpose of transferring the burden of legal costs from a privately funded litigant to public funds. Alternatively, it contended that justice and equity did not require the transfer of money from public funds held by the commission to public funds held by a government department, and that, in any event, it would not normally be appropriate to make a costs order against the commission where, as in the instant cases, the Secretary of State had chosen to appear on an application even though his attendance was not required by the CPR.

Held – (1) The new regulatory scheme was not compatible with the current practices of the court. The function of deciding whether or not a costs order could and should be made against the commission was now expressly assigned to the costs judge or district judge. He could not make such an order unless and until the prescribed formalities had been completed. It was not open to the trial court to rule that it was just and equitable to make the order or to direct that the order be made before the prescribed formalities had been completed. Regulation 9(6)^b of the costs regulations permitted the trial court, when making a costs order, to make findings of fact relevant to the determination of the amount to be paid by the client. It was also open to the trial court to make any finding in relation to the conduct of the parties or facts which had emerged in the course of the proceedings which had relevance to the task to be performed by the costs judge or district judge. Beyond that the trial court should not go. It followed that, in the instant cases, the court should not have usurped the function of the costs judge in deciding that it was just and equitable to make a costs order against the commission and to direct that such an order be made. That practice should no longer be followed, whether in the county court, the High Court, or the Court of Appeal (see [34], below).

(2) There was jurisdiction to make an order against the commission in favour of a public body, even if that body was a government department. The use of the expression 'out of public funds' in reg 5(3)(d) of the cost protection regulations did not, on the basis that costs incurred by the Secretary of State already came out of public funds, remove jurisdiction to make an order against the commission in his favour. The 'funds' contemplated by reg 5(1) and (2) were the funds administered by the commission. In reg 2^c, the expressions 'funded proceedings', 'funded services' and 'non-funded party' clearly predicated commission funding and the expression 'public funds' in reg 5(3)(d) should also be read as referring to the

^b Regulation 9 is set out at [14], below

a funds of the commission. Moreover, jurisdiction under earlier statutes to make an order in favour of a public body had been assumed by the court, and no change in legislative intent could be detected in that respect (see [38], [40], below).

(3) When an application was made to a costs judge for costs against the commission following a decision by the Court of Appeal in favour of a non-funded party, the judge should proceed on the basis that it was 'just and equitable' that the commission should stand behind its 'client' unless he or she was aware of facts which rendered that result unjust or inequitable. In stating that conclusion, the court was not encouraging government departments to make applications against the commission on renewed applications for judicial review or, indeed, in other cases. There was force in the argument that it would not usually be sensible to do so. However, the costs judge or district judge did have power to accede to an application for costs against the commission made by a government department. Moreover, the question whether it would be appropriate to make an order against the commission where the Secretary of State had attended a hearing even though he was not required to do so by the CPR would normally depend upon whether or not it was appropriate to make an order for costs against the client. In the instant cases, the court had concluded that it was, and there was no basis for disturbing that conclusion. However, for the reasons given, the order made in each case went beyond the powers of the court under the current regulations (see [50]–[52], below); *Re O (a minor) (legal aid costs)* [1997] 1 FCR 159 applied.

Notes

e For the Legal Services Commission, see Supp to 27(2) *Halsbury's Laws* (4th edn reissue) para 1866A.

For the Access to Justice Act 1999, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1483.

f For the Community Legal Service (Costs) Regulations 2000, reg 9, see 11 *Halsbury's Statutory Instruments* (2000 issue) 20.

For the Community Legal Service (Cost Protection) Regulations 2000, reg 5, see 11 *Halsbury's Statutory Instruments* (2000 issue) 49.

Cases referred to in judgment

Maynard v Osmond (No 2) [1979] 1 All ER 483, [1979] 1 WLR 31, CA.

g *O (a minor) (legal aid costs)*, *Re* [1997] 1 FCR 159, CA.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

R v Greenwich London BC, ex p Lovelace (No 2), *R v Greenwich London BC, ex p Fay* [1992] 1 All ER 679, [1992] QB 155, [1991] 3 WLR 1015, CA.

h Cases also cited or referred to in skeleton arguments

Aiden Shipping Co Ltd v Interbulk Ltd, *Interbulk Ltd v ICCO International Corn Co NV, The Vimeira (No 2)* [1986] 2 All ER 409, [1986] AC 965, HL.

General Mediterranean Holdings SA v Patel [1999] 3 All ER 673, [2000] 1 WLR 272.

j *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 3 All ER 384, [1972] 1 WLR 1213.

c Regulation 2, so far as material, provides: '... "funded proceedings" means proceedings ... in relation to which the client receives funded services ... "funded services" means services which are provided directly for a client and funded for that client by the Commission as part of the Community Legal Service ... "non-funded party" means a party to proceedings who has not received funded services in relation to those proceedings under a certificate ...'

R v Camden London BC, ex p Martin [1997] 1 All ER 307, [1997] 1 WLR 359.

R v Immigration Appeal Tribunal, ex p Gulsen [1997] COD 430.

R v Secretary of State for Trade and Industry, ex p Eastaway [2001] 1 All ER 27, [2000] 1 WLR 2222, HL.

R v Secretary of State for Wales, ex p Rozhon (1993) 91 LGR 667, CA.

Ridehalgh v Horsefield [1994] 3 All ER 848, [1994] Ch 205, CA.

Applications

R v Secretary of State for the Home Dept, ex p Gunn

The applicant, the Legal Services Commission, challenged the lawfulness of an order made by Buxton LJ on 14 July 2000 which, inter alia, determined that it was just and equitable that the commission pay the costs incurred by the respondent, the Secretary of State for the Home Department, on a renewed application to the Court of Appeal by Mr John Gunn, an assisted person, for permission to apply for judicial review to quash an order of the Secretary of State, such permission having been refused by Carnwath J on 16 March 2000. The facts are set out in the judgment of the court.

R (on the application of Kelly) v Secretary of State for the Home Dept

The applicant, the Legal Services Commission, challenged the lawfulness of an order made by Buxton LJ on 25 August 2000 which, inter alia, (i) recorded that the court was satisfied that it would be just and equitable for the commission to pay the costs incurred by the respondent, the Secretary of State for the Home Department, on an application to the Court of Appeal by Edward Kelly, an assisted person, for permission to appeal against the refusal of Owen J on 10 May 2000 to grant him permission to apply for judicial review to quash an order of the Secretary of State, and (ii) directed the master to make an order for the payment of costs by the commission. The facts are set out in the judgment of the court.

R (on the application of Khan) v Secretary of State for the Home Dept

The applicant, the Legal Services Commission, challenged the lawfulness of an order made by Hale LJ on 18 August 2000 which, inter alia, (i) recorded that the court was satisfied that it would be just and equitable for the commission to pay the costs incurred by the Secretary of State on an application to the Court of Appeal by Zahid Hussain Khan, an assisted person, for permission to appeal against the refusal of Sullivan J on 4 July 2000 to grant him permission to apply for judicial review to quash an order of the Secretary of State, and (ii) directed the master to make an order for the payment of costs by the commission. The facts are set out in the judgment of the court.

Jonathan Swift (instructed by *Treasury Solicitor*) for the Secretary of State.

Jeremy Morgan (instructed by the *Legal Services Commission*) for the commission.

Cur adv vult

7 June 2001. The following judgment of the court was delivered.

LORD PHILLIPS MR.

Introduction

[1] These are applications by the Legal Services Commission (the commission) requesting the court to consider the lawfulness of orders for costs

a made adverse to the commission and in favour of proposed respondents where funded litigants made applications for judicial review. The issues raised are of general importance at all levels of civil litigation.

[2] In all three cases before the court applications for permission to apply for judicial review to quash orders of the Secretary of State for the Home Department had been refused, in the case of *R v Secretary of State for the Home Department, ex p Gunn* by Carnwarth J on 16 March 2000, in the case of *R (on the application of Kelly) v Secretary of State for the Home Department* by Owen J on 10 May 2000 and in the case of *R (on the application of Khan) v Secretary of State for the Home Department (Zahid)* by Sullivan J on 4 July 2000. In each case, applications were made to the Court of Appeal. In the case of *Gunn*, the application took the form of a renewed application for permission to apply for judicial review. In the other two cases the applications were made after CPR Pt 52 had come into force, so that the applications took the form of applications for permission to appeal against the decision of the court below. The application of *Gunn* was heard by Buxton LJ on 14 July 2000, that of *Kelly* by Buxton LJ on 25 August 2000 and that of *Zahid* by Hale LJ on 18 August 2000. In each case the application was refused, costs orders were made against the applicant and provision was made for costs to be paid by the commission. The order in *Gunn* provided:

‘1. this application be refused;

2. the Applicant do pay the costs, such costs to be assessed if not agreed;

e 3. the costs of the Applicant be assessed in accordance with reg 107 of the Civil Legal Aid (General) Regulations 1989;

4. AND ON the application of the Respondent for an order that its costs of this application (“the Court of Appeal Costs”) be paid by the Legal Services Commission pursuant to s 18 of the Legal Aid Act 1988

f THE COURT HAS DETERMINED (subject to paragraphs (B) and (C) below) that: (i) it is just and equitable that the Court of Appeal costs be paid out of public funds; and (ii) that the Applicant is not liable to pay any part of the Court of Appeal costs

AND IT IS ORDERED that

(A) Subject to paragraphs (B) and (C) below that the Court of Appeal costs be paid by the Legal Services Commission (B) the operation of paragraph (A) of this order shall be suspended until the expiration of 10 weeks from the date of the seal on this order (4.30pm on xxxxxxx) and, if the relevant Area Director gives notice of objection in accordance with paragraph (C), the suspension shall continue until the objections have been heard and determined; and (C) a copy of this order shall be sent by the Civil Appeals Office to the relevant Area Director and, unless within the said period of 10 weeks the Area Director gives notice in writing to the Civil Appeals Office that the Legal Services Commission wishes to object to the making of a s 18 order and states the grounds of objection, paragraph (A) shall take effect without further order.’

j [3] The order in *Kelly* provided:

‘1. this application be refused

2. the Respondent’s costs of this Application by paid by the Applicant such costs to be assessed if not agreed

3. the costs of the Applicant be assessed in accordance with Community Legal Service (Costs) Regulations 2000

(4) The Court having made an order for the payment of the Respondent's costs by the Applicant, who was in receipt of services funded by the Legal Services Commission, and made no determination of the liability of the Applicant. a

(5) The Court directs that, if costs are not agreed under the costs order paragraph number 2 (a) the amount to be paid by the Applicant under the above order for costs and (b) any application for an order for the payment of costs by the Legal Services Commission under regulation 5(2) of the Community Legal Service (Cost Protection) Regulations 2000 in respect of the proceedings in the Court of Appeal shall be determined by a Costs Judge within three months of the date of the seal of this order, namely by Wednesday 3rd January 2001 in accordance with regulation 10 of the Community Legal Services (Costs) Regulations 2000. b
c

(6) In the event that an application is made for the payment of costs by the Legal Services Commission, (a) IT IS RECORDED THAT the Court was satisfied that it would be just and equitable in the circumstances of this application that provision for the costs of these proceedings should be made out of public funds and (b) THE COURT DIRECTS that, following the determination by a Costs Judge of any amount to be paid by the Applicant and subject to its terms, the Master makes an order for the payment of the costs by the Legal Services Commission. d

IT IS FURTHER ORDERED that if the Legal Services Commission make an application to this Court it is reserved to Lord Justice Buxton.' e

[4] The material parts of the order in *Zahid* were to the same effect as those in *Kelly*.

[5] In his judgment on costs in *Gunn*, Buxton LJ dealt first with questions not now in issue in these proceedings. These were (1) whether a renewed application for permission to apply for judicial review should be treated as an appeal and (2) whether there was jurisdiction to make an order for costs in favour of a proposed respondent in such proceedings. While these were live issues in the case of *Gunn*, they do not arise in later cases, to which CPR Pts 52 and 54 apply. Before us the commission sensibly decided not to pursue the points. f

[6] In explaining his order in relation to the commission, Buxton LJ stated: g

'10. Third, I did express the view in the judgment which I have delivered this morning that this was an application which should not have been renewed to this court. I do not make this order on that basis. My view is that this order is *prima facie* an appropriate one whenever an application is made to the court in circumstances where it may be expected that the Secretary of State would appear and that an application fails: whether it is an application that should never have been made at all or an application that, although reasonably before the court, is in the event unsuccessful. h

11. I have set those considerations out at some length because I am not aware of such an order having been made previously in this court in these circumstances; and it may well be that the Legal Aid Board will wish to raise points in connection with it. j

12. The order will be that this order will not pass the seal for a period of ten weeks, during which time it will be open to the Legal Aid Board to make application to this court for the order to be set aside or reviewed. Any such application will be reserved to myself.'

a [7] In *Kelly*, Buxton LJ adopted his reasoning in *Gunn* as did Hale LJ in *Zahid*. Buxton LJ has since released to the full court consideration of the commission's application in *Gunn*.

The statutory regime

b [8] Jurisdiction to make an order for the payment of costs by the commission (then the Legal Aid Board) to an unassisted party was conferred by s 18 of the Legal Aid Act 1988, following earlier statutes. Section 18(1) to (4) provided:

'(1) This section applies to proceedings to which a legally assisted person is a party and which are finally decided in favour of an unassisted party.

c (2) In any proceedings to which this section applies the court by which the proceedings were so decided may, subject to subsections (3) and (4) below, make an order for the payment by the Board to the unassisted party of the whole or any part of the costs incurred by him in the proceedings.

(3) Before making an order under this section, the court shall consider what order for costs should be made against the assisted party and for determining his liability in respect of such costs.

d (4) An order under this section in respect of any costs may only be made if—(a) an order for costs would be made in the proceedings apart from this Act; (b) as respects the costs incurred in a court of first instance, those proceedings were instituted by the assisted party and the court is satisfied that the unassisted party will suffer severe financial hardship unless the order is made; and (c) in any case, the court is satisfied that it is just and equitable in all the circumstances of the case that provision for the costs should be made out of public funds.'

f [9] Under that procedure the order against the board was made, whether at first instance or on appeal, by the court deciding the substantive dispute between the parties. Before doing so, the court had to determine the liability, if any, for costs of the assisted party. The practice grew of making the order an 'unless' order that gave the Legal Aid Board the opportunity to appear to challenge the order.

g [10] On 1 April 2000, the former Legal Aid Scheme was replaced by community legal service funding under Pt I of the Access to Justice Act 1999. The commission took over the functions of the Legal Aid Board and the Community Legal Service (Costs) Regulations 2000, SI 2000/441 (the costs regulations) and the Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824 (the cost protection regulations), made in exercise of the powers conferred by the 1999 Act, came into force on that date. Both regulations were subject to minor amendments which came into force on 2 April 2001. Section 18 of the 1988 Act was repealed (s 106 and Pt I of Sch 15 to the 1999 Act).

h [11] The transitional procedures are not straightforward but Mr Morgan, for the commission, has not considered it necessary to address the court in detail upon them because it is upon the regime under the 1999 Act that the commission seeks guidance. The commission is concerned less with the form of the orders of Buxton LJ and Hale LJ than with what orders it is now appropriate to make under the new law and procedure that have come into effect.

The 1999 Act

[12] Section 11 of the 1999 Act provides:

'(1) Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for

him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including—(a) the financial resources of all parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate; and for this purpose proceedings, or a part of proceedings, are funded for an individual if services relating to the proceedings or part are funded for him by the Commission as part of the Community Legal Service.

(2) In assessing for the purposes of subsection (1) the financial resources of an individual for whom services are funded by the Commission as part of the Community Legal Service, his clothes and household furniture and the tools and implements of his trade shall not be taken into account, except so far as may be prescribed.

(3) Subject to subsections (1) and (2), regulations may make provision about costs in relation to proceedings in which services are funded by the Commission for any of the parties as part of the Community Legal Service.

(4) The regulations may, in particular, make provision—(a) specifying the principles to be applied in determining the amount of any costs which may be awarded against a party for whom services are funded by the Commission as part of the Community Legal Service, (b) limiting the circumstances in which, or extent to which, an order for costs may be enforced against such a party, (c) as to the cases in which, and extent to which, such a party may be required to give security for costs and the manner in which it is to be given, (d) requiring the payment by the Commission of the whole or part of any costs incurred by a party for whom services are not funded by the Commission as part of the Community Legal Service, (e) specifying the principles to be applied in determining the amount of any costs which may be awarded to a party for whom services are so funded, (f) requiring the payment to the Commission, or the person or body by which the services were provided, of the whole or part of any sum awarded by way of costs to such a party, and (g) as to the court, tribunal or other person or body by whom the amount of any costs is to be determined and the extent to which any determination of that amount is to be final.

[13] Thus the power to require payment by the commission to a party for whom services are not funded by the commission is now governed by the regulations rather than, as under the former scheme, by the statute itself. Mr Morgan has referred to the cost protection regulations as providing the substantive law and to the costs regulations as governing procedure. Clearly they must be considered together.

The costs regulations

[14] The procedures for ordering costs against client and commission are set out in regs 9 and 10 of the costs regulations, as amended:

'9.—(1) Where the court is considering whether to make a section 11(1) costs order, it shall consider whether, but for cost protection, it would have made a costs order against the client and, if so, whether it would, on making the costs order, have specified the amount to be paid under that order.

(2) If the court considers that it would have made a costs order against the client, but that it would not have specified the amount to be paid under it, the court shall, when making the section 11(1) costs order: (a) specify the amount (if any) that the client is to pay under that order if, but only if: (i) it

a considers that it has sufficient information before it to decide what amount is, in that case, a reasonable amount for the client to pay, in accordance with section 11(1) of the Act; and (ii) it is satisfied that, if it were to determine the full costs at that time, they would exceed the amount referred to in sub-paragraph (i); (b) otherwise, it shall not specify the amount the client is to pay under the costs order.

b (3) If the court considers that it would have made a costs order against the client, and that it would have specified the amount to be paid under it, the court shall, when making the section 11(1) costs order: (a) specify the amount (if any) that the client is to pay under that order if, but only if, it considers that it has sufficient information before it to decide what amount is, in that case, a reasonable amount for the client to pay, in accordance with section 11(1) of the Act; (b) otherwise, it shall not specify the amount the client is to pay under the costs order.

c (4) Any order made under paragraph (3) shall state the amount of the full costs.

d (5) The amount (if any) to be paid by the client under an order made under paragraph (2)(b) or paragraph (3)(b), and any application for a costs order against the Commission, shall be determined in accordance with regulation 10, and at any such determination following an order made under paragraph (2)(b), the amount of the full costs shall also be assessed.

e (6) Where the court makes a section 11(1) costs order that does not specify the amount which the client is to pay under it, it may also make findings of fact, as to the parties' conduct in the proceedings or otherwise, relevant to the determination of that amount, and those findings shall be taken into consideration in that determination.

f **10.—**(1) The following paragraphs of this regulation apply where the amount to be paid under a section 11(1) costs order, or an application for a costs order against the Commission, is to be determined under this regulation by virtue of regulation 9(5).

(2) The receiving party may, within three months after a section 11(1) costs order is made, request a hearing to determine the costs payable to him.

g (3) A request under paragraph (2) shall be accompanied by: (a) if the section 11(1) costs order does not state the full costs, the receiving party's bill of costs, which shall comply with any requirements of relevant rules of court relating to the form and content of a bill of costs where the court is assessing a party's costs; (b) a statement of resources; and (c) if the receiving party is seeking, or, subject to the determination of the amount to be paid under the section 11(1) costs order, may seek, a costs order against the Commission, written notice to that effect.

h (4) The receiving party shall file the documents referred to in paragraph (3) with the court and at the same time serve copies of them: (a) on the client, if a determination of costs payable under section 11(1) of the Act is sought; and (b) on the Regional Director, if notice has been given under paragraph (3)(c).

j (5) Where documents are served on the client under paragraph (4)(a), the client shall make a statement of resources.

(6) The client shall file the statement of resources made under paragraph (5) with the court, and serve copies of it on the receiving party and, if notice has been given under paragraph (3)(c), on the Regional Director, not more than 21 days after the client receives a copy of the receiving party's statement of resources.

(7) The client may, at the same time as filing and serving a statement of resources under paragraph (6), file, and serve on the same persons, a statement setting out any points of dispute in relation to the bill of costs referred to in paragraph (3)(a). a

(8) If the client, without good reason, fails to file a statement of resources in accordance with paragraph (6), the court shall determine the amount which the client shall be required to pay under the section 11(1) costs order (and, if relevant, the full costs), having regard to the statement made by the receiving party, and the court need not hold an oral hearing for such determination. b

(9) If the client files a statement of resources in accordance with paragraph (6), or the period of filing such notice expires, or if the costs payable by the client have already been determined, the court shall set a date for the hearing and, at least 14 days before that date, serve notice of it on: (a) the receiving party; (b) the client (unless the costs payable by the client have already been determined); and (c) if a costs order against the Commission is or may be sought, the Regional Director. c

(10) The court's functions under this regulation may be exercised: (a) in relation to proceedings in the House of Lords, by the Clerk to the Parliaments; (b) in relation to proceedings in the Court of Appeal, High Court or a county court, a costs judge or a district judge; (c) in relation to proceedings in a magistrates' court, by a single justice or by the justices' clerk; (d) in relation to proceedings in the Employment Appeal Tribunal, by the Registrar of that Tribunal.' d

[15] Regulation 10A empowers the court to order a funded party to pay an amount on account of costs and reg 13(1)(a) permits a regional director appointed by the commission to appear at any hearing in relation to which notice has been given under reg 10(3)(c). e

The cost protection regulations f

[16] Regulation 5 of the cost protection regulations provides:

'(1) The following paragraphs of this regulation apply where: (a) funded services are provided to a client in relation to proceedings; (b) those proceedings are finally decided in favour of a non-funded party; and (c) cost protection applies. g

(2) The court may, subject to the following paragraphs of this regulation, make an order for the payment by the Commission to the non-funded party of the whole or any part of the costs incurred by him in the proceedings (other than any costs that the client is required to pay under a section 11(1) costs order). h

(3) An order under paragraph (2) may only be made if all the conditions set out in sub-paragraphs (a), (b), (c) and (d) are satisfied: (a) a section 11(1) costs order is made against the client in the proceedings, and the amount (if any) which the client is required to pay under that costs order is less than the amount of the full costs; (b) the non-funded party makes a request under regulation 10(2) of the Community Legal Service (Costs) Regulations 2000 within three months of the making of the section 11(1) costs order; (c) as regards costs incurred in a court of first instance, the proceedings were instituted by the client and the court is satisfied that the non-funded party will suffer severe financial hardship unless the order is made; and (d) in any j

case, the court is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds ...

(3A) An order under paragraph (2) may be made—(a) in relation to proceedings in the House of Lords, by the Clerk to the Parliaments; (b) in relation to proceedings in the Court of Appeal, High Court or a county court, by a costs judge or a district judge; (c) in relation to proceedings in a magistrates' court, by a single justice or by the justices' clerk; (d) in relation to proceedings in the Employment Appeal Tribunal, by the Registrar of that tribunal.

(4) Where the client receives funded services in connection with part only of the proceedings, the reference in paragraph (2) to the costs incurred by the non-funded party in the relevant proceedings shall be construed as a reference to so much of those costs as is attributable to the part of the proceedings which are funded proceedings.

(5) Where a court decides any proceedings in favour of the non-funded party and an appeal lies (with or without permission) against that decision, any order made under this regulation shall not take effect: (a) where permission to appeal is required, unless the time limit for applications for permission to appeal expires without permission being granted; (b) where permission to appeal is granted or not required, unless the time limit for appeal expires without an appeal being brought.

(6) Subject to paragraph (7), in determining whether the conditions in paragraph (3)(c) and (d) are satisfied, the court shall have regard to the resources of the non-funded party and of his partner.

(7) The court shall not have regard to the resources of the partner of the non-funded party if the partner has a contrary interest in the funded proceedings.

(8) Where the non-funded party is acting in a representative, fiduciary or official capacity and is entitled to be indemnified in respect of his costs from any property, estate or fund, the court shall, for the purposes of paragraph (3), have regard to the value of the property, estate or fund and the resources of the persons, if any, including that party where appropriate, who are beneficially interested in that property, estate or fund.'

[17] Regulation 7 provides:

'(1) No order to pay costs in favour of a non-funded party shall be made against the Commission in respect of funded proceedings except in accordance with these Regulations, and any costs to be paid under such an order shall be paid out of the Community Legal Service Fund.

(2) Nothing in these Regulations shall be construed, in relation to proceedings where one of more parties are receiving, or have received, funded services, as: (a) requiring a court to make a costs order where it would not otherwise have made a costs order; or (b) affecting the court's power to make a wasted costs order against a legal representative.'

[18] Regulation 7 has the effect of excluding the possibility of an order for costs against the commission under the broad and general power to order costs under s 51(3) of the Supreme Court Act 1981.

The issues

[19] This application raises the following issues. (i) What role, if any, does the court trying the substantive dispute have in determining whether an order for

costs should be made against the commission? (ii) Is there jurisdiction to make an order for costs against the commission in favour of a body that is financed from public funds? (iii) What principles govern the test of whether it is 'just and equitable' that costs should be paid out of public funds. a

What is the role of the court?

[20] The old 'unless' procedure was, so far as we have been able to ascertain, devised by the Court of Appeal in *Maynard v Osmond (No 2)* [1979] 1 All ER 483 at 487-488, [1979] 1 WLR 31 at 35-36 per Lord Denning MR. Under that procedure, after giving judgment in the substantive dispute, the court would go on to make a provisional determination of (i) the amount, if any, of costs to be paid by the funded party; and (ii) whether an order should be made for costs to be paid by the legal aid fund. The order would not be drawn up for ten weeks in order to enable the Legal Aid Committee to come in and object if they wished to do so. Although this procedure was laid down in the Court of Appeal, we understand that it was subsequently adopted at first instance. Thus at first instance the trial judge would rule on the issue of whether the unassisted party would suffer severe financial hardship unless the order was made. b
c
d

[21] Under the new regulations an order against the commission can only be made at first instance where: (i) the court is satisfied that the non-funded party will suffer severe financial hardship unless the order is made; and (ii) the court is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds. e

[22] The court which makes the order is not, however, the court that tried the substantive dispute but a costs judge or district judge.

[23] The order made in the cases of *Kelly* and *Zahid* (i) recorded that the court was satisfied that it would be just and equitable in the circumstances that provision for the costs should be made out of public funds, and (ii) directed that, following the determination by a costs judge of any amount to be paid by the applicant and subject to its terms, the master make an order for the payment of the costs by the Legal Services Commission. f

[24] No general challenge was made by the commission of the propriety of the Court of Appeal including such rulings in its order. The scrutiny of the regulations made necessary by this application led us, however, to question whether it was proper for the Court of Appeal to concern itself with the question of whether it was just and equitable that an order should be made against the commission, let alone for the court to direct that such an order should be made. Once we had raised this matter Mr Morgan submitted that those parts of the order which had caused us concern were, indeed, outwith the jurisdiction of the court. g
h

[25] For the Secretary of State, Mr Swift submitted that it was perfectly in order for this court to continue to fulfil the role of determining whether, in principle, an order for costs should be made against the commission. He contended that the wording of reg 10 of the costs regulations contemplated only a quantification of costs by the costs judge rather than a decision whether costs should be awarded against the commission. That accorded with traditional procedures by which the court hearing the substance of the matter, and in the best position to consider the merits of an application, made the decision as to who was to pay the costs, leaving quantification to be determined, in the absence of agreement, by a costs judge. j

[26] This is an issue of some moment. The orders made in *Kelly* and *Zahid* were in the standard form now adopted by the Court of Appeal. We understand

a that courts of first instance take it upon themselves to determine whether the 'severe hardship' and the 'just and equitable' requirements are met and to direct, where appropriate, that costs be ordered against the commission. This application puts in issue the propriety of the practice of courts of first instance just as it does the propriety of the practice of this court.

b *The regulatory scheme*

[27] The new regulations introduce a two-stage process in relation to the recovery of costs in cases to which s 11(1) of the 1999 Act applies. The procedure to be followed is primarily to be derived from the costs regulations. The scheme is as follows.

c *Stage 1*

[28] The first stage involves the court dealing with the substance of the dispute, which we shall call the trial court. The role of the trial court is as follows.

(i) To decide whether to make an order for costs against a funded litigant (the client) (reg 9(1)). (ii) To decide whether it is in a position to specify the amount, if any, to be paid by the client (reg 9(2)). (iii) To make a costs order against the client which either (a) specifies the amount, if any, to be paid by the client and states the amount of the full costs, or (b) does not specify the amount to be paid by the client (reg 9(3) and (4)). The order is described in the regulations as a s 11(1) costs order and is defined in both sets of regulations as a 'costs order against a client where cost protection applies'. 'Cost protection' means 'the limit set on costs awarded against a client set out in s 11(1) of the Act'. (iv) Where the order does not specify the amount to be paid by the client, to make, if it sees fit, findings of fact, as to the parties' conduct in the proceedings or otherwise, relevant to the determination of that amount (reg 9(6)).

f *Stage 2*

[29] Stage 2 consists of the procedure to be followed to ascertain the amount of costs to be paid by the client against whom the trial court has made an order that does not specify the amount. Stage 2 also includes the procedure for determining whether an order for costs should be made against the commission (reg 9(5)). The regulations in relation to Stage 2 allocate certain functions to 'the Court'.

g Regulation 10(10) provides that in relation to proceedings in the Court of Appeal, High Court or county court the court's functions 'may be exercised' by a costs judge or a district judge. While it is arguable that the High Court and the Court of Appeal also enjoy jurisdiction to exercise these functions, we think it plain that the scheme does not envisage that they should do so.

h [30] Regulation 2 provides that 'Costs Judge' has the same meaning as in the CPR. CPR 43.2(1)(b) provides that 'Costs Judge' means a taxing master of the Supreme Court.

j [31] The procedure under Stage 2 is as follows. (i) The party in whose favour the costs order has been made (the receiving party) may, within three months of the making of the costs order, request a hearing to determine the costs payable to him (reg 10(2)). (ii) The receiving party may, at the same time, seek a costs order against the commission. (reg 10(3)(c)). We wish to take this opportunity to emphasise a fact that we understand is not generally appreciated. The three-month time limit for seeking an order against the commission is mandatory—there is no power to extend it. (iii) The receiving party must, when making the request, file with the court and serve on the client and the regional director of the commission

(if an order is sought against the commission): (a) a bill of costs; (b) a statement of resources; and (c) a written notice that a costs order is sought against the commission (reg 10(3) and (4)). (iv) The client must file a statement of resources and serve this on the receiving party and the regional director (where a claim is made on the commission) (reg 10(6)). (v) The court sets a date for the hearing (reg 10(9)). (vi) The court conducts the hearing, assesses the costs (if any) to be paid by the client and, where appropriate, makes a costs order against the commission.

[32] The costs regulations do not, in fact, expressly provide that the costs judge shall carry out the functions set out under (vi) above, but it is plainly implicit that he should. That this is part of his role is confirmed by the explicit provisions of the cost protection regulations.

[33] The cost protection regulations set out the circumstances in which the costs judge or district judge may make a costs order against the commission. Regulation 5(3) makes it plain that it is for the costs judge or district judge to be satisfied that it is just and equitable that provision for the costs should be made out of public funds and, in respect of proceedings at first instance, that the non-funded party will suffer severe financial hardship unless the order is made. In considering these matters the costs judge or district judge is expressly required to have regard to the resources of the non-funded party and of his partner—reg 5(6).

[34] We have set out the new regulatory scheme in detail because we have concluded that it is not compatible with the current practices of the trial court. The function of deciding whether or not a costs order can and should be made against the commission is now expressly assigned to the costs judge or district judge. He cannot make such an order unless and until the prescribed formalities have been completed. It is not open to the trial court to rule that it is just and equitable to make the order or to direct that the order is to be made before the prescribed formalities have been completed. Regulation 9(6) of the costs regulations permits the trial court, when making a costs order, to make findings of fact relevant to the determination of the amount to be paid by the client. We consider that it must also be open to the trial court to make any findings in relation to the conduct of the parties or facts that have emerged in the course of the proceedings that have relevance to the task to be performed by the costs judge or district judge. Beyond this the trial court should not go. It follows that, in the cases before us, this court should not have usurped the function of the costs judge—in these cases the taxing master—in deciding that it was just and equitable to make a costs order against the commission and to direct that such an order be made. This practice must no longer be followed, whether in the county court, the High Court or the Court of Appeal.

[35] The object of the commission's application to this court was not to attack the procedure adopted, but to obtain guidance in relation to the other issues that we have set out above. We propose to address those issues in order to provide that guidance.

Is there jurisdiction to make an order for costs against the commission in favour of a body that is financed from public funds?

[36] In relation to this issue Mr Morgan focussed on the provision of reg 5(3)(d) of the cost protection regulations which makes it a prerequisite of the right to make a costs order against the commission that the court is satisfied that 'it is just and equitable' in the circumstances that provision for the costs should be made *out of public funds*. Mr Morgan submitted that it was implicit in this

a provision that an order could only be made for the purpose of transferring the burden of legal costs from a privately funded litigant to public funds. Where the costs would in any event be met out of public funds, this essential pre-condition to making the order could never be satisfied. In support of this submission he sought to refer, under the principle in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, to a ministerial statement which he contended supported his interpretation.

b [37] We do not accept Mr Morgan's interpretation.

c [38] The use of the expression 'out of public funds' in reg 5(3)(d) of the cost protection regulations does not, on the basis that costs incurred by the Secretary of State already come out of public funds, remove jurisdiction to make an order against the commission in his favour. The 'funds' contemplated in reg 5(3)(d) and in the expression 'non-funded party' in reg 5(1) and 5(2) are the funds administered by the commission. In reg 2, the expressions 'funded proceedings', 'funded services' and 'non-funded party' clearly predicate commission funding and the expression 'public funds' in reg 5(3)(d) should also be read as referring to the funds of the commission.

d [39] We do not consider the proposed reference to the ministerial statement in the House of Commons, which led to the enactment of the Legal Aid Act 1964, to be permissible in this case but it does not in any event assist the commission's submission. Power to award costs out of the legal aid fund was conferred in s 1 of the 1964 Act. Section 1(1) empowered a court to 'make an order for the payment to the unassisted party out of the legal aid fund'. Section 1(2) provided that such an order may be made only if 'the court is satisfied that it is just and equitable in all the circumstances that provision for those costs should be made out of public funds'. The fund contemplated in s 1(2) is clearly the legal aid fund mentioned in s 1(1). While the wording of the relevant provisions has become more elaborate in the current regulations, the purpose and effect are in our judgment unchanged.

e [40] Moreover, in cases before this court under the earlier Acts, which we shall consider when we come to the next issue, jurisdiction to make an order in favour of a public body was assumed. In *Maynard's* case, the Law Society made submissions to the court and in *R v Greenwich London BC, ex p Lovelace (No 2)*, *R v Greenwich London BC, ex p Fay* [1992] 1 All ER 679, [1992] QB 155 the Legal Aid Board made submissions to the court. In neither case was it suggested that, as a matter of statutory interpretation, a costs order against the legal aid fund could never be made in favour of a public body. We can detect no change in legislative intent in this respect and conclude that there is jurisdiction to make an order against the commission in favour of a public body, even if it is a government department. There are, of course, legal entities publicly funded whose funds are much more limited than those of government departments.

h What principles govern the test of whether it is 'just and equitable' that costs should be paid out of public funds?

j [41] Mr Morgan submitted that justice and equity did not require the transfer of money from public funds held by the commission to public funds held by a government department. It followed that an order could not properly be made against the commission in favour of the Secretary of State in any of the three cases with which we are concerned. This is not the first time that such an argument has been advanced.

[42] The requirement that an order shall be made only if it is 'just and equitable in the circumstances that provision for the costs should be paid out of public funds' dates back to the 1964 Act. a

[43] In *Maynard's case* [1979] 1 All ER 483 at 486, [1979] 1 WLR 31 at 34, Lord Denning MR stated:

'This is the "just and equitable" point. The question is whether in this particular case it is just and equitable that the legal aid fund should pay the costs of the Hampshire police authority out of their funds. The fact that an unassisted party has a good deal of money does not mean that it is not just and equitable to make an order against the legal aid fund. Orders have been made in favour of building societies, insurance companies and the like. In the Court of Appeal it is often just and equitable that their costs should be paid if they have been put to expense by an unsuccessful assisted person coming to this court. It is suggested to us that a public authority, like the Hampshire police authority, is in a different position from an insurance company or a building society because the legal aid fund receives its money from central funds (from the government) and the Hampshire police authority also received its money directly or indirectly from public funds. About a quarter comes from the ratepayers of Hampshire and about three-quarters from central funds (that is, from the taxpayer). It is said that, on that account, a public authority or a local authority is in a different position from an insurance company or a building society. I am afraid that I cannot go with that argument at all. It seems to me that if the legal aid fund takes up a case on behalf of an assisted person and put an authority to a great deal of expense in fighting it, it is often just and equitable that the authority should have its costs from the legal aid fund. It is that fund, after all, which has been responsible for the litigation and has led to all the legal costs being incurred.'

b
c
d
e

[44] Having considered the facts of the particular case, Lord Denning MR added: f

'But I would not confine it to cases which involve important points of law. I think the principle should be extended so as to be of general application. It seems that whenever the legal aid fund takes up cases for assisted persons and brings another party before the courts, then, if the case fails, it is often just and equitable that the legal aid fund should pay the costs of the unassisted party.' (See [1979] 1 All ER 483 at 487, [1979] 1 WLR 31 at 35.) g

[45] In *Ex p Lovelace (No 2)*, the applicant for an order against the Legal Aid Board under the 1988 Act was a London borough council. Neill LJ stated: h

'In the case of the costs incurred by the council in the Court of Appeal, however, there is no need to establish severe financial hardship. But on behalf of the board a further argument was put forward which raises the fourth question I have outlined above. Thus it was submitted that it was necessary in any event for the court to be satisfied that it was just and equitable in all the circumstances that provision for the costs should be made out of public funds, and that the court could not or should not be so satisfied where the applicant was itself a public body. For my part I would see some force in this argument if the applicant were a public body funded solely by the general body of taxpayers. But that is not this case. Although a substantial j

a portion of the expenditure of local authorities is met out of general taxation, a further substantial proportion is met by local residents and businesses. These proceedings were made possible because the applicants seeking judicial review were in receipt of legal aid. I consider that it would be just and equitable that the council should recover the costs which they were obliged to incur in defending those proceedings. I would therefore make an order in favour of the council in respect of their costs in the Court of Appeal.' (See [1992] 1 All ER 679 at 687, [1992] QB 155 at 166.)

[46] In *Re O (a minor) (legal aid costs)* [1997] 1 FCR 159, the applicant was again a local authority. Lord Woolf MR stated (at 165):

c 'If the court comes to a conclusion that in those circumstances it would make the hypothetical order for costs then in the case of an appeal the court will usually conclude, in the absence of some special circumstance, that for the purposes of s 18(4)(c) [of the 1988 Act] it is just and equitable to make an order. Contrary to Mr Howard's submissions a local authority, because it is a public body, is not at a disadvantage as compared with any other litigant in seeking an order against the Board.'

[47] Mr Morgan submitted that these authorities were no longer authoritative. He submitted that the fact that the court is required to have regard to the resources of the non-funded party in deciding whether it is just and equitable to make the order cannot be reconciled with the approach of the courts to the earlier legislation. A well-resourced public authority is not to be treated as in as good a position as a party with few resources.

f [48] We do not agree that the now well-established meaning of 'just and equitable' in this context requires change by reason of the introduction of para (6). That provision applies to both sub-paras (c) and (d) of reg 5(3). Its relevance to the exercise required in reg 5(3)(c) is obvious as is the newly introduced requirement under reg 10(3)(b) of the costs regulations to provide a statement of resources. Resources could, in some circumstances, be of relevance to the 'just and equitable' test and it would have been curious, as a matter of drafting, if the para 6 requirement had not been extended to reg 5(3)(d). It does not, however, follow that the requirement was intended to modify the practice based on the authorities already cited, in relation to applications in courts other than courts of first instance.

h [49] It seems to us that this practice reflects reasoning that it will normally be just and equitable that when a costs order is made against a party who has been supported by public funds, the costs covered by the order should, insofar as they cannot be recovered from the funded party, be defrayed out of public funds.

j [50] We consider that the practice laid down in *Re O* should be followed by costs judges when applications are made to them for costs against the commission following a Court of Appeal decision in favour of non-funded parties, even if they are government departments. Costs judges should proceed on the premise that it is just and equitable that the commission should stand behind their 'client', by definition under the regulations the individual who receives funded services, unless they are aware of facts which render that result unjust or inequitable.

[51] In stating this conclusion, we are not encouraging government departments to make applications against the commission on renewed applications for judicial review or, indeed, in other cases. We see the force in the argument that

it will usually not be sensible to do so and we also note that, within their resources, the commission have in place procedures which attempt to prevent unmeritorious renewals and other appeals. However, we confirm the power in a costs judge or district judge to accede to an application for costs against the commission made by a government department.

[52] In each of the three cases before us the Secretary of State chose to appear on applications where his presence was not required by the CPR. Mr Morgan argued that in such circumstances it was not normally appropriate that a costs order should be made against the commission. It seems to us that this will normally depend upon whether or not it is appropriate to make an order for costs against the client. In the three cases before us the court concluded that it was and we can see no basis for disturbing that conclusion. For the reasons that we have given, however, the order made in each case went beyond the powers of the court under the current regulations.

[53] We will hear counsel further as to the effect of this judgment upon the orders made and what, if anything, is to be substituted for them.

Order accordingly.

Kate O'Hanlon Barrister.

a Lewis v Commissioner of Inland Revenue and others

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, MUMMERY LJ AND MAURICE KAY J

b 24 OCTOBER, 2 NOVEMBER 2000

c *Company – Winding up – Liquidator – Costs of proceedings – Liquidator wishing to bring proceedings for wrongful trading and preferences against former directors of company – Whether liquidator automatically entitled to recoup costs of proposed litigation from company's assets – Insolvency Act 1986, ss 115, 175(2), 214, 239 – Insolvency Rules 1986, r 4.218(1).*

d The respondent was the liquidator of a company which had gone into creditors' voluntary liquidation. After realisation of the company's assets, the liquidator held £11,250. That sum would have paid a dividend of just under 44p in the pound to preferential creditors, leaving nothing for unsecured creditors. On the basis of his own investigations and legal advice, the liquidator concluded that there were substantial claims against the former directors of the company under ss 214 and 239 of the Insolvency Act 1986—the provisions dealing with wrongful trading and preferences. Although the possible recovery on those claims was e estimated at £165,000, the preferential creditors refused to give their consent to the proceedings. In contrast, the unsecured creditors were in favour of pursuing the directors, and a meeting of the liquidation committee authorised the liquidator to commence proceedings. He subsequently made an application to the court, seeking an order that he was at liberty to use the realised funds of the company for the commencement of the proposed proceedings. That application f was opposed by the preferential creditors. Although they accepted that the court had a discretion to allow the liquidator to be paid his costs (and any costs ordered to be paid by him) out of the company's uncharged assets, they contended that he had no automatic right to recoup such costs out of the assets. The deputy judge held that the costs of the proposed proceedings would fall within s 115^a of the 1986 Act, which provided that all 'expenses properly incurred in the winding up' g were payable out of the company's assets in priority to all other claims, or s 175(2)^b, which provided that preferential creditors ranked equally among themselves after the 'expenses of the winding up'. He further held that those provisions were not restricted to imposing the priority of expenses, but also created the right and obligation to pay the expenses; that money recovered under ss 214 and 239 h constituted 'assets' of the company within the meaning of r 4.218(1)^c of the Insolvency Rules 1986, the provision which prescribed the order of priority for the payment, out of those assets, of the 'expenses of the liquidation'; that the costs of the proposed proceedings, if successful, would fall within r 4.218(1)(a) as 'expenses properly chargeable or incurred' by the liquidator in 'realising or j getting in any of the assets of the company'; and that the costs of unsuccessful proceedings would constitute a 'necessary' disbursement by the liquidator in the course of his administration within the meaning of r 4.218(1)(m). Accordingly,

a Section 115 is set out at p 503 b, below

b Section 175, so far as material, is set out at p 503 d, below

c Rule 4.218, so far as material, is set out at p 503 fg, below

the deputy judge held that the liquidator was entitled to recoup the costs of the proposed litigation, whether or not successful, out of the assets of the company as an expense of the liquidation. The preferential creditors appealed. a

Held – A liquidator was not entitled as of right to recoup, out of the company's assets, the costs of proceedings brought by him under ss 214 and 239 of the 1986 Act. Section 115 of that Act was not to be construed as meaning that all winding up expenses, so long as properly incurred, were to be payable out of the company's assets. It was concerned with the priority of expenses in the liquidation, not inter se but as against other claims. Nor did s 175(2) provide the liquidator with the right to recoup litigation costs out of the assets of the company. The reference to 'expenses of the winding up' was more restrictive than the similar expression in s 115. Indeed, with its passing reference to the expenses of the winding up, s 175(2) was a wholly improbable source of an independent right in the liquidator to recoup such expenses out of the assets. Rule 4.218 of the 1986 rules stated both what expenses were to be treated as the expenses of a winding up and what priority they had inter se. The liquidator had the right to recoup those expenses out of the assets in that order, subject to the court's power to dictate a different order of priority. However, the costs of the proposed litigation would not fall within r 4.218(1). The right of action of a liquidator for preferences or wrongful trading and the fruits of such an action were not the property of the company. Rather, they were held on the statutory trust for distribution by the liquidator. Nor did para (m), or any other paragraph of r 4.218(1), encompass the costs of unsuccessful litigation against the former directors of the company. Such costs were not 'necessary' within the meaning of para (m), a meaning which was not the same as 'proper' in s 115. It followed in the instant case that the deputy judge had been wrong to conclude that the costs of the proposed litigation would fall within r 4.218(1)(a) and (m). Moreover, assuming that there was a discretion to permit recovery of the costs of the proposed litigation from the assets of the company, the court was not in a position to exercise that discretion since it lacked sufficient information to reach a proper decision. Accordingly, the appeal would be allowed (see p 509 j to p 510 c e f j to p 511 f and p 512 b c e f, below). b
c
d
e
f

Re M C Bacon Ltd (No 2) [1990] BCLC 607, *Re Oasis Merchandising Services Ltd (in liq)*, *Ward v Aitkin* [1997] 1 All ER 1009 and *Mond v Hammond Suddards (a firm)* [2000] Ch 40 applied. g

Dicta of Phillips and Morritt LJ in *Re Exchange Travel (Holdings) Ltd (in liq) (No 3)*, *Katz v McNally* [1997] 2 BCLC 579 at 587–588, 596 not followed.

Notes

For the costs of proceedings brought by liquidators, see 7(3) *Halsbury's Laws* (4th edn reissue) para 2354. h

For the Insolvency Act 1986, ss 115, 175, 214, 239, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 810, 856, 885, 908.

For the Insolvency Rules 1986, r 4.218, see 3 *Halsbury's Statutory Instruments* (1998 issue) 467. j

Cases referred to in judgment

Bacon (M C) Ltd (No 2), *Re* [1990] BCLC 607, [1991] Ch 127, [1990] 3 WLR 646.

Beddoe, Re, Downes v Cottam [1893] 1 Ch 547, CA.

Exchange Travel (Holdings) Ltd (in liq) (No 3), *Re, Katz v McNally* [1997] 2 BCLC 579, CA.

Mond v Hammond Suddards (a firm) [2000] Ch 40, [1999] 3 WLR 697, CA.

- a *Oasis Merchandising Services Ltd (in liq), Re, Ward v Aitkin* [1997] 1 All ER 1009, [1998] Ch 170, [1997] 2 WLR 764, CA.
Silver Valley Mines, Re (1882) 21 Ch D 381, CA.
Wallersteiner v Moir (No 2), Moir v Wallersteiner (No 2) [1975] 1 All ER 849, [1975] QB 373, [1975] 2 WLR 389.
Wilson Lovatt & Sons Ltd, Re [1977] 1 All ER 274.
- b *Yagerphone Ltd, Re* [1935] Ch 392, [1935] All ER Rep 803.

Cases also cited or referred to in skeleton arguments

- Atlantic Computer Systems plc, Re* [1992] 1 All ER 476, [1992] Ch 505, CA.
Barleycorn Enterprises Ltd, Re, Mathias & Davies (a firm) v Down (liquidator of Barleycorn Enterprises Ltd) [1970] 2 All ER 155, [1970] Ch 465, CA.
- c *Kentish Homes Ltd, Re* [1993] BCLC 1375.
London Metallurgical Co, Re [1895] 1 Ch 758.
Mesco Properties Ltd, Re [1980] 1 All ER 117, [1980] 1 WLR 96, CA.
Portbase Clothing Ltd, Re [1993] 3 All ER 829, [1993] Ch 388.
- d *Robbie (N W) & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613, [1963] 1 WLR 1324, CA.
Toshoku Finance UK plc (in liq), Re, Kahn v IRC [2000] 3 All ER 938, [2000] 1 WLR 2478, CA.

Appeal

- e The appellants, the Commissioners of Inland Revenue, the Commissioners of Customs and Excise, the Secretary of State for Employment and the Secretary of State for Social Security, who were preferential creditors of Floor Fourteen Ltd (in liquidation), appealed from the decision of David Donaldson QC, sitting as a Deputy Judge of the High Court, on 24 May 1999 ([1999] 2 BCLC 666) whereby, on an application for directions brought by the respondent, Barry David Lewis,
- f the liquidator of the company, he held that the liquidator was entitled to recoup from the company's assets the costs of proposed proceedings against the company's former directors under ss 214 and 239 of the Insolvency Act 1986. The facts are set out in the judgment of the court.
- g *John McCaughran* (instructed by *Solicitor of the Inland Revenue*) for the preferential creditors.
Jane Giret (instructed by *Isadore Goldman*) for the liquidator.

Cur adv vult

- h 2 November 2000. The following judgment of the court was delivered.

PETER GIBSON LJ.

1. This appeal gives rise to an issue of some general importance, far greater than the amount involved in the case, as to whether the liquidator of an insolvent company, proposing to bring proceedings under s 214 (wrongful trading) or s 239 (preferences) of the Insolvency Act 1986 against the former directors, has the right to recoup the costs of the litigation, whether or not successful, including any costs which he may be ordered to pay, out of the assets of the company as an expense of the liquidation. Mr David Donaldson QC, sitting as a Deputy Judge of the High Court, held that the liquidator had such right. That is challenged on this appeal by four preferential creditors (the Commissioners of Inland Revenue,
- j

the Commissioners of Customs and Excise, the Secretary of State for Employment and the Secretary of State for Social Security).

2. The deputy judge's decision is now reported ([1999] 2 BCLC 666) and we need only refer to the background facts shortly. Floor Fourteen Ltd (the company) went into creditors' voluntary liquidation on 15 August 1995. The deficiency shown in the statement of affairs was £257,088. It owed unsecured creditors £304,680. It owed preferential creditors £27,707. After realisation of assets, the liquidator held £11,250.38. This would pay a dividend of just under 44p in the pound to preferential creditors, leaving nothing for unsecured creditors.

3. The liquidator's investigations and advice from solicitors and counsel led him to conclude that there are substantial claims against the former directors under ss 214 and 239, the possible recovery being estimated at about £150,000 for the s 214 claim and £14,000 to £15,000 for the s 239 claim. He asked the preferential creditors for their consent to him taking that course. That consent was not given. He convened a liquidation committee meeting. Not surprisingly the representatives of the unsecured creditors, whose position could not be made worse but might be improved by the litigation if successful, were in favour of the liquidator pursuing the directors, and the meeting resolved to authorise the liquidator to commence proceedings. The liquidator has agreed with his legal advisers that they will act in the proceedings on a conditional fee basis, and insurance cover against an adverse costs order requiring the liquidator to pay the directors' costs of up to £25,000 is available at a cost of £3,750. The former directors have assets in the form of two properties which, if realised, would appear sufficient to satisfy the claims. We are told by Mrs Giret for the liquidator that he has tried unsuccessfully to obtain funding from the unsecured creditors.

4. The liquidator applied to the court, seeking an order that he be at liberty to use the realised funds of the company for the commencement of the proposed proceedings against the former directors. It was on that application that the deputy judge was asked to rule.

5. He made clear at the outset that the court's approval of or authority for the proposed proceedings was neither sought nor required, and that the preferential creditors did not contend that such proceedings were inappropriate or ill-founded. Their case before the deputy judge was and in this court is that whilst the court has a discretion to allow the liquidator to be paid his costs (and any costs ordered to be paid by the liquidator to another party) out of the uncharged assets of the company, the liquidator has no automatic right to recoup such costs out of the assets. The main issue was identified by the deputy judge as: 'Would the costs of the proposed proceedings constitute expenses of the voluntary winding up to be paid automatically in priority to the preferential creditors?'

6. That issue turns on the true construction of the statutory provisions relevant to the point in issue and on the effect of the authorities which, unhappily, are not all in agreement.

The statutory provisions

7. Chapter V of Pt IV of the Act, comprising ss 107 to 116, contains provisions applicable to a members' voluntary winding up and to a creditors' voluntary winding up.

8. By s 112(1) the liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court may exercise if the company were being wound up by

a the court. It is under this section that the liquidator made the application which came before the deputy judge.

9. By s 112(2), the court, if satisfied that the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

b 10. Section 115 of the Act (relating to expenses of voluntary winding up) provides: 'All expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.'

11. Also in Pt IV is s 156, containing one of the powers conferred on the court in a compulsory winding up. That provides:

c 'The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the expenses incurred in the winding up in such order of priority as the court thinks just.'

12. In Ch VIII of Pt IV is s 175, relating to preferential debts. It provides:

d '(1) In a winding up the company's preferential debts ... shall be paid in priority to all other debts.

(2) Preferential debts—(a) rank equally among themselves after the expenses of the winding up and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions ...'

e 13. Section 411(1) allows rules to be made for the purpose of giving effect to Pts I to VII. Section 411(2) (read with para 17 of Sch 8 to the Act) allows rules to be made which make provision as to the fees, costs, charges and other expenses which may be treated as expenses of a winding up.

f 14. By the Insolvency Rules 1986, SI 1986/1925, the following relevant rules were made:

'General rule as to priority

4.218.—(1) The expenses of the liquidation are payable out of the assets in the following order of priority—(a) expenses properly chargeable or incurred by the official receiver or the liquidator in preserving, realising or getting in any of the assets of the company ... (m) any necessary disbursements by the liquidator in the course of his administration ...

Saving for powers of the court

4.220.—(1) In a winding up by the court, the priorities laid down by Rules 4.218 and 4.219 are subject to the power of the court to make orders under section 156, where the assets are insufficient to satisfy the liabilities ...

Costs, expenses, etc.

12.2. All fees, costs, charges and other expenses incurred in the course of winding up or bankruptcy proceedings are to be regarded as expenses of the winding up or, as the case may be, of the bankruptcy.'

j *The authorities*

15. In *Re M C Bacon Ltd (No 2)* [1990] BCLC 607, [1991] Ch 127 the liquidator of a company in creditors' voluntary liquidation unsuccessfully challenged the validity of a floating charge in favour of a bank on the basis that it was a voidable preference under s 239 of the Act and that the bank was liable under s 214 for wrongful trading. The liquidator's proceedings were dismissed with costs. The

liquidator applied to the court for reimbursement out of the assets of the company (including those subject to the floating charge) of his own costs and the costs he was ordered to pay the bank. The basis of that claim was that the costs were either 'expenses of the winding up' within s 175(2) or 'expenses properly incurred in the winding up' within s 115. The effect therefore of his claim if upheld would have been that the bank would have had to pay out of the assets subject to its charge the costs of the liquidator's unsuccessful attempt to challenge the security.

16. Millett J rejected the liquidator's claim. He assumed that the proceedings by the liquidator were properly brought, but he held that the costs did not fall within r 4.218(1)(a) for the following reasons. First, any sums recovered in an action pursuant to s 239 did not become part of the company's assets but were received by the liquidator impressed with a trust in favour of those creditors among whom he has to distribute the assets of the company (*Re Yagerphone Ltd* [1935] Ch 392, [1935] All ER Rep 803), and so a claim to set aside a voidable preference is not a claim to realise or get in any of the assets of the company; accordingly the costs of the claim did not come within para (a) of r 4.218(1). The same reasoning, Millett J said, applied with even greater force to a claim under s 214, where there was no existing asset to be got in or realised. Second, where litigation is unsuccessful or nothing is recovered, the costs are not expenses incurred in realising or getting in any of the assets of the company. Third, the costs did not fall within para (m) of r 4.218(1) as even if they were 'proper' they were not 'necessary'. Fourth, s 115, which, the liquidator claimed, conferred an independent statutory right on him, did not assist. Millett J said:

'In my judgment, however, s 115, like its predecessors, does not confer the right claimed. It is merely a priority section. In my view, it does not *provide* that the expenses with which it is concerned are to be payable out of the company's assets; it *assumes* that they are so payable and *provides* for their priority. It does not mean "All expenses properly incurred in the winding up ... are payable out of the company's assets (and are so payable in priority to all other claims)", but "All expenses properly incurred in the winding up ... (if and so far as payable out of the company's assets) are so payable in priority to all other claims". The former construction would produce an unnecessary overlap with r 4.218(1) and a conflict between para (m) thereof, with its requirement that the expenditure must be necessary, and s 115 with its more liberal allowance of expenditure which is merely proper. In my judgment, the latter construction not only gives sensible effect to s 115 but is consonant with the authorities, all of which treat the liquidator as having not a statutory right of recoupment but the right to apply to the court for an order permitting it ... As I construe the section, it is concerned with expenses properly incurred by the liquidator which are aliunde made payable, *inter alia*, out of the floating charge assets ...' (See [1990] BCLC 607 at 614-615, [1991] Ch 127 at 140.)

Fifth, the court has jurisdiction to order the payment of costs out of the assets available for distribution to the general body of creditors, not out of assets subject to a floating charge, and when the order is made it does not make the costs expenses of the liquidation or bring them within r 4.218(1).

17. Millett J then considered, if he was wrong, whether he would order payment. He rejected the argument that because the expenditure was properly incurred, the order should be made, saying that the test was whether it would be just to make the order. On that test he would have refused to make the order.

- a 18. In *Re Oasis Merchandising Services Ltd (in liq)*, *Ward v Aitkin* [1997] 1 All ER 1009, [1998] Ch 170 a liquidator of a company in compulsory liquidation brought proceedings under s 214 against former directors of the company. He assigned the fruits of the proceedings to another company. The assignment was champertous, but it was argued by the liquidator and the assignee that the power conferred on the liquidator by para 6 of Sch 4 to the Act to sell 'any of the company's property' b authorised the sale of the fruits of the proceedings. This court held, in agreement with Robert Walker J ([1995] 2 BCLC 493), that 'the company's property' in para 6 was confined to the property of the company at the commencement of the liquidation and property representing the same and did not include property which only arose after the liquidation of the company, which was recoverable only by the liquidator pursuant to his statutory powers and which was then held c on the statutory trust for distribution. This court said that the fruits of the s 214 proceedings fell into the latter category. The reasoning of Millett J in *Re M C Bacon* that a claim under s 214 was not an existing asset and that an application for an order under the section was not to realise or get in an asset of the company was expressly approved (see [1997] 1 All ER 1009 at 1019, [1998] Ch 170 at 180).
- d 19. *Re Exchange Travel (Holdings) Ltd (in liq) (No 3)*, *Katz v McNally* [1997] 2 BCLC 579 involved proceedings under s 239 of the Act brought by the liquidators of a company in compulsory liquidation against former directors of the company. The directors were ordered by the trial judge to make repayment. The directors appealed and the liquidators cross-appealed. One of the points taken by the e directors was that by reason of the decision in *Re M C Bacon* the liquidators had no right to recoup the costs of the s 239 proceedings from the recoveries made in the proceedings. Phillips LJ (at 587) said that he was unable to accept Millett J's analysis as it ran counter to a clear and straightforward statutory scheme. But Phillips LJ said that this court in that case had not had the depth of argument that this important question would merit, were its resolution to constitute a ratio decidendi of that case, and that his conclusions were not determinative of the f issue before him. Those conclusions were expressed as follows (at 587–588):

'(1) Section 115 confers a right to payment of the expenses specified. It may, of course, be sensible for the liquidator to obtain the approval of the court that the expenses are "properly incurred". (2) Expenses incurred by a g liquidator in s 239 and similar proceedings constitute "expenses of the winding up". Rule 12.2 would seem to put this beyond doubt. (3) Rule 4.218 sets out to make comprehensive provision for the order of priority of all types of expense properly incurred by the liquidator in the performance of his duties and its provisions should be interpreted accordingly. (4) "Assets" h in r 4.218(1) and (1)(a) include those recoveries made by the liquidator in s 239 and similar proceedings. This meaning accords with that which should be given to "assets" in rr 4.127, 4.138, 4.179, 4.180 and 4.186. (5) "necessary disbursements" in r 4.218(1)(m) should be interpreted to mean disbursements rendered necessary by the proper performance of the liquidator's duties, as opposed to unnecessary disbursements not properly incurred.'

j He therefore rejected the directors' argument that what he called 'the s 239 expenses' (by which we think he meant the s 239 recoveries) were not 'assets' under r 4.218(1)(a). The decision in *Re Oasis Merchandising* was distinguished as relating to the meaning of 'the company's property' in para 6 of Sch 4 to the Act.

20. Those observations received the powerful support of Morritt LJ. He accepted that the right of a liquidator to bring s 239 proceedings was not property of the

company at the commencement of the winding up capable of being sold by the liquidator. But he said that it did not follow that the recoveries did not become assets in the hands of the liquidator out of which the costs and expenses of the liquidation may be paid. He continued (at 596):

‘In my view recoveries in respect of voidable preferences are assets for the purposes of ss 115, 156 and 175 of the 1986 Act and rr 4.218 and 4.220. Were it otherwise it is hard to understand how the recoveries in respect of a voidable preference ever become subject to the statutory trusts for a *pari passu* distribution to creditors. The decision of this court in *Re Oasis Merchandising Services Ltd* (*Re Oasis Merchandising Services Ltd (in liq)*, *Ward v Aitkin* [1997] 1 All ER 1009, [1998] Ch 170) is consistent with this view. The fact that the cause of action was not the property of the company at the commencement of the winding up and therefore not within the statutory power of sale conferred by para 6 of Sch 4 to the 1986 Act is a different issue altogether. Given that the recoveries are assets for the purposes of those sections and rules the question then is whether there is any comparable statutory right to obtain reimbursement for the costs incurred out of those assets. I agree with Phillips LJ that the costs incurred in proceedings to set aside a voidable preference must be fees, costs, charges, and other expenses incurred in the course of the winding up and therefore expenses of the winding up within r 12.2 of the 1986 rules. Proceedings to set aside a voidable preference are, *par excellence*, winding-up proceedings. If this is right then s 156 of the 1986 Act and the opening words of r 4.218 of the 1986 rules provide or recognise that those expenses are payable out of the assets in the hands of the liquidator whether derived from property of the company or not. The decision of Millett J in *Re M C Bacon Ltd (No 2)* ([1990] BCLC 607, [1991] Ch 127) would seem to be contrary to this conclusion. If it were necessary to do so in order to resolve this appeal I would respectfully disagree with him.’

But Morritt LJ added that the point did not receive the depth of argument its importance warranted and that it was not necessary to reach any final conclusion.

21. Leggatt LJ agreed with both judgments without finding it necessary to impugn the decision in *Re M C Bacon*.

22. Finally in *Mond v Hammond Suddards (a firm)* [2000] Ch 40, [1999] 3 WLR 697, decided shortly after the deputy judge gave judgment but without that judgment or *Re Exchange Travel* being cited, this court again considered *Re M C Bacon*. The case included a dispute between the receivers of a company which went into compulsory liquidation and the liquidator as to which of them was entitled to a sum paid to the liquidator by way of compromise of a claim to recover money paid by the company to its solicitors after the presentation of the winding up petition. The trial judge held against the liquidator, but said that the liquidator was entitled to be reimbursed his costs of the unsuccessful litigation out of the assets of the company, which he held to include assets subject to the floating charge. Another judge was then asked to review the trial judge’s decision but he held that he had no jurisdiction to set aside the trial judge’s order. The result was that the liquidator was permitted to deduct his own costs from his liability to the receiver, rendering that liability ineffective. The receivers appealed to this court.

23. Chadwick LJ (with whom Clarke LJ and Sir Iain Glidewell agreed) said that Millett J in *Re M C Bacon* accepted that the liquidator had a statutory right to recoup costs which fell within the categories described as ‘the expenses of the

- a liquidation' and listed in r 4.218(1). Chadwick LJ commented that that must follow from the fact that the rules were made under s 411 and he referred to para 17 of Sch 8 to the Act. He expressly agreed both with Millett J's conclusion in *Re M C Bacon* that para (a) in r 4.218(1) could have no application to the costs of an unsuccessful attempt to recover assets and with the reasoning upon which that conclusion was based. Chadwick LJ also agreed with Millett J's conclusion that there was no other paragraph under r 4.218(1) which could be said to encompass the costs of unsuccessful litigation. He commented:
- b

'I do not find that surprising. It would be remarkable if the Rules did give to the liquidator an unfettered right to recoup his costs of unsuccessful litigation. It must be kept in mind that a liquidator may bring or defend proceedings in his own name without first obtaining sanction; and it is necessary that the court should retain some control over his right to recoup the costs of such proceedings where the liquidator is unsuccessful.' (See [2000] Ch 40 at 52, [1999] 3 WLR 697 at 708.)

c

- d 24. Chadwick LJ then referred to Millett J's views on s 115. He pointed out that s 115 had no application in a winding up by the court, but that s 156, allowing the court in a compulsory winding up when assets are insufficient to satisfy the liabilities, to order payment out of the assets of 'the expenses incurred in the winding up' in such order of priority as it thinks just, was the relevant section in the case before him. That expression he thought synonymous with the expression in s 115, 'expenses properly incurred in the winding up'. He concluded that both expressions were wider in scope than the expression 'the expenses of the winding up' in s 175(2) or the expression 'expenses properly chargeable or incurred ... in pursuing, realising or getting in any of the assets of the company' used in r 4.218(1)(a). He continued:
- e

- f 'Both sections 115 and 156 recognise that there will be expenses properly incurred in the winding up which do not fall within the more restricted expressions used in section 175(2) and rule 4.218(1)(a); but which are, nevertheless, payable out of the assets of the company. Those expenses may include the costs of unsuccessful litigation: see *In re Silver Valley Mines* ((1882) 21 Ch D 381) and *In re Wilson Lovatt & Sons Ltd.* ([1977] 1 All ER 274), referred to by Millett J. in *Re M.C. Bacon Ltd.* ([1990] BCLC 607 at 614, [1991] Ch 127 at 140). But neither section 115 nor, a fortiori, section 156 of the Act gives the liquidator a right to recoup such costs. The sections are, as Millett J. pointed out, concerned with priority. The court retains power to disallow such costs if it thinks fit.' (See [2000] Ch 40 at 53, [1999] 3 WLR 697 at 708.)
- g

h

The deputy judge's judgment

- j 25. The deputy judge ([1999] 2 BCLC 666) did not of course have the benefit of this court's judgment in *Mond's* case. He referred to what Millett J said in *Re M C Bacon Ltd (No 2)* [1990] BCLC 607, [1991] Ch 127 about s 115 in the passage which we have cited, but said that like Phillips LJ, and probably also Morritt LJ, he was led by 'the structure of the legislation' to the conclusion that s 115 was logically prior to r 4.218(1) and that the same was true of s 175, those sections not being restricted to imposing the priority of expenses over other obligations but also creating the right and obligation to pay the expenses. He said that by contrast r 4.218(1) purported only to determine the priority as between different categories of expenses, and not to create the right and obligation to pay them or

even to define the meaning of expenses in the two sections. He thought it would be appropriate to interpret r 4.218(1) so as to embrace all expenses naturally falling within the words of the two sections 'so as to avoid a lacuna in the hierarchy of priority as between such expenses', and that on that basis any conflict between 'proper' in s 115 and 'necessary' in r 4.218(1)(m) disappeared. He considered that the costs of the proposed proceedings would be 'expenses properly incurred in the winding up' (s 115) or 'expenses of the winding up' (s 175) or 'fees, costs, charges and other expenses incurred in the course of winding up ... proceedings' (r 12.2), all these formulations being identical. As the propriety of the liquidator's decision was not challenged, he held that the costs would plainly fall within ss 115 and 175 and were therefore recoverable in priority to the distribution to the preferential creditors.

26. The deputy judge then turned to the question whether the costs of the proposed proceedings fell within para (a) or para (m) of r 4.218(1). He agreed with Phillips and Morritt LJ in *Re Exchange Travel* that from the moment of recovery money or property recovered under s 239 is an asset of the company and by identity of reasoning so are monies paid to the liquidator under s 214. He distinguished *Re Oasis Merchandising Services Ltd (in liq)*, *Ward v Aitkin* [1997] 1 All ER 1009, [1998] Ch 170 on the same grounds as Phillips and Morritt LJ. He thought the words 'realising or getting in any of the assets of the company' fairly susceptible of a wider interpretation than realising or getting in existing assets. He could see—

'no reason of structure, function or policy why r 4.218(1)(a) should seek to distinguish between the cost of increasing the fund of distributable assets according to the nicety of whether or not the recovery is based on pre-existing ownership.' (See [1999] 2 BCLC 666 at 673.)

However, he agreed with Millett J that the costs of unsuccessful proceedings could not fall within para (a) of r 4.218(1). As for para (m) of r 4.218(1) the deputy judge applied the test suggested by Phillips LJ in *Re Exchange Travel (Holdings) Ltd (in liq)* (No 3), *Katz v McNally* [1997] 2 BCLC 579 at 588 of whether the costs were 'rendered necessary by the proper performance of the liquidator's duties', and held that they were, regardless of the outcome of the proceedings.

27. The result, therefore, if the deputy judge were right in his conclusion, is that both *Re M C Bacon* and *Mond's* case should have been decided differently, and in each case the owners of charged assets should in effect have been required to fund the unsuccessful litigation against them on the footing that the liquidator had incurred the litigation expenses properly. That is a remarkable result.

The first issue: ss 115 and 175(2)

28. The first issue which arises on the deputy judge's reasoning is whether ss 115 or 175(2)(a) give the liquidator the right to recoup out of the assets the costs of the proposed litigation. As we have noted the deputy judge followed the guidance given by Phillips and Morritt LJ in *Re Exchange Travel* in finding the structure of the legislation leading him to the conclusion that ss 115 and 175 were logically prior to r 4.218(1). Mrs Giret submitted that the reasoning in *Re Exchange Travel* and that of the deputy judge should be preferred to that of Millett J in *Re M C Bacon*. Mr McCaughran for the preferential creditors submits that Millett J was entirely correct and that in any event the decision of this court in *Mond's* case, in which the reasoning of Millett J was expressly approved, is binding.

a 29. The considered views of Phillips and Morritt LJ, expressed in reserved judgments, deserve the highest respect; but, as they themselves acknowledged, the points were not explored in argument in sufficient depth and their remarks were obiter. They are therefore not binding on this court, whereas the reasoning which led to the conclusions reached by this court in *Mond's* case is binding, unless that decision can be said to be per incuriam. It is surprising and unfortunate
b that *Re Exchange Travel* was not brought to the attention of this court in *Mond's* case, but Mrs Giret rightly does not suggest that the failure to take note of obiter dicta renders the decision in *Mond's* case one which this court can choose not to follow. However, Mrs Giret submitted to us that the absence of any reference to
c r 12.2 of the rules in *Mond's* case does have that effect. Her argument was that the rule, made pursuant to s 411(2)(a) and para 17 of Sch 8 to the Act, providing the fees, costs, charges and other expenses which may be treated as expenses of a winding up, was r 12.2. Rule 4.218, she said, governed the order of priority of expenses of the liquidation inter se, though she accepted that that rule was intended to be a comprehensive statement of those expenses.

d 30. We are not able to accept that submission for two reasons. First, the fact that a provision is not referred to in a judgment does not mean that the provision was not cited or was overlooked. If Chadwick LJ thought r 12.2 was too insignificant for mention, that would not appear to be far different from the view of the deputy judge who referred only to it as providing an elucidative gloss. Phillips LJ too seems to have thought it only confirmatory of his view formed
e from other provisions. Second, we find it impossible to read r 12.2 as providing a complete statement of what are to be treated as expenses of a winding up. It only applies to fees, costs, charges and other expenses incurred in the course of winding up or bankruptcy proceedings. Mrs Giret's initial submission was that the reference to 'winding up' was not limited by the word 'proceedings'. That is an impossible construction, creating an absurd distinction between liquidations
f and bankruptcies. Plainly 'winding up' is used in an adjectival sense attached to the noun 'proceedings', just as 'bankruptcy' goes with 'proceedings'. The rule can only be comprehensive if all the fees, costs, charges and other expenses incurred in the winding up or bankruptcy are within the rule. But it cannot be right to ignore the word 'proceedings' (compare, for example, in r 12.3 the expression 'in both winding up and bankruptcy'). Pace Morritt LJ we doubt if s 214 and s 239
g proceedings are winding up proceedings within the meaning of the rules. They are insolvency proceedings, as defined in r 13.7, being proceedings under the Act, and they are proceedings in the winding up. But to our minds the expression 'winding up proceedings' connotes the proceedings instituted by the petitioner to obtain a winding up order, just as bankruptcy proceedings are proceedings to obtain a
h bankruptcy order. So read, r 12.2 does no more than make clear that the expenses incurred in those proceedings are to be treated as expenses of a winding up or bankruptcy. Mr McCaughan pointed out that there appears to be no predecessor to this provision which appeared for the first time in the rules. It may be that it was included for the avoidance of doubt. Accordingly, we cannot accept that the
j authority of *Mond's* case is undermined by the absence of reference to r 12.2.

31. In our judgment, the reasoning of this court in *Mond's* case on the first issue is binding on us. In reaching his conclusion that the liquidator was not entitled to his costs in his unsuccessful litigation out of the assets, Chadwick LJ, dealing as he was with a company in compulsory liquidation, expressly approved the reasoning of Millett J in *Re M C Bacon*, dealing as he was with a company in voluntary liquidation, and held that there was no material difference in the

applicable statutory provisions. He expressly stated that s 115 and a fortiori s 156 did not give the liquidator a right to recoup costs, being sections concerned with priority. a

32. We would add that in any event we agree with the way Millett J expounded how the relevant statutory provisions were intended to operate. Where the Act specifically contemplates, by s 411(2)(a) and para 17 of Sch 8, that the rules are to provide what fees, costs, charges and other expenses are to be treated as the expenses of a winding up, it would be odd if s 115 were to be construed as meaning that all winding up expenses, so long as properly incurred, are to be payable out of the company's assets. As it seems to us, the section is concerned with the priority of expenses in the liquidation, not inter se but as against other claims. Rule 4.218 tells one both what are the expenses to be treated as the expenses of a winding up and what priority they have inter se. The liquidator has the right to recoup those expenses out of the assets in that order, subject to the ability of the court on an application under s 156 in the case of a compulsory liquidation, or an application under s 112, in the case of a voluntary liquidation, to exercise the power under s 156, to dictate a different order of priority. b
c

33. We can deal with s 175 of the Act more shortly as Mrs Giret did not press her submission that this too provided the liquidator with the right to recoup litigation costs out of the assets of the company. The deputy judge, it will be recalled, appears to have thought s 175(2) did confer that right, treating the reference to 'expenses of the winding up' as identical to the similar expressions in s 115 and r 12.2. Again, that cannot stand in the light of *Mond's* case, Chadwick LJ stating that the expressions in ss 115 and 156 were wider in their scope than the more restricted expression in s 175(2). We would add that s 175(2)(a), with its passing reference to the priority of the expenses of the winding up, seems to us to be a wholly improbable source of an independent right in the liquidator to recoup such expenses out of the assets. d
e

34. For these reasons, therefore, we respectfully disagree with the deputy judge on the first issue. f

The second issue: r 4.218(1)

35. The second issue is whether the costs of the proposed litigation fall within r 4.218(1). Only two paragraphs of that rule are suggested to be relevant: (a) and (m). g

36. The deputy judge held that the costs would not fall within para (a) if the proceedings were unsuccessful. The correctness of that conclusion was confirmed in *Mond's* case and is not challenged by Mrs Giret. We therefore need say no more about it. The deputy judge however held that the costs of successful proceedings would qualify under para (a), because in agreement with Phillips and Morritt LJ he considered that moneys recovered from proceedings under ss 239 or 214 became assets of the company. Like them he thought that the decision of this court in *Re Oasis Merchandising Services Ltd* (in liq), *Ward v Aitkin* [1997] 1 All ER 1009, [1998] Ch 170 was distinguishable, as deciding only the quite different issue that the fruits of a s 214 claim were not 'the property of the company' within para 6 of Sch 4 to the Act. h
j

37. Mr McCaughran submitted that the reasoning of this court in *Re Oasis Merchandising* which led it to the decision on that issue covered this point and is therefore binding on this court. In *Re Oasis Merchandising* this court drew a distinction between the property of the company existing at the commencement

- a of the liquidation and assets which arise only after the liquidation of the company and are recoverable only by the liquidator pursuant to the statutory powers conferred on him. The right of action of a liquidator for preferences or wrongful trading and the fruits of such an action were said by this court not to be the property of the company but to be held on the statutory trust for distribution by the liquidator, and that distinction was said to be supported by a number of
- b authorities including *Re M C Bacon*. We agree with Mr McCaughran. We therefore conclude that the deputy judge was wrong to find that the costs of the proposed litigation, if successful, would fall within para (a) of r 4.218(1).

38. The deputy judge held that the costs also fell within para (m) of r 4.218(1), relying on Phillips LJ's remarks that necessary disbursements were those rendered necessary by the proper performance of the liquidator's duties. Mr McCaughran
- c relies again on *Mond's* case as being inconsistent with that view. In *Mond's* case Chadwick LJ, as we have already noted, expressly agreed with the reasoning of Millett J in *Re M C Bacon* in concluding that neither para (a) of r 4.218(1) nor any other paragraph of that rule could be said to encompass the costs of unsuccessful litigation. The reasoning of Millett J included drawing a distinction between
- d 'necessary' in para (m) of r 4.218(1) and 'proper' in s 115, and saying that whilst the liquidator did not have a statutory right of recoupment, he had the right to apply to the court for such recoupment. Mrs Giret points out that in one of the two cases referred to by Millett J as authorities for treating the liquidator as having the right to apply to the court for an order permitting the payment of the costs out of the assets of the company, *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER
- e 274 at 286, Oliver J treated as a prima facie presumption the entitlement of a liquidator to recoup himself, unless the liquidator's decision to do so is challenged. But that was noted by Millett J (*Re M C Bacon Ltd (No 2)* [1990] BCLC 607 at 614, [1991] Ch 127 at 140). Whatever be the true position on the court's discretion, the reasoning in *Mond's* case is again decisive of whether para (m) of r 4.218(1) is
- f applicable. It would be surprising if 'necessary' meant no more than 'proper'. We would respectfully disagree with the deputy judge on the applicability of that paragraph.

Discretion

39. It was asserted by the preferential creditors before the deputy judge that
- g there was a discretionary power in the court to permit recovery of the costs of the proposed litigation from the assets of the company. The deputy judge said that the existence of such power was assumed by Millett J in *Re M C Bacon* and not disputed, but that its source was unclear to him as were the principles to be applied in the exercise of any such discretion. He refrained from considering the
- h matter further.

40. Mrs Giret asked that this court should decide whether the liquidator should be permitted to recoup the costs from the assets of the company. She submitted that the liquidator having made his investigations and taken the decision that the litigation against the former directors should proceed and having agreed with his
- j own legal representatives a conditional fee arrangement and obtained the quotation for insurance which we have recounted, and because the propriety of the proposed proceedings is not in doubt, the court should authorise the payment of costs (such as the insurance premium) out of the assets of the company. She pointed out that the litigation if successful could benefit the preferential creditors as well as the other unsecured creditors. Mr McCaughran submitted that no order should be made in advance of the outcome of the proceedings.

The liquidator, he said, should not use moneys, which would otherwise be paid as a dividend to the preferential creditors, in funding litigation largely for the benefit of the unsecured creditors, who should be required to provide that funding or else buy out the preferential creditors. a

41. We share the deputy judge's uncertainty as to the source of the asserted discretion. We are doubtful whether s 156 read with s 112 assists as it merely permits a rearrangement of the order of priority of expenses (presumably of the priority in r 4.218; see r 4.220(1)). Mr McCaughran relied on the inherent jurisdiction as an alternative source of the discretion of the court, but it is surprising to find that having to be relied on in this field so overlaid with statutory provisions. b

42. Let us however assume that the court has that entirely desirable and beneficial discretion. In the circumstances of this case we would not be prepared to exercise it, as we do not think that we have sufficient information before us to reach a proper decision. It is appropriate to be cautious where the court is asked to provide for the liquidator's costs out of the assets even if the litigation ultimately proves unsuccessful, particularly where the preferential creditors who would otherwise be paid a dividend oppose the use of the company's moneys for that purpose. We have not been provided with the sort of information that is regularly provided on a trustee's *Beddoe* application (*Re Beddoe, Downes v Cottam* [1893] 1 Ch 547) or what is required for obtaining an indemnity as to costs in a minority shareholder's action (*Wallersteiner v Moir (No 2)*, *Moir v Wallersteiner (No 2)* [1975] 1 All ER 849 at 859, 869, [1975] QB 373 at 392, 404). Thus we do not know in what terms counsel was instructed and advised in recommending the litigation proposed. The evidence before us is also now rather dated and these proceedings have no doubt taken their toll in costs. We were also told by Mrs Giret that a writ has already been issued (for limitation purposes) but not served. c
d
e

43. In all the circumstances we do not think that we are in a position to exercise the assumed discretion, though the liquidator must of course be free to go back to the Companies Court if so advised to pursue an application on fuller evidence to be put before the court. f

44. For these reasons we would allow the appeal and set aside the order of the deputy judge.

Appeal allowed.

Gillian Crew Barrister

a Compagnie Noga D'Importation et
D'Exportation SA v Abacha and another
(as personal representatives of Sani
Abacha (deceased))
b Attorney General of the Federal Republic
of Nigeria and another v Abacha and
another (as personal representatives of
c Sani Abacha (deceased))

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

RIX LJ

d 10–12, 17 APRIL, 3 MAY 2001

Judgment – Alteration – Variation of decision after judgment delivered – Judge's power to recall and change judgment – Whether exercise of power dependent on existence of exceptional circumstances.

- e The applicant company was a party to a complex dispute in the Commercial Court. After a lengthy trial, the judge handed down a reserved judgment, finding against the company. The latter claimed that, in the course of his judgment, the judge had misapplied the parol evidence rules in disregard of binding authority, and that his decision was flawed as a result. It therefore asked the judge to
f reconsider his judgment, invoking the court's jurisdiction to reconsider its judgment before the perfecting of the order. In doing so, it contended that the exercise of that jurisdiction was not dependent on the existence of exceptional circumstances.
- g **Held** – The court's jurisdiction to reconsider its judgment before its order had been perfected could only be exercised in a case which raised considerations, in the interests of justice, which were out of the ordinary, extraordinary or exceptional. An exceptional case did not have to be uniquely special, and 'strong reasons' was perhaps an acceptable alternative to 'exceptional circumstances'. It would necessarily be in an exceptional case that strong reasons were shown for reconsideration. In the
h instant case, there were no such reasons. It was a case where it was said that the judge had got it wrong, on points which had been argued. The appeal process would be subverted if the application were granted. There were, of course, cases where an error of fact or law might be too plain for argument, and it was better that the error was corrected without imposing on the parties the need for an
j appeal. It was wrong, however, for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances a judge should be tempted to open up reconsideration of his judgment, an appeal would not be avoided: it would be made inevitable. Every case would become subject to an unending process of reconsideration, followed by appeal, both on the issue of reconsideration and on the merits. Accordingly, the application to reconsider the judgment would be dismissed (see [41], [43]–[45], [47], [48], below).

Stewart v Engel [2000] 3 All ER 518 applied.

Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 All ER 736 and *Pittalis v Sherefettin* [1986] 2 All ER 227 considered.

Notes

For amendment before entry of judgment or order, see Supp to 26 *Halsbury's Laws* (4th edn) para 555.

Cases referred to in judgment

Australian Direct Steam Navigation, Re, Miller's Case (1876) 3 Ch D 661; *affd* (1877) 5 Ch D 70, CA.

Barrell Enterprises, Re [1972] 3 All ER 631, [1973] 1 WLR 19, CA.

Biguzzi v Rank Leisure plc [1999] 4 All ER 934, [1999] 1 WLR 1926, CA.

Blenheim Leisure (Restaurants) Ltd (No 3), Re (1999) Times, 9 November.

Glebe Sugar Refining Company Ltd v Trustees of Port and Harbours of Greenock [1921] 2 AC 66, HL.

Harrison's Share under a Settlement, Re, Harrison v Harrison, Re Ropner's Settlement Trusts, Ropner v Ropner [1955] 1 All ER 185, [1955] Ch 260, [1955] 2 WLR 256, CA.

Heilbut, Symons & Co v Buckleton [1913] AC 30, [1911–13] All ER Rep 83, HL.

Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503, [1932] All ER Rep 494, HL.

Macdonald v Longbottom (1860) 1 E & E 977, [1843–60] All ER Rep 1050, 120 ER 1177.

Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 All ER 736, [1937] 1 KB 717, CA.

Murphy v Stone Wallwork (Charlton) Ltd [1969] 2 All ER 949, [1969] 1 WLR 1023, HL.

Pittalis v Sherefettin [1986] 2 All ER 227, [1986] QB 868, [1986] 2 WLR 1003, CA.

Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

Spice Girls Ltd v Aprilia World Service BV (2000) Times, 12 September.

Stewart v Engel [2000] 3 All ER 518, [2000] 1 WLR 2268, CA.

Williams v Roffey Bros & Nicholls (Contractors) Ltd [1990] 1 All ER 512, [1991] 1 QB 1, [1990] 2 WLR 1153, CA.

Applications

Compagnie Noga d'Importation et d'Exportation SA (Noga), the claimant in two actions brought against the estate, family and business associates of Sani Abacha deceased (the SJ Berwin defendants), applied for Rix LJ to reconsider his judgment, handed down on 26 February 2001, determining preliminary issues in those actions and in a further action brought by the Federal Government of Nigeria (the FGN) against the SJ Berwin defendants. Noga applied alternatively for permission to appeal. The SJ Berwin defendants and FGN also applied for permission to appeal against parts of the judgment. The facts are set out in the judgment.

Steven Gee QC, Vasanti Selvaratnam and Mary Gibbons (instructed by Stephenson Harwood) for Noga.

Gordon Pollock QC, Lawrence Cohen QC and Paul Stanley (instructed by Dechert) for the SJ Berwin defendants.

David Railton QC and Andrew Mitchell (instructed by Eversheds) for the FGN.

a 3 May 2001. The following judgment was delivered.

RIX LJ.

[1] Every day of the legal year courts of higher jurisdiction are reversing the judgments and orders of lower courts. In this case, a losing party in a lengthy, difficult and complex dispute, after a six-month trial, and a reserved judgment
b running to 655 paragraphs, seeks reconsideration of that judgment, not on appeal, but by the trial judge himself on the ground that he is in error. The applicant prays in aid what has been called the *Barrell* jurisdiction (see *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19) or what is submitted to be a still wider jurisdiction called the 'reconsideration jurisdiction'. In sum, the applicant asks
c the court to reverse its judgment so that a claim for \$US100m under an alleged settlement agreement should be held to have succeeded rather than failed. The question is whether this application falls properly within the appropriate judicial exercise of such a jurisdiction.

[2] I am the trial judge and the application has been made to me. For the purposes of this application I shall have to set the scene by saying something
d about the trial and the reserved judgment which I have written, but nothing I say by way of what is necessarily a compressed gloss of that judgment is intended to affect it or qualify it in any way.

[3] In these proceedings in the Commercial Court in London, two actions have been brought by a Geneva company, which I shall call Noga (*Compagnie Noga d'Importation et d'Exportation SA*) against, among others, a group of individuals
e and companies who have throughout been known, after their original, but not current, solicitors, as the SJ Berwin defendants. Those defendants are essentially the estate, family and business associates of the late General Abacha, a former ruler of Nigeria, as well as certain of their companies. The subject matter of those actions was a transaction by which Nigeria bought back the debt instruments
f which it had guaranteed in respect of the construction of a steel plant at Ajaokuta in Nigeria. Noga claims to have interests in those instruments, the Ajaokuta bills. Subsequently, the Federal Government of Nigeria (the FGN) itself commenced a third action against the SJ Berwin defendants in respect of the same debt buy-back transaction, claiming that it was a corrupt transaction, engineered between General Abacha himself and his family interests, under which the SJ Berwin
g defendants had obtained a corrupt profit.

[4] Subsequently the three parties, by which I intend to refer to Noga, the SJ Berwin defendants and the FGN, met in Abuja in Nigeria in July and August 1999 for the purpose of negotiations designed to settle their disputes. As a result, three agreements were made, the first involving all three parties, and the second
h and third involving the FGN and the SJ Berwin defendants alone. The first agreement has been called the tripartite agreement. It is dated 11 August 1999. The other two agreements are known after their dates as the 13 August agreement and the 16 August agreement. The 16 August agreement states that it supersedes the 13 August agreement.

[5] Under the tripartite agreement both the FGN and Noga agreed to drop the claims in their London actions and the SJ Berwin defendants agreed to pay 'a settlement sum' to Noga. Under the 13 August agreement, the SJ Berwin defendants agreed to pay DM300m to the FGN in return for the settlement of all claims that the FGN might have against them, not only in respect of the Ajaokuta transaction but also in respect of anything else. This was known as the 'global waiver'. The FGN does in fact advance against the SJ Berwin defendants a raft of other

claims, known generally as the 'looting claims', under which the complaint is made that General Abacha with the aid of the SJ Berwin defendants looted his own country and its treasury. Under the 16 August agreement, the 13 August agreement was superseded and the DM300m payment was restricted to the settlement of the FGN's Ajaokuta claim. a

[6] The tripartite agreement mentioned a 'settlement sum' but did not identify it. In cl 2 it is said that 'NOGA, having agreed to receive a settlement amount ... agrees to withdraw its claims' and in cl 3 it is said that the SJ Berwin defendants agree 'to pay a settlement sum to NOGA in consideration of the above'. b

[7] The parties soon fell again into dispute. Was the tripartite agreement a binding contract at all, or a mere agreement to agree? Had a settlement amount or sum ever been agreed between the SJ Berwin defendants and Noga? Noga said that \$US100m had been agreed, but the SJ Berwin defendants said that nothing had been agreed. Was the 13 August agreement valid and effective? The FGN said that it had been orally stipulated to be subject to the approval of the President and the Vice President, which had been refused, and that in any event it had been induced by a fraudulent misrepresentation that the global waiver had been previously agreed with the Vice President, and that in consequence it had been validly avoided. Had the 13 August agreement in any event been superseded by the 16 August agreement, or was the latter agreement ineffective because of want of consideration? c
d

[8] On 30 September 1999 Moore-Bick J gave directions for preliminary issues to be tried in the three actions as to whether 'any claims in them have been settled and, if so, which of the claims have been settled and on what terms'. The trial of these preliminary issues began in December 1999. It continued, with some interruptions, into May 2000. Judgment was reserved. The completion of the judgment was delayed for a while by an application by the SJ Berwin defendants to introduce further evidence. That application was resolved on 19 December 2000. The judgment was distributed in draft to the parties' counsel on 13 February 2001. In between the time of such distribution and the appointed time for its formal handing down in court on 26 February, Noga's solicitors gave notice to me by fax dated 19 February 2001 and by an application issued on the same day that Noga wished to apply to me to reconsider that section of my judgment where I had concluded that Noga had failed to prove that the tripartite agreement was binding. In particular a section of my judgment headed 'Was the \$US100m agreement contractually binding?', running between paras 579 and 601, was said to have been in error. Paragraph 601 concludes: e
f
g

'Be all that as it may, it still remains the position that at the end of the day, it is Noga that bears the burden of proving a binding agreement with the SJ Berwin defendants through Mr Bagudu. I am prepared to accept that the figure of \$US100m was agreed, but not unconditionally and not by way of a contractually binding contract to be found in the tripartite agreement.' h

[9] The Mr Bagudu there referred to is one of the SJ Berwin defendants. He is the close business associate of General Abacha's son, Mohammed Abacha, another of the SJ Berwin defendants. It was Mr Bagudu who had the burden of the Abuja negotiations on behalf of the SJ Berwin defendants. j

[10] Thus it was that Noga ultimately failed to win the case which it had been presenting at the trial of the preliminary issues, which was that there was a binding settlement agreement involving the payment to it by the SJ Berwin

a defendants of \$US100m. Its defeat may be described as a narrow defeat. By far the largest single factual issue at the trial was whether there had been agreement on \$US100m with Mr Bagudu on behalf of the SJ Berwin defendants. (Mr Bagudu denied that \$US100m had even been discussed let alone agreed.) Noga won that issue, but I held that it had failed to prove that that agreement was unconditional.

b [11] In due course, when informed of my judgment, Noga authorised the application, foreshadowed by its lawyers, that I should reconsider my decision. That application has now been heard. For the purpose of making it, Mr Steven Gee QC and Ms Vasanti Selvaratnam on behalf of Noga have produced written submissions running to 388 paragraphs, and reply submissions of 182 paragraphs. Those submissions referred to some 70 authorities, encompassing authorities both on the reconsideration jurisdiction itself and on the underlying merits of the application, the substantial majority being of the latter category. I made it clear, in giving directions for the hearing of the application, that I had first to be satisfied of the jurisprudential basis of the reconsideration jurisdiction. Mr Gee felt that he could not do justice to his application or to my direction without explaining in detail how I had fallen into error. As a result of his and his junior's written submissions, and the court's pre-reading, he was able to complete his oral submissions in a little over a day. The hearing of the application as a whole was completed in two days. Compared to the length of the trial and the importance of the interests involved, and the range of arguments deployed, that was not perhaps a disproportionate amount of time. But there is no doubting that the application has involved a substantial commitment of resources, and that greater delay to the process of completing the handing down of a final judgment has been restricted only by very considerable efforts having to be made by all involved, including court listing but in particular counsel, for which I am grateful.

f [12] It is common ground that until an order has been perfected, the court retains control over its judgment and its decision, and can permit argument to be reopened. As a result it may modify or even reverse a decision to which it has already come, and which it has communicated to the litigants. As Jenkins LJ said, giving the judgment of the court, in *Re Harrison's Share under a Settlement, Harrison v Harrison, Re Ropner's Settlement Trusts, Ropner v Ropner* [1955] 1 All ER 185 at 188, [1955] Ch 260 at 276: 'We think that an order pronounced by the judge can always be withdrawn, or altered or modified, by him until it is drawn up, passed and entered. In the meantime it is provisionally effective ...'

g [13] In that case a judge made an order in chambers approving a variation of trust and a few days later the House of Lords gave a decision which showed that the judge had lacked jurisdiction to do what he had done. He recalled his order before it had been drawn up, and the Court of Appeal said that he was entitled to do so. The same jurisdiction was considered in *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19, where it was sought to reopen an appeal on the ground of fresh evidence before the Court of Appeal's order had been entered. The Court of Appeal declined to permit the appeal to be reopened. Russell LJ gave the judgment of the court. He said:

j 'When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present ... In all these cases there

were circumstances of a wholly exceptional character. It is clearly not permissible for a party to ask for a further hearing merely because he has thought of a possible ground of appeal that he originally overlooked. The discovery of fresh evidence has never been suggested as a ground for reopening the argument before the Court of Appeal. If fresh evidence comes to light, of such a character as to call for further consideration of the issues, the right way to deal with the situation is by applying for leave to appeal to the House of Lords: see *Murphy v Stone Wallwork (Charlton) Ltd* ([1969] 2 All ER 949, [1969] 1 WLR 1023); or if such appeal be not available in a contempt case, then by application for release.' (See [1972] 3 All ER 631 at 636, 637, [1973] 1 WLR 19 at 23–24.)

[14] Since the entry into force of the CPR regime, there is now the recent authority of *Stewart v Engel* [2000] 3 All ER 518, [2000] 1 WLR 2268, where the Court of Appeal had to consider whether what it described as the *Barrell* jurisdiction had survived the introduction of the CPR and if so in what terms. That was a case where the judge at first instance had reopened his decision, before the drawing up of his order, to strike out the claimant's case. After the claimant had changed her mind as to whether she wished to replead her case in another way the judge permitted her to do so and thus changed his own order and declined to dismiss the claim. The Court of Appeal held, by a majority, that the judge was wrong, as a matter of discretion, to reopen the matter. Sir Christopher Slade said:

'I accept that it is possible that the *Barrell* jurisdiction (*Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19) falls to be regarded as a rule of practice rather than law and was capable of being abrogated by the introduction of the CPR. Nevertheless, I am satisfied that there is nothing in the CPR which obliges us to hold that it was so abrogated and that we should not reach any such conclusion. On the contrary, the jurisdiction, if very cautiously and very sparingly exercised, in my judgment serves a useful purpose, fully in accord with the overriding objective of enabling the court to deal with cases "justly", as particularised in r 1.1. Neuberger J in *Re Blenheim Leisure (Restaurants) Ltd (No 3)* (1999) Times, 9 November gave some helpful examples of cases where the jurisdiction might justifiably be invoked before the order in question was drawn up: "... a plain mistake on the part of the court; a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant; or discovery of new facts subsequent to the judgment being given. Another good reason was if the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider." It is to be observed that in all these instances, if the court had no power to reconsider its order before it was drawn up, the only remedy open to the party prejudiced would be by way of appeal from the order. Though on such hypothetical facts an appeal would itself have a good chance of success, common sense suggests that in such cases the judge who made the order should himself have the power to vary it before the appeal procedure has to be set in motion, with the likelihood of exposing all parties to far greater expense and delay than an application to the court of first instance.' (See [2000] 3 All ER 518 at 523–524, [2000] 1 WLR 2268 at 2274.)

a [15] Later on, Sir Christopher Slade made these additional comments:

‘Since there must be some finality in litigation and litigants cannot be allowed unlimited bites at the cherry, it is not surprising that, according to the authorities, there are stringent limits to the exercise of the discretion conferred on the court by the *Barrell* jurisdiction.’ (See [2000] 3 All ER 518 at 525, [2000] 1 WLR 2268 at 2275.)

b [16] He then quoted from the judgment in *Re Barrell Enterprises* and continued:

c ‘This principle must apply a fortiori where the judgment is a formal written judgment in final form, handed down after the parties have been given the opportunity to consider it in draft and make representations on the draft. The principle recognises that the doing of justice requires justice to both parties in litigation, not merely one. At least until the coming into force of the CPR, the *Barrell* decision would have been clear authority, binding on this court, for the proposition that only in exceptional circumstances can it be proper for a judge to exercise his discretion under the relevant jurisdiction to vary a previous order of his once such order has been made. It may be that now, having regard to the CPR and what was said as to their effect in *Biguzzi’s* case (*Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, [1999] 1 WLR 1926), the *Barrell* decision is no longer strictly binding authority. Nevertheless, all the considerations which led the court to decide as it did in that case in my judgment still apply. They are in my judgment not merely consistent with, but also a proper application of the overriding objective of enabling the court to deal with cases justly as stated in CPR 1.1(1), having regard to all the various factors that fall to be taken into account, by virtue of r 1.1(2), in dealing with cases justly.’ (See [2000] 3 All ER 518 at 525, [2000] 1 WLR 2268 at 2276.)

f [17] Roch LJ put the matter in this way:

g ‘The power of a court to reopen, whether by revocation or variation, its judgment or order must be exercised sparingly in my judgment, if it is to be exercised in accordance with the overriding objective of the CPR. The overriding objective of the new code is to enable a court to deal with a case justly; see CPR 1.1(1). In dealing with a case justly, as in discharging its duty to manage a case, the court must bear in mind expense, the financial position of each party, the desirability of ensuring the parties are on an equal footing and that cases should be dealt with quickly and efficiently, which includes dealing with as many aspects of the case as the court can on the same occasion; see CPR 1.1(2)(a)(b) and (d), and 1.4(2)(i) and (l). The judge in his judgment accepted that the jurisdiction of a court to reopen a judgment or order which it has delivered but which has not yet been drawn up was discretionary; a discretion to be used in special cases. The judge said: “It is clear that where the court has heard argument on a point and made a decision, it will be exceptional that it will allow it to be reopened.”’ (See [2000] 3 All ER 518 at 540, [2000] 1 WLR 2268 at 2291–2292.)

h He said: ‘The court should require the party seeking to reopen the full and final judgment to demonstrate that it is an exceptional case or that there are strong reasons for doing so’ (see [2000] 3 All ER 518 at 542, [2000] 1 WLR 2268 at 2294).

i [18] Clarke LJ, dissenting, thought that the overriding principle of CPR 1.1 had overtaken the *Barrell* test, and that the critical question was not whether the

situation was exceptional but what the interests of justice required (see [2000] 3 All ER 518 at 531–532, 533, [2000] 1 WLR 2268 at 2282–2283, 2284).

[19] Mr Gee submitted that *Re Barrell Enterprises* was concerned with the issue of fresh evidence and that *Stewart v Engel* was concerned with the issue of the amendment of pleadings, and that both such contexts partook of their own nature and were not a good guide to all possible cases in which the reconsideration jurisdiction might arise. In particular they were not a good guide to the present case, where his submission was that I had simply erred in the application of classic principle and in disregard of leading authorities binding on me. Over the wider jurisdiction as a whole, he submitted that there was no need of exceptional circumstances, and that other decisions of the Court of Appeal concerned with the reconsideration jurisdiction had not imposed the requirement of exceptionality. If necessary, however, he would submit that this case met such a requirement.

[20] I shall have to revert to these submissions, but first I must seek to say something further about the error which Mr Gee submits I have made in my judgment.

[21] I will seek very much to simplify a complex range of submissions. In essence, as it seems to me, Mr Gee complains that I have failed to apply the parol evidence rules as they should be applied, and in doing so have reversed the burden of proof. Having found that Mr Bagudu had agreed a sum of \$US100m, I should have simply concluded that the tripartite agreement was, with the insertion of \$US100m for the ‘settlement amount’ in cl 2 and the ‘settlement sum’ in cl 3, a binding contract. Instead, I have gone on to consider whether the \$US100m was agreed unconditionally, and having concluded that it was not proved that it was, I have on that ground alone wrongly declined to give effect to the tripartite agreement. I was wrong to do so because while it is always permissible to have regard to parol evidence to give content to (Mr Gee would say to ‘interpret’ or give meaning to) a descriptive phrase such as ‘a settlement amount’ (cl 2) or ‘a settlement sum’ (cl 3), it is, however, impermissible to look at such parol evidence for the purpose of modifying the written contract. The only ground on which it might be permissible to consider parol evidence for that purpose is if a case of a collateral condition or arrangement had been pleaded by the party who sought to undermine the effectiveness of the tripartite agreement, namely the SJ Berwin defendants. If such a case had been pleaded, then it would have to have been proved. However, such a case had never been pleaded, and there is in any event no finding in my judgment that it had been proved. Since I had in every other respect held that the tripartite agreement on its true construction was intended to bind its parties (para 586 of my judgment) and had rejected various cases that the legal effectiveness of the agreement was upset by collateral representation, stipulation or agreement (para 587), I was wrong to do other than conclude that the tripartite agreement was binding and effective: binding *inter alia* on Noga to withdraw its claims against the SJ Berwin defendants in its two actions and on the SJ Berwin defendants to pay a settlement sum of \$US100m to Noga in return.

[22] In this connection Mr Gee himself at one point of his submissions boiled down the essence of his submissions to two or at most three authorities. He relied on *Prenn v Simmonds* [1971] 3 All ER 237 at 240, [1971] 1 WLR 1381 at 1384–1385 (a) for Lord Wilberforce’s statement of the legitimate and illegitimate uses of parol evidence, what Mr Gee described as the ‘inclusionary rule’ and the ‘exclusionary rule’, and (b) for Lord Wilberforce’s approval, as part of the inclusionary rule, of

- a *Macdonald v Longbottom* (1860) 1 E & E 977, [1843–60] All ER Rep 1050, where a contract of sale for ‘your wool’ was upheld with the assistance of parol evidence to identify the wool in question. Thus Lord Wilberforce said:

- b ‘Moreover, at any rate since 1859 (*Macdonald v Longbottom* (1860) 1 E & E 977, [1843–60] All ER Rep 1050) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.’ (See [1971] 3 All ER 237 at 240, [1971] 1 WLR 1381 at 1384.)

- c [23] His second authority was *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, [1932] All ER Rep 494, where the doctrine of *certum est quod certum reddi potest* was affirmed in order to save a contract which was otherwise said to be too uncertain to stand as other than a mere agreement to agree. And his third authority was *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 47, [1911–13] All ER Rep 83 at 91, where Lord Moulton, in a classic passage, said that collateral contracts must be strictly proved, otherwise the authority of written contracts would be undermined.

- d [24] This being the error of which Mr Gee complains, he submits that I should rectify it by rewriting those parts of my judgment at paras 579–601 which are inconsistent with the authorities which he has cited and the analysis which he has based on those authorities. He submits that there is no need to alter or add a single finding of fact. The conclusion for which he contends is inevitable upon the findings that I have made, if only the correct analysis were adopted and the
- e binding authorities applied.

- f [25] In this connection, Mr Gee recognises that it is not in every case that a judge can properly be asked to reconsider and reverse his judgment before it is perfected by order. He therefore relies on the following considerations deriving from the instant case to support his submission that either exceptional circumstances or strong reasons are present here, and/or that the overriding principle and the interests of justice demand that I reconsider my judgment. He submits that I should do so *ex debito iustitiae*.

[26] I trust that I give proper effect to the extensive range of his submissions in the following passages of this judgment.

- g [27] Mr Gee submits that my judgment as it stands is inconsistent with numerous binding decisions or decisions of great persuasive importance, none of which were cited at trial, and which ought to have been cited, as a matter of the duty of counsel. My judgment is inherently inconsistent. It is therefore *per incuriam*. A short point of law is involved, which has been overlooked, which is determinative of Noga’s case and which should now be determined. In the critical
- h part of my judgment I overlooked cl 2 of the tripartite agreement (see paras 579 and 584, where I mention *inter alia* cl 3 but not cl 2). In closing oral submissions, Mr Pollock QC, counsel for the SJ Berwin defendants, misrepresented Noga’s case, which was simply based on the written contract contained in the tripartite agreement, as being a case based on a contract partly written and partly oral:
- j Noga’s case was therefore ‘swapped’. As a result Noga’s case at trial had been overlooked. It was not a case based on a contract partly oral and partly written, but a case based on a written contract which referred to the figure of \$US100m by means of the descriptive phrase ‘settlement amount’ or ‘settlement sum’. In the circumstances, my judgment simply fails to articulate reasons, or sufficiently transparent reasons, for its conclusion. In any event, Noga was not given a fair opportunity to deal with the manner in which its case has been dealt with.

Finally, in the light of my finding that \$US100m was agreed, Noga has won and is entitled to judgment.

[28] In order to put these submissions into context, it is necessary for me to say something about the trial. It was a complex and lengthy one. With three parties involved, the permutations of interests, cases and possibilities multiplied. At the end of the evidence, there was an adjournment of some four weeks for counsel to write and serve final submissions and for me to read them. The request was for a longer than normal period, both because of the weight of the oral evidence, and also because counsel wished to put as much as possible into writing. Following the service of final written submissions, which ran into many hundreds of pages, there was a period of four (long) days for closing speeches. The period available was by agreement between the parties and by direction of the court divided up so as to give all three parties a fair allocation of time. The end of the spring term in May 2000 represented a deadline for completion of the argument of which everyone had long had notice. I was due to take up my responsibilities in the Court of Appeal in the summer term. Everyone had been working to that deadline for some time. The directions for the timing of final written submissions and closing speeches took this timing into account. Mr Gee, representing the claimant Noga, had two closing speeches, one in reply. Everyone was under a lot of pressure. The pressure on Mr Gee and his team was increased by the late realisation, initiated by inquiries made by the SJ Berwin defendants, that the timings of telephone records had been misunderstood and needed to be re-evaluated. Noga had to respond, during the run-up to and during final speeches themselves, to a new case made by the SJ Berwin defendants about the telephone record timings (see eg at paras 85 and 237 of my judgment). These telephone timings were relevant to the events of 17 and 29 September 1999 and thus important to the whole structure of the argument relating to the \$US100m question (see paras 71–85). Mr Gee was under such pressure that at one point he had to absent himself from court for a period during final speeches. Nevertheless, I am satisfied that he was able to follow the argument, either through the transcript and/or from reports from other members of his team. To the extent that any point of importance was made in his absence, he had an opportunity to reply, and did in fact reply to it.

[29] In their final written submissions and in their final speeches, all three parties concentrated on the facts rather than on legal analysis or authorities. Outside the issues of want of consideration and hearsay, practically no authorities were cited, other than a few passages from *Chitty on Contracts*.

[30] Despite the pressures involved in bringing a large and complex trial to completion, I am satisfied that Noga suffered no unfairness in the process. If Mr Gee had thought that there was any matter that he had not been able to address as he would have wished, he would have been able to request permission to deal with it in writing following the end of the trial.

[31] On the subject of legal authorities in particular, it seems to me that the parties had many months to consider what particular points of legal analysis they might wish to emphasise with the use of citation. They chose not to do so, save as I have indicated above. In the course of writing my judgment, I referred on my own initiative to two authorities: one was *Prenn v Simmonds* (see para 586) and the other was the *Hillas* case (see para 607), as it happens two out of the three authorities which Mr Gee now submits encapsulate the core of his case on his application for reconsideration of the judgment.

a [32] It is in these circumstances that I have to consider the validity of Noga's application. When it was first foreshadowed in Stephenson Harwood's fax of 19 February 2001, it was said that further findings of fact would be requested. This was a matter of particular concern to me, for it was important that I had made all necessary findings of fact. When the parties appeared before me on the occasion which had been fixed for the formal handing down of my judgment, I was
b told by Mr Gee that no further findings of fact were requested after all. I inquired of the other parties whether they were concerned, in the light of Noga's application, about the adequacy of my findings of fact, and I directed that if any request for further findings was to be made, it should be done without delay. No party has made any request for further findings.

c [33] On that same occasion, Mr Gee made two further submissions or assertions. One was that the reconsideration of my judgment would be requested on the ground of new points which had not previously been argued, supported by new authorities which had not previously been cited. The other was that, apart from the discretionary jurisdiction to reconsider a judgment which had not yet been
d perfected by the drawing up of an order in respect of it, there was also a mandatory obligation to reconsider a judgment under the provisions of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998). In the event, Mr Gee has persevered in neither of these submissions or assertions. It has become clear in the course of Mr Gee's written and oral submissions that the points which Mr Gee seeks to raise are
e those which were covered by competing submissions at trial, albeit without the aid of the authorities which Mr Gee now brings into play, and without the refinement of analysis which he now seeks to deploy. As for art 6 of the convention, Mr Gee has made no separate submission in respect of it. He is prepared to accept that, where no order has yet been drawn up, the jurisdiction
f to reconsider a judgment in the interests of justice, even if an exceptional one, covers the same ground as art 6 of the convention.

[34] I revert to Mr Gee's submission that the jurisdiction in question does not require exceptional circumstances. For these purposes, he relies on three decisions of the Court of Appeal other than *Re Barrell Enterprises* itself, of which one, *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 All ER 736, [1937] 1 KB 717,
g preceded *Re Barrell Enterprises* but was not cited in it. Of the other two, the earlier, *Re Harrison's Share under a Settlement, Harrison v Harrison, Re Ropner's Settlement Trusts, Ropner v Ropner* [1955] 1 All ER 185, [1955] Ch 260, preceded *Re Barrell Enterprises* and was cited in it, and the other, *Pittalis v Sherefettin* [1986] 2 All ER 227, [1986] QB 868, postdated *Re Barrell Enterprises* and referred to it.

h [35] In *Millensted's* case Hilbery J gave an oral judgment in a personal injury claim, finding liability and awarding damages of £50 with costs. He was then informed that there had been a payment of £20 into court. Overnight, he changed his mind of his own motion about the level of damages. The next day, he told the parties that he was revising the level of damages down to £35, and his order was
j drawn up in that form. His costs order was not changed. The plaintiff appealed. The essence of the appeal was in the submission that the judge was no longer competent to revise his decision on damages *after* being informed of the sum paid into court. This submission was based on a rule of court stating that a judge should not be informed of a payment in 'until all questions of liability and amount of debt or damages have been decided'. The Court of Appeal held that the rule was directory, not compulsory, and left the judge with a discretion to continue.

It was common ground that in all other respects a judge was at liberty to reconsider his decision until his order had been drawn up (see [1937] 1 All ER 736 at 738, [1937] 1 KB 717 at 722). It is true that there is no statement that the jurisdiction to reconsider a decision before an order has been drawn up is only exercisable in exceptional circumstances. That, however, is because there is simply no discussion at all in the judgments either as to the circumstances in which the general jurisdiction to reconsider is to be exercised or as to the specific discretion to continue with a case after the court has been informed of a payment in. The reason is that there was no appeal based upon a wrongful exercise of the court's discretion, only on the court's absence of jurisdiction by reason of the special rule of court regarding payment in. In my judgment *Millensted's* case is only of interest as an example of the general jurisdiction and as a ruling on the specific rule regarding payment in, but not otherwise. It tells one nothing about the judicial exercise of the jurisdiction to reconsider.

[36] I have already referred to *Re Harrison's Share* above. That was the case where a House of Lords decision showed that the judge had acted without jurisdiction. The only submission of present relevance is that 'if and so far as there is any discretionary power, the learned judge should not have exercised it as he did' (see [1955] 1 All ER 185 at 187, [1955] Ch 260 at 275). That submission was dealt with by the court at [1955] 1 All ER 185 at 190–192, [1955] Ch 260 at 281–284. The facts were that the House of Lords decision was absolutely plain: the judge was prepared to offer the litigants a further hearing, but they did not want it, because, as the judge himself said 'the result is a foregone conclusion' (see [1955] 1 All ER 185 at 192, [1955] Ch 260 at 283). In the circumstances, the only argument which was presented upon appeal on the question of discretion was that there was inequality in the treatment of litigants as between those cases of variations of trust affected by the House of Lords decision where a judge's decision had already been drawn up in an order before the House of Lords decision became known to him, and those, such as the instant cases, where the order had not yet been drawn up. But, as the Court of Appeal pointed out, in either case the variations of trust were doomed, either in the first court or in the Court of Appeal, and it was wrong to put the parties to the cost of going to the Court of Appeal to reverse them. In the circumstances there was no need for the Court of Appeal to discuss the question of whether the jurisdiction to reconsider could only be exercised in exceptional cases. In *Re Barrell Enterprises* [1972] 3 All ER 631 at 637, [1973] 1 WLR 19 at 24, however, Russell LJ pointed out that this decision, like others also reviewed, involved 'circumstances of a wholly exceptional character'.

[37] Mr Gee's third case was *Pittalis v Sherefettin* [1986] 2 All ER 227, [1986] QB 868. That concerned a rent review arbitration. The tenant was late in claiming arbitration, and applied to extend time under s 27 of the Arbitration Act 1950. The judge decided that he should not extend time. He had second thoughts and on the very next day he wrote to the parties to say that he was minded to grant the extension of time applied for. At a further hearing, he confirmed his later view. In his second judgment he said that 'he was sure' that his first decision was wrong 'within minutes of delivering his first judgment' (see [1986] 2 All ER 227 at 234, [1986] QB 868 at 879). The factor which seemed to have driven his ultimate decision was that he thought that the new rent demanded by the landlord was 'manifestly grossly inflated'. A number of points were argued on appeal, and in the event the appeal succeeded, for the Court of Appeal pointed out that the judge had had no adequate material upon which he could come to

a the conclusion that the new rent demanded was grossly inflated. However, despite the success of the appeal, the Court of Appeal held that the judge had been entitled to reconsider his judgment. Fox LJ said:

b 'We are dealing with a case where the judge, practically as soon as he gave the judgment, decided that he was wrong. As a matter of the sensible administration of justice and fairness between parties, it seems to me proper in the circumstances that the judge should be at liberty to recall his order. The position can properly be called exceptional.' (See [1986] 2 All ER 227 at 234–235, [1986] QB 868 at 879.)

c [38] Dillon LJ agreed that the case was exceptional, but nevertheless appears to have thought that the jurisdiction did not require exceptional circumstances. He said:

d 'It is submitted for the landlords that the decision of this court in *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19 is to be regarded as a comprehensive exposition of the exceptional circumstances in which it is proper for a court or a judge to recall an order which has been pronounced orally but has not yet been drawn up, registered or otherwise perfected. But I cannot regard *Re Barrell Enterprises* as overruling or qualifying the earlier decision of this court in *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 All ER 736, [1937] 1 KB 717 (which apparently was not cited in *Re Barrell Enterprises*). In *Millensted* this court approved statements of the law in earlier authorities to the effect that a judge can always reconsider his decision until his order has been drawn up or perfected, and, more importantly, this court upheld the action of a High Court judge, who had in an oral judgment awarded a certain sum by way of damages but then withdrew that judgment and substituted judgment for a lower figure, because before his order was drawn up he was satisfied after serious further consideration that the sum he had originally awarded was excessive ... *Millensted v Grosvenor House (Park Lane) Ltd* is, in my judgment, a close parallel to the present case. It is indeed exceptional for a judge who has pronounced an order in court to be completely satisfied, before the order has been drawn up, registered or perfected, that the order was wrong. That happened, however, in the present case, and accordingly the judge was entitled, taking the view he did, to recall his earlier order. I see nothing unfair in the procedure he followed to do so.' (See [1986] 2 All ER 227 at 236, 237, [1986] QB 868 at 882.)

h [39] Neill LJ ([1986] 2 All ER 227 at 241, [1986] QB 868 at 888) agreed with both judgments and only added further comments on other aspects of the appeal.

[40] Mr Gee points out that in *Pittalis v Sherefettin* Dillon LJ remarked on the fact that *Millensted's* case was not cited in *Re Barrell Enterprises*; and that neither *Millensted's* case nor *Pittalis v Sherefettin* were cited in *Stewart v Engel* [2000] 3 All ER 518, [2000] 1 WLR 2268.

j [41] Nevertheless, in my judgment, I am bound by the decision in *Stewart v Engel*, following the spirit, if not the letter, of the decision in *Re Barrell Enterprises* in the light now of the requirements of the overriding principle, to regard the need for exceptional circumstances as a requirement for the proper exercise of the jurisdiction to reconsider a decision. If in *Pittalis v Sherefettin* Dillon LJ is to be understood as saying by reference to *Millensted's* case that the discretion is a wide open one, unrestricted by the requirement of exceptional circumstances, then I

would with respect feel bound to disagree. In my judgment the width or narrowness of the discretion was simply not in issue in *Millensted's* case. As for *Pittalis v Sherefettin*, both Fox and Dillon LJ accepted that the circumstances in that case were exceptional.

[42] Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the floodgates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of the drawing up of an order. As Jenkins LJ said in *Re Harrison's Share* [1955] 1 All ER 185 at 188, [1955] Ch 260 at 276: 'Few judgments are reserved and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae.'

[43] Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary, or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration.

[44] In the present case Noga asks the court to reconsider its judgment because of the submission that it has got the answer wrong. In every case where an appeal is allowed, the court below has, by definition, got it wrong. The solution is to appeal. What is special, what is exceptional about this case? What are the strong reasons? It is not a case of an ex tempore oral judgment. The judgment here, whatever its defects, has been reserved and is the product of substantial reflection. It is not a case where a new binding precedent has immediately reversed the previous law so as to make a judgment simply unsustainable, as in *Re Harrison's Share*. It is not a case where a judge has of his own motion immediately come to the conclusion that he is wrong, as in *Millensted's* case, or *Pittalis v Sherefettin* (not perhaps a good example of judicial second thoughts), or *Re Australian Direct Steam Navigation Company*, *Miller's Case* (1876) 3 Ch D 661, where Jessel MR realised, after giving an oral judgment, that he had not had his attention directed to the crucial article in the company's articles of incorporation. It is not a case where, even before judgment, a court has realised that it has not had its attention drawn to the critical section in a statute, as in *Glebe Sugar Refining Company Ltd v Trustees of Port and Harbours of Greenock* [1921] 2 AC 66, and has itself required a renewed hearing. It is not a case of new evidence, or of amendment. It is not a case of new thoughts. Nor is it a case such as occurred recently in *Spice Girls Ltd v Aprilia World Service BV* (2000) Times, 12 September. There, following the handing down of a judgment on quantum, Arden J received a submission that permission to appeal should be granted because her judgment was inconsistent with a concession of fact that had been made. Arden J sought clarification, and it was then submitted on the other side that no concession had been intended. In such circumstances, Arden J concluded that the appropriate course was to reopen argument, because

a she was satisfied after a further hearing both that the concession had been made, and that it had been made in such circumstances that it could not be withdrawn. In the event, therefore, she was obliged to reconsider her judgment in the light of the concession which had been overlooked. It was in that context that she said:

b 'In my judgment, an appeal is not the appropriate course where there are errors in judgments which can be corrected by the court which conducted the trial. To leave such matters to an appeal means further delay, uncertainty and costs, which is not in the interests of litigants. The trial judge is in a strong position to consider the effect of the error in the context of the entire case.'

c [45] If this case is like none of those, what is it then? It is a case where it is said that the judge has got it wrong, on points which have been argued. The very issue for reconsideration is in dispute. On behalf of the SJ Berwin defendants Mr Lawrence Cohen QC submits that I have got it right. I am satisfied that I have considered Noga's case and its submissions. That is I think clear from para 584 of my judgment where I specifically consider Mr Gee's submission that it is sufficient to point to the tripartite agreement and say that 'with \$US100m thought of as being inserted into cl 3 in place of or alongside the words "a settlement sum", that documentary agreement is complete and binding'. Mr Gee complains that I should have mentioned cl 2 as well, but I am not impressed by that submission. I am also satisfied that I had in mind the leading authorities which Mr Gee has mentioned in his application (see para 586 where I mention *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381 and para 607 where I mention *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, [1932] All ER Rep 494, even though neither of them were cited at trial). As for Mr Gee's analysis, it seems to me that I had it sufficiently in mind at para 590 where I state:

f 'Perhaps the true analysis is that the tripartite agreement itself was the final (and binding) outcome of the agreement with Mr Bagudu whereby he was prepared on behalf of the SJ Berwin defendants to agree that Noga should receive \$US100m, provided only that the FGN agreed to accept nothing for Ajaokuta—which under the tripartite agreement the FGN did agree to do. In such a case, the conditionality of Mr Bagudu's agreement would have been satisfied as long as the tripartite agreement was binding on the FGN.'

g [46] That is not perhaps a wholly complete statement of Mr Gee's present submissions, but it is very close to being at their centre. Mr Gee would perhaps add that, provided that the tripartite agreement was binding on the FGN, it would not matter what other conditions were stipulated by Mr Bagudu for his agreement to pay Noga \$US100m, unless those other conditions were either to be found in the tripartite agreement itself, or were pleaded and proved by the SJ Berwin defendants.

h [47] I do not wish to say anything against the usefulness of the reconsideration jurisdiction, within its proper limits. I have made use of it myself. However, it is in the nature of the legal process that, once judgment has been rendered, analysis thereafter becomes clarified and refined, and citation of authority is applied to the findings made at first instance so as to illuminate that clarification and refinement of analysis of which I speak. But that is the function of the appeal process. In my judgment, to grant this application that I reconsider my judgment would subvert the appeal process itself. In doing so, it would not answer the interests of justice, but would be the antithesis of justice according to law. There are of course cases

where an error of fact or law may be too clear for argument. The best test of that is perhaps—but not necessarily—where the judge himself identifies the error which concerns him. In such a case, it is better that the error is corrected without imposing on the parties the need for an appeal. But no parallel to Noga's application has been cited to me. It is in my judgment wrong for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances a judge should be tempted to open up reconsideration of his judgment, an appeal would not be avoided, it would be made inevitable. Every case would become subject to an unending process of reconsideration, followed by appeal, both on the issue of reconsideration and on the merits.

[48] I therefore reject Noga's application to reconsider my judgment. But I allow its application for permission to appeal. The grounds of such an appeal concern only a limited section of my judgment, do not challenge findings of fact, could be argued in two days, concern a claim for \$US100m, and have a realistic prospect of success.

[49] I have also been asked for permission to appeal by the SJ Berwin defendants and the FGN.

[50] The SJ Berwin defendants want permission to appeal in connection with the point of want of consideration relating to the 16 August agreement (paras 639–651). The point is again a limited one, entirely one of law, worth (potentially at any rate) a great deal both to them and to the FGN, and would not take a great deal of court time. There is a realistic prospect of success. I have granted them permission to appeal. If the FGN needs it, I have also in this context granted it permission to appeal in respect of the *Williams v Roffey* point (see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512, [1991] 1 QB 1) discussed at paras 648–649 of my judgment.

[51] The SJ Berwin defendants also want permission to appeal with respect to the issue whether the \$US50m promissory note given by Mohammed Abacha to the FGN on 11 May 1999 was given in full and final settlement of the FGN's Ajaokuta claim (see paras 2–50, 423–430, 462–471 and 541–546). I have not granted permission to appeal on that issue. It is essentially a question of fact, or to the extent that it involves any question of law it is entirely dependent upon findings of fact. Those findings cover a large area of evidence, and my ultimate conclusions depend on preferring a witness with credibility over one who lacks credibility (see para 545). Moreover, it is not clear to me that even if the SJ Berwin defendants succeeded on the point, they would be able to overcome the fact that ultimately the 16 August agreement (which required the payment of DM300m in settlement of the FGN's Ajaokuta claim) superseded the 13 August agreement; and the 13 August and the 16 August agreements both stated that they discharged the \$US50m promissory note. In such circumstances it seems to me that if permission to appeal is to be granted at all it should be done by the Court of Appeal, who will have the advantages both of bringing to that application a fresh insight and of doing so in the knowledge that their jurisdiction on appeal is primarily one of review and not one of rehearing (see CPR 52.11(1)).

[52] The FGN applies for permission to appeal in respect of the issue as to the validity or effectiveness of the 13 August agreement. Under my judgment, it failed in its attack on that agreement (see paras 609–638 under the heading 'Was the 13 August agreement induced by misrepresentation or subject to approval?'). Mr David Railton QC submits, however, that he does not need permission to appeal since he can raise such issues under a respondent's notice in response to the SJ Berwin defendants' appeal in respect to the 16 August agreement.

a Nevertheless, he asks for permission out of an abundance of caution, in case he needs it. I am by no means sure that the FGN does not need permission to appeal, but that is a matter which is still subject to further submissions. If it does need permission to appeal, I am not minded to grant it. The issues are entirely matters of fact. Those factual matters again cover a wide range of evidence and ultimately turn on the credibility of the FGN's critical witness, the Attorney General. In such
b circumstances, I am again of the view that if permission to appeal is to be granted at all it should be done by the Court of Appeal. There is in any event no point in such an appeal unless the 16 August agreement is void for want of consideration.

[53] Finally, I mention a contingent argument raised by the SJ Berwin defendants in their written submissions on Noga's application to reconsider, but not mentioned in their oral submissions. The SJ Berwin defendants submit that
c if Noga were right in its submission that the tripartite agreement is a binding contract, then under it the FGN would be obliged to withdraw its Ajaokuta claim against the SJ Berwin defendants. It goes on to submit that the 16 August agreement does not expressly supersede the tripartite agreement, as distinct from the 13 August agreement; and that in any event the 16 August agreement could
d not be accorded any validity where it was itself in breach of the FGN's promise in the tripartite agreement to withdraw its Ajaokuta claim. These were points contingently raised in the SJ Berwin defendants' pleadings but not pursued in final submissions. If I had reconsidered my judgment on Noga's application and concluded that I should change my mind as to the effectiveness of the tripartite agreement, then the SJ Berwin defendants would have wanted also to reconsider
e their arguments as to the relationship of the tripartite agreement and the 16 August agreement. That is an example of where the reopening of argument by way of reconsideration of a judgment might lead. I have not, however, taken any account of those contingent ramifications in concluding that Noga's application fails. If it had succeeded, and I had reversed my judgment as to the tripartite
f agreement, then I would have had to consider as an entirely separate matter whether the SJ Berwin defendants' contingent application should succeed.

Application to reconsider judgment dismissed. Applications for permission to appeal granted as specified.

James Wilson Barrister (NZ).

Royal Society for the Prevention of Cruelty to Animals v Attorney General and others

CHANCERY DIVISION

LIGHTMAN J

15, 18, 19 DECEMBER 2000, 26 JANUARY 2001

Charity – Unincorporated association – Rules – Alteration – Rules allowing association to refuse membership to applicants – Association having mitigation of animal suffering as objective – Association opposing hunting with dogs – Campaigns to persuade association to change anti-hunting policy – Member of association attempting to recruit new members for ulterior purpose of changing policy – Association wishing to adopt membership policy to exclude such persons – Association proposing administrative scheme to implement membership policy – Guidance – Construction of rules – Whether membership policy and scheme permissible – Human Rights Act 1998, Sch 1, Pt I, art 11.

The RSPCA (the Society), a registered charity with the objective of mitigating animal suffering, had a long-established policy against hunting with dogs which was strenuously opposed by supporters of field sports. The members of the Society's governing body (the council), who formulated its policies, were charity trustees within the meaning of the Charities Act 1993. The rules of the Society provided that an applicant for membership, after having paid a subscription fee and completed a form containing a declaration of support for the Society's objectives, 'shall in the absolute discretion of the Council have been accepted' (r III.1 and III.2). The council had the power to refuse and/or return any subscription provided it had given the application its full consideration (r III.7). For a number of years, M, who was both an annual member of the Society and a member of a field sports pressure group, led campaigns directed at persuading the Society to change its anti-hunting policy and to that end had set out to recruit new members. The Society considered that those campaigns and the activities pursued by members who had joined for the ulterior purpose of changing its policy, whether or not pursuant to such campaigns, were damaging to it. Accordingly, the council proposed to adopt (i) a policy which would enable it to exclude such persons (the membership policy), and (ii) an administratively convenient scheme for implementing the membership policy (the scheme). Under the council's preferred scheme, the fact that an existing member or applicant fell within certain defined categories, set out in a schedule, would constitute conclusive proof that he fell within the class of persons to be excluded under the membership policy, without the need for consideration of the merits of any particular case. In the event that it was impossible to implement that scheme, the council's second choice was to use the categories as giving rise to a prima facie presumption of the existence of grounds for rejection. Pending the implementation of the proposals, the council delayed the confirmation of the memberships of some 600 applicants, including V and A. The Society brought charity proceedings seeking the court's guidance as to the construction of its rules and the approval of the proposed membership policy and scheme. The Attorney General was joined as defendant to the proceedings to represent the interests of the Society and M, V and A were joined as second, third and fourth defendants, respectively. M contended, inter alia, that the provisions of the

- a* Human Rights Act 1998 required the council, in the exercise of its powers, to respect members' and applicants' rights of freedom of speech and thought, and that the rules had accordingly to be read as prohibiting the adoption of the membership policy and the scheme, since they contravened those rights.

- Held** – (1) On their true construction, the rules of the Society conferred on the council the powers to exclude those at whom the membership policy was directed. Since the powers were fiduciary in nature, the council had to exercise them according to the purposes for which they were conferred in what they considered to be the best interests of the Society. In the instant case, in adopting the membership policy, the council had acted in good faith according to what it considered to be the best interests of the Society. Moreover, pursuant to art 11^a of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), which protected the right to freedom of assembly and association, 'freedom of association' embraced the freedom to exclude from association those people whose membership the Society honestly believed to be damaging to its interests.
- b* Since the council, by the membership policy, was not attempting to muzzle members or applicants, or censor what they said or did, the proposed use of the rules did not concern the freedom of speech or thought of members or prospective members, but rather the freedom of association, under art 11, of the Society itself. It followed that the rules of the Society did not preclude the adoption of the membership policy or the scheme and there was no ground for challenge to either of them, or the underlying rules, on human rights grounds or other grounds. Accordingly, the Society could legitimately exclude those people whose reasons for joining could render their membership contrary to the interests of the Society (see [36], [37], below); *Gaiman v National Association for Mental Health* [1970] 2 All ER 362 considered.

- c* (2) The council could not apply the preferred scheme either: (a) in the exercise of its absolute discretion to accept or refuse applications for membership conferred by r III.1 and III.2; nor (b) under its power to remove members conferred by r III.7, since it was implicit in that provision that the full merits of each case had to be explored. The proposed scheme was draconian in that it could exclude from membership persons to whom (if the full facts were taken into account) no conceivable objection could be taken, persons who could not only contribute their subscriptions and services but leave legacies to the Society. Although there could be circumstances in which emergency action was required calling for the expulsion of a group of members which included 'the innocent' as well as 'the guilty', e.g. where there was an imminent threat of a take-over or other irreparable damage, that was not the situation in the instant case. Since the instant case concerned a fully considered long-term policy, the plight of the 'innocent' had to take on greater weight when an alternative course was available, such as the council's second choice of scheme. Moreover, the Society's public image and reputation for fairness and justice, which were of critical importance to a charity of such standing, size and substance, had not been given sufficient consideration by the council when choosing the method of implementation of the membership policy. It followed that if the membership policy was to be adopted in respect of applicants, they should be so informed in the application form; they should be

a Article 11, so far as material, provides: '(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others ...'

invited to state whether they fell within any of the categories from which inferences could be drawn; and if they fell within such a category, they should be invited to give their reasons why, none the less, they should be admitted to membership. Accordingly, it was not in the interests of the Society or conducive to its good name to adopt an arbitrary method of implementing the membership policy, such as the scheme under which the council could treat the fact that an applicant fell within one of the defined categories as conclusive proof of the existence of grounds for rejection (see [40]–[42], below); *Gaiman v National Association for Mental Health* [1970] 2 All ER 362 considered.

Notes

For the powers of charity trustees in general, see 5(2) *Halsbury's Laws* (4th edn reissue) paras 327–329.

For the Human Rights Act 1998, Sch 1, Pt I, art 11, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 524.

Cases referred to in judgment

Allen-Meyrick's Will Trusts, Re, Mangnall v Allen-Meyrick [1966] 1 All ER 740, [1966] 1 WLR 499.

Cheall v UK (1985) 42 DR 178.

Gaiman v National Association for Mental Health [1970] 2 All ER 362, [1971] Ch 317, [1970] 3 WLR 42.

Hampton Fuel Allotment Charity, Re [1989] Ch 484, [1988] 3 WLR 513, CA.

Haslemere Estates Ltd v Baker [1982] 3 All ER 525, [1982] 1 WLR 1109.

Marley v Mutual Security Merchant Bank & Trust Co Ltd [1991] 3 All ER 198, PC.

National Grid plc v Laws (1997) PLR 157.

Public Trustees v Cooper (20 December 1999, unreported), Ch D.

Scott v National Trust for Places of Historic Interest or Natural Beauty [1998] 2 All ER 705.

Cases also cited or referred to in skeleton arguments

Alsop Wilkinson (a firm) v Neary [1995] 1 All ER 431, [1996] 1 WLR 1220.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Beddoe, Re, Downes v Cottam [1893] 1 Ch 547, CA.

Bede Steam Shipping Co Ltd, Re [1917] 1 Ch 123, 86 LJ Ch 65.

Brooks v Richardson [1986] 1 All ER 952, [1986] 1 WLR 385.

Courage Group's Pension Schemes, Re, Ryan v Imperial Brewing and Leisure Ltd [1987] 1 All ER 528, [1987] 1 WLR 495.

D'Epinoix's Settlement, Re, D'Epinoix v Fettes [1914] 1 Ch 890.

Drexel Burnham Lambert UK Pension Plan, Re [1995] 1 WLR 32.

Edge v Pensions Ombudsman [1999] 4 All ER 546, [2000] Ch 602, CA.

Equitable Life Assurance Society v Hyman [2000] 3 All ER 961, [2000] 3 WLR 529, HL.

Forbes v Eden (1867) LR 1 Sc & Div 568, HL.

Harris v Lord Shuttleworth [1994] ICR 991, CA.

IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93, [1982] AC 617, HL.

Joseph Rowntree Memorial Trust Housing Association v A-G [1983] 1 All ER 288, [1983] Ch 159.

Londonderry's Settlement, Re, Peat v Walsh [1964] 3 All ER 855, [1965] Ch 918, CA.

Minors v Battison (1876) 1 App Cas 428, 46 LJ Ch 2.

Nagle v Feilden [1966] 1 All ER 689, [1966] 2 QB 633, CA.

- Pilkington v IRC* [1962] 3 All ER 622, [1964] AC 612, HL; *rsvg sub nom Pilkington's Will Trusts, Re, Pilkington v Pilkington* [1961] 2 All ER 330, [1961] Ch 466, CA.
- R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909, CA.
- R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening)* [1987] 1 All ER 564, [1987] QB 815, CA.
- Richards v Mackay* (1990) 1 OTR 1.
- Smith & Fawcett Ltd, Re* [1942] 1 All ER 542, [1942] Ch 304, CA.
- Smith (Howard) Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126, [1974] AC 821, PC.
- Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167.
- Wight v Olswang (No 2)* (2000) Times, 6 April, Ch D.
- Woodford v Smith* [1970] 1 All ER 1091, [1970] 1 WLR 806.

Application

- The claimant charity, the Royal Society for the Prevention of Cruelty to Animals (the Society), sought the guidance and approval of the court as to (a) the construction of its membership rules; (b) a proposed membership policy which would enable the Society to remove and to exclude certain persons from its membership; and (c) a proposed administratively convenient scheme for implementing the membership policy. The Society joined the first defendant, the Attorney General, as a defendant to represent the interests of charity. The second defendant, Richard Hannay Meade, an annual member of the Society, applied to be joined as a defendant and was made a defendant by a consent order. Pending the determination of the proceedings the Society placed in abeyance some 600 applications for membership, including those of the third defendant, Nigel Baron Vinson of Roddam Dene, and the fourth defendant, Gillian Rosemary Atkinson. The third and fourth defendants were joined by consent orders without prejudice to the right of the Society and the Attorney General to contend that they were not persons interested in the Society or persons who would have a right to complain to the court about their exclusion from membership irrespective of the reason for exclusion or to contend that they should not be parties to the proceedings. The facts are set out in the judgment.

- David Unwin QC and Francesca Quint* (instructed by *Nabarro Nathanson*) for the Society.
- William Henderson* (instructed by the *Treasury Solicitor*) for the Attorney General.
- John Martin QC and Michael Patchett Joyce* (instructed by *Charles Russell, Cheltenham*) for the added defendants.

- Cur adv vult*

26 January 2001. The following judgment was delivered.

LIGHTMAN J.

- Introduction*

[1] These are charity proceedings commenced with the leave of the Charity Commissioners by the Royal Society for the Prevention of Cruelty to Animals (the Society), a registered charity. The Society has a long-established policy opposing hunting with dogs (the policy on hunting). There have for some years been campaigns to persuade supporters of hunting to join the Society and together

to bring about a change in the policy on hunting. The Society considers that these campaigns and the activities of members who join the Society for the purpose of bringing about a change in that policy in order to protect field sports (whether or not pursuant to such campaigns) are damaging to the Society and it wishes (if it lawfully can) to adopt: (i) a policy on membership (the membership policy) which will enable the Society to remove and exclude these persons from the Society; and (ii) an administratively convenient scheme for implementing the membership policy (the scheme). Both the membership policy and the scheme are highly contentious, and there is a dispute whether the rules admit of their adoption and whether (if they do) the members of the council as the governing body of the Society (the council) would be acting properly as charity trustees if they did adopt them. In these circumstances, the Society seeks the guidance of the court: (a) to the construction of the relevant rules; and (b) whether it can adopt the membership policy and the scheme. There is also raised, as a preliminary issue, the question whether existing members and applicants for membership who may be affected by the adoption or implementation of the membership policy and the scheme have the necessary standing to raise questions as to their lawful character and to participate in these proceedings.

[2] The Society currently has about 1,400 life members and 53,200 annual members of whom 15,836 are joint members. (Couples living together as partners at the same address may apply for joint membership.) To become a member it is necessary to sign a declaration of support for the objects of the Society. Membership subscriptions are not a significant source of income for the Society compared with gifts and legacies. Life membership for an individual costs £500 and for joint members £750. Annual membership costs £17.50 for an individual and £25 for joint members. The administrative costs of processing applications for membership means that the financial benefit to the Society is limited. The direct administrative costs to the Society of individual and joint members paying by cheque total £12.79 and £17.56 respectively in the first year of joining and £11.86 and £16.19 respectively in subsequent years. Legacies are the main source of income for the Society. In 1998 the year's legacy income was £26m. The members elect the council and can speak and express their views at annual and extraordinary general meetings and on polls. If they disapprove of the policies adopted by the council, they can vote in new members of the council who will adopt different policies. The council has delegated to its Supporter Care Department (the department) as an administrative function the processing of applications for membership.

[3] There are 25 members of the council. They are charity trustees within the meaning of the Charities Act 1993. Fifteen of the twenty-five are elected by postal vote of members entitled to vote (one third of the 15 retire each year). Ten are elected regionally by the Society's local branches. These retire every third year. The council formulates the Society's policies on animal welfare and decides on priorities for its work and expenditure. The Society's work is very broadly based and is carried out by a combination of paid staff and volunteers (who may be, but often are not, members of the Society). There are currently five priority areas: the inspectorate, companion animals, farm animals, alternatives to laboratory animals and international work. In 1998 the Society investigated 124,374 cruelty complaints, leading to 3,114 convictions and 819 banning orders, and treated 180,095 animals. The Society has a long history of campaigning for changes and improvements in animal welfare including campaigns to support legislation.

These started in 1826 with a petition to Parliament to abolish bull baiting. Since 1976 the Society has steadfastly maintained the policy on hunting which

a opposes all forms of hunting with dogs or other animals and supports moves to introduce and pass legislation banning foxhunting. The policy on hunting has been an issue on which over the years there has been recurrent conflict between members of the Society.

b [4] The policy on hunting is strenuously opposed by the supporters of foxhunting, and these supporters include members of the Society and non- members who support the aims of the Society. The second defendant, Mr Meade, is an annual member of the Society and a former member of the council who, under the names of the Country Sports Animal Welfare Group (CSAWG) (in 1996–1997), of the Animal Welfare Committee of the Countryside Alliance (AWCCA) (in 1988), and of the Countryside Animal Welfare Group (CAWG) (in and since 1998), has campaigned to change the policy on hunting and to this end has set out to recruit as new members of the Society persons who, as well as supporting the objects of the Society, are supporters of hunting with the object that these new members will vote at meetings of the Society to bring about the change to the policy on hunting which he wants. The council is anxious to prevent campaigns to recruit supporters of hunting as new members for this specific purpose and pending the determination of the questions raised in this case has placed in abeyance some 600 applications for membership made in the period commencing in December 1999 and ending in March 2000. The third and fourth defendants are two of such applicants. The Society joined the first defendant, the Attorney General, as a defendant to represent the interests of charity. The second to fourth defendants applied to be joined as defendants and were so joined on terms to which I will later refer.

Constitution of the Society

f [5] I turn to the constitution of the Society. The Society was founded in 1824 as an unincorporated association having as its objective ‘the mitigation of animal suffering and the promotion and expansion of the practice of humanity towards the inferior classes of animated beings’ (the recital to the Royal Society for the Prevention of Cruelty to Animals Act 1932). By 1932 its membership had grown to over 7,500 and in that year, by the 1932 Act (a private Act), the Society was incorporated. The 1932 Act has been supplemented on administrative and investment matters by two later Acts passed in 1940 and 1958, neither of which is relevant. Section 4 of the 1932 Act provided:

g ‘The objects of the Society shall be to promote kindness and to prevent or suppress cruelty to animals and to do all such lawful acts as the Society may consider to be conducive or incidental to the attainment of those objects.’

h [6] The rules of the Society have undergone a series of changes over the years. A resolution at a general meeting is required for any change in the rules. Since the history of a provision in the rules can in rare cases be relevant on construction when the rules are ambiguous or uncertain (see *National Grid plc v Laws* (1997) PLR 157 (para 73)), I shall shortly set out the history of the relevant provisions in the rules, adding a few comments as I proceed.

j [7] The 1932 rules provided (in r IV) that the council shall have the management of the Society which may delegate its powers and duties to a committee of the council (a committee). This continues to be the position under the current rules. The 1932 rules further provided (in r III.1) that a donation of £20 constituted the donor a life member and (in r III.2) that the payment of an annual subscription of £1 constituted the subscriber an annual member. Rule III.3

placed a safeguard in respect of such donation or payment giving rise to automatic membership of the Society:

'Provided always that the Council shall have power to refuse any donation or annual subscription at any time if the Council shall be of the opinion that it would not be advisable to accept such donation or subscription having regard to the objects of the Society and the Council shall not be under any obligation to give any reason for such refusal to the individual firm corporation association of persons or other body presenting the same ...'

Rule III.3 is the predecessor of the current rule (r III.7) whose meaning and effect lies at the heart of this dispute, but there are changes in the terms of the rule and the context. The effect of r III.3 was to confer on the council a power delegable to a committee not to accept a donor or subscriber as a life or annual member by refusing to accept the donation or subscription, but this power existed only so long as the donation or subscription had not been paid over and could only be exercised if the council considered that it would not be advisable to accept the donation or subscription 'having regard to the objects' (and not any policy) 'of the Society'. At that time there was no provision for automatic renewal of annual membership (first introduced in the January 1976 rules): an existing annual member had to apply for membership in the succeeding year in the same way as a non-member and in this context r III.3 was clearly applicable on a renewal of annual membership. The words 'at any time' made plain that a donation or subscription from an applicant for membership might be refused though a subscription had been accepted from him in previous years. Rule XXVIII, which is much in the same terms as the current rule, made provision for the expulsion of a member whose conduct was prejudicial to the interests of the Society.

[8] The 1964 rules made no material change save that in r III.3 there was added to the words 'shall have power to refuse' the words 'and/or to return' (the wording in the current rule) and r III.6 provided that no persons should become a life or annual member under the age of 18. The amendment to r III.3 extended the power of the council to refuse membership where the donation or subscription had been paid over: the council could return it and such return had the same effect as if it had been refused.

[9] In 1973 Charles Sparrow QC conducted an inquiry into the affairs of the Society. It is plain from contemporary documents that r III.3 was viewed as exercisable to prevent any annual member renewing his membership: there was (as I have said) at the time no provision for automatic renewal. His report made certain recommendations which the Society accepted and implemented.

[10] The January 1976 rules made significant changes which are reflected in the current rules:

'III(1)(a) Completion of a form of application supplied by the Society for life membership and payment to headquarters of a subscription of ... shall, subject as hereinafter mentioned, constitute the applicant a life member of the Society as from the date his application shall in the absolute discretion of the Council have been accepted and his name entered on the register of members ...'

(2)(a) Completion of a form of application supplied by the Society for annual membership and payment to headquarters of a subscription of ... shall subject as hereinafter mentioned constitute the applicant an annual

a member of the Society as from the date his application shall in the absolute discretion of the Council, have been accepted and his name entered on the register of members ... (b) Such person shall continue to be an annual member for twelve months from the date on which his application shall have been accepted and his name entered on the register of members and thereafter from year to year upon payment of the appropriate annual subscription ...

b (6) The Council shall have power to refuse and/or to return any membership subscription at any time if the Council shall be of the opinion that it would not be advisable to accept or retain it. This power shall be exercised only by resolution of and after full consideration by the Council.

c (7) A member shall cease to be a member of the Society and his name shall be removed from the register of members, (a) If his annual subscription is in arrear for three months. (b) If by notice in writing addressed to the Society he resigns his membership. (c) If he is removed from membership of the Society by the Council under powers conferred by the Rules. (d) If he becomes of unsound mind.'

d The significant changes effected were that there was no longer automatic membership upon payment of the subscription subject only to the power of the council to refuse or return the subscription: there is conferred upon the council an absolute discretion delegable to a committee whether to accept the application for membership; the annual member is given a right to renewal of his membership upon payment of the appropriate subscription; and the delegable power of the council to refuse to accept or to return a subscription becomes a non-delegable power exercisable subject to the important procedural safeguards in favour of the persons affected. This fundamental change in the structure of the rules (as it seems to me) renders it unhelpful when construing the relevant January 1976 and later rules to have regard to the terms of their predecessors before 1976.

f [11] The August 1976 rules reduced the age for eligibility for membership to 17. Otherwise they made no relevant change.

g [12] The August 1979 rules added a provision to r III.1(a) that the completed form of application should contain a declaration of support for the objects of the Society.

[13] The January 1983 and 1991 rules made no material change.

[14] The current rules were adopted in 1997 and will be referred to as 'the rules'. The rules (like their predecessors) provide for the management of the affairs of the Society:

h 'IV The Society shall be under the management of a Council hereinafter called "The Council" which shall subject to these Rules control the affairs funds property and proceedings of the Society and without prejudice to such general powers shall in particular have power ...

j (4) To appoint Committees of the Council and to entrust to such Committees such powers and duties as the Council thinks fit ...

(5) To make Bye-laws (not inconsistent with these Rules) for the management of the affairs of the Society and the regulation of the proceedings of the Council and the Committees ...'

Byelaws made by the Council provide that the quorum for a meeting of a Committee of the Council shall be four.

[15] Rule III provides that the Society shall consist of life members, annual members, ex officio members and junior members. The sub-rules to this rule read (so far as material):

(1) LIFE MEMBERS:

(a) Completion of a form of application supplied by the Society for life membership, which form shall contain a declaration of support for the objects of the Society, and payment to Headquarters of a minimum subscription of two hundred and fifty pounds or such higher sum as may from time to time be determined by resolution of the Council shall, subject as hereinafter mentioned, constitute the applicant a life member of the Society as from the date his application shall in the absolute discretion of the Council have been accepted and his name entered on the register of members maintained at the Headquarters of the Society ...

(2) ANNUAL MEMBERS:

(a) Completion of a form of application supplied by the Society for annual membership, which form shall contain a declaration of support for the objects of the Society, and a payment in whole or committed part to the National Charity, Registered Charity No 219099 of a minimum subscription of eight pounds or such higher sum as may from time to time be determined by resolution of the Council shall, subject as hereinafter mentioned, constitute the applicant an annual member of the Society as from the date his application shall in the absolute discretion of the Council have been accepted and his name entered on the register of members maintained at the Headquarters of the Society. (b) Such person shall continue to be an annual member for twelve months from the date on which his application shall have been accepted and his name entered on the register of members and thereafter from year to year upon payment in whole or committed part to the National Charity, Registered Charity No 219099 of the appropriate annual subscription provided that he shall not be entitled unless otherwise qualified to any of the rights and privileges of membership or to speak or vote at any annual or extraordinary general meeting of the Society until three months after payment in whole or committed part (whichever is the case) of his first subscription ...

(5) The Society may establish and maintain a junior membership in accordance with the arrangements from time to time approved by the Council provided that such arrangements shall not confer any privileges or rights in relation to the conduct of the affairs of the Society.

(6) No person shall be eligible for membership, other than junior membership, of the Society who has not attained the age of seventeen years.

(7) The Council shall have power to refuse and/or to return any membership subscription at any time if the Council shall be of the opinion that it would not be advisable to accept or retain it. This power shall be exercised only by resolution of and after full consideration by Council.

(8) A member shall cease to be a member of the Society and his name shall be removed from the register of members, and he shall thereupon forfeit all rights and privileges of membership. (a) If his annual subscription is in arrear for three months. (b) If by notice in writing addressed to the Society he resigns his membership. (c) If he is removed from membership of the Society by the Council under powers conferred by the Rules.'

[16] Rule XI.16 provides:

a '... it shall be deemed conduct prejudicial to the interest of the Society if any officer or member of the Society or of any Branch at any time publicly misrepresents [the policy of the Society] in any communication of a public nature unless the said officer or member satisfies the Council that such misrepresentation was unintentional or accidental ...'

b [17] Provision for the expulsion of members is made in r XXVIII which (so far as material) reads:

c 'A member of the Society as defined by Rule III shall cease to be a member and shall thereupon forfeit all rights and privileges as such if his conduct, in the opinion of not less than two thirds of the members of the Council present and voting at a meeting of the Council, has been prejudicial to the interests of the Society provided that prior to such meeting reasonable notice in writing shall have been given to the member of the intention of the Council to consider his conduct and an opportunity afforded him to submit any explanation either personally or in writing ... The members of any Committee of the Council which has recommended the Council to exercise d the power contained in this Rule in any particular case shall not be entitled to vote when any resolution in that case is put to the Council.'

e In answer to a question raised before me I should make it clear (a) that conduct 'prejudicial to the interests of the Society' for the purposes of r XXVIII is not confined to conduct so described in r XI.16; and (b) that the fact that the rules deem the specified conduct as prejudicial does not mean that the Society could not have held it to be prejudicial in the absence of r XI.16: r XI.16 merely underlines the seriousness of such conduct and removes any possible doubt that it can trigger the exercise of the power of expulsion.

f [18] For completeness I should add that in 1996 a resolution was passed to expand the declaration of support for, and compliance with, the objects of the Society required of applicants for membership to include a declaration that the applicant for membership does not participate in any activity which is considered by the Society to involve avoidable suffering to animals. Lloyd J on 31 March 1999 held that this proposed rule change designed to require compliance with the policy on hunting was void for uncertainty.

g *Status of the second, third and fourth defendants*

[19] The first question which arises is the status of Mr Meade, Baron Vinson and Ms Atkinson in these proceedings. Each of them may be affected by the outcome of the proceedings. Mr Meade has been an annual member since 1970. h He applied to be joined as a defendant and he was made a defendant by a consent order dated 5 June 2000. Baron Vinson and Ms Atkinson are applicants for membership whose applications are being held in abeyance. They likewise applied to be joined, and by a consent order dated 2 October 2000 they were also joined, but without prejudice to the right of the Society and the Attorney General j to contend, if they wished to do so, that: (a) Baron Vinson and Ms Atkinson are not persons interested in the Society or persons who would have a right to complain to the court about their exclusion from membership irrespective of the reasons for exclusion; and (b) depending on the answer to (a) above, they should not be parties to the proceedings.

In the case of all three added defendants (to whom I shall refer collectively as 'the added defendants') all questions of costs were reserved.

[20] The question of the status of the added defendants may be of limited significance on this application, since at the hearing the Society and the Attorney General raised no objection to their full participation in the hearing. But in view of the request by the Society and the Attorney General that I should provide some guidance on this question in case it arises again in relation to the Society, I shall do so.

[21] The first issue is whether the added defendants are persons 'interested in the Society' within the meaning of s 33(1) of the Charities Act 1993 and, accordingly, persons entitled (with the requisite permission of the Charity Commission) to commence charity proceedings challenging the propriety of any decision of the Society to remove them from membership or refuse them membership or renewal of membership. Section 33(1) provides that charity proceedings may be taken with reference to a charity either by the charity or by any of the charity trustees or by any person interested in the charity. In the case of *Re Hampton Fuel Allotment Charity* [1989] Ch 484 at 494, [1988] 3 WLR 513 at 520, Nicholls LJ (giving the judgment of the Court of Appeal) said:

'If a person has an interest in securing the due administration of a trust materially greater than, or different from, that possessed by ordinary members of the public ... that interest may, depending on the circumstances, qualify him as a "person interested". It may do so because that may give him ... "some good reason for seeking to enforce the trusts of a charity or secure its due administration ..." [per Sir Robert Megarry V-C in *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525 at 537, [1982] 1 WLR 1109 at 1122.]'

The circumstances referred to by Nicholls LJ include the particular respect in which the person in question is seeking to secure due administration: he may have the requisite interest in the due administration of the provisions of the trust, e.g. in respect of his membership, whilst at the same time having no such requisite interest in the due administration of provisions, e.g. concerning the purchase or sale of land. The rule (like the parallel rule requiring the applicant for judicial review to have a sufficient interest) is not a technical rule of law, but a practical rule of justice affording a degree of flexibility responding to the facts of each particular case. The answer is clear in the case of Mr Meade. Rule III.2(b) makes provision for renewal of the membership of an annual member: the annual member has a special interest in the proper construction of that provision and of r III.7 and their due implementation so far as it may affect him. In respect of renewal he has an interest going beyond that of ordinary members of the public. He has, likewise, such an interest if the council purported to exercise its power under r XXVIII to expel him. A life member also has such an interest in the construction and implementation of rr III.7 and XXVIII so far as they may affect him. But I do not think that a disappointed applicant for membership has any such sufficient interest. Any member of the public is free to apply for membership: the exercise of that liberty cannot elevate the status of a non-member into that of a person interested. To extend the right of suit to any such applicant would be to cast the net too wide (consider *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 715). I should add, in view of the suggestion by Mr Martin QC [for the added defendants] to the contrary, that it does not seem to me to be a factor of any significance on the issue of the status of the added defendants that in 1932, by a private Act, the Society was transformed from being an unincorporated association into a corporate body. The fact that the Society is now constituted by an Act of Parliament does

- a not give a member or prospective member any greater right of access to the court.

[22] The second issue is whether Baron Vinson and Ms Atkinson are able to challenge the Society's decision on their applications for membership in judicial review proceedings in the Administrative Court. It is well established that judicial review proceedings are inappropriate where the issue can be the subject matter of charity proceedings. The question raised is whether Baron Vinson and Ms Atkinson are able to bring judicial review proceedings if they do not have the necessary interest to bring charity proceedings. The answer to this question is in the negative. There is a serious question whether the Society is the sort of public body which is amenable to judicial review, most particularly in respect of decisions made in relation to its membership (consider *Scott's case* (at 716)). The fact that a charity is by definition a public, as opposed to a private, trust means that the trustees are subject to public law duties and judicial review is in general available to enforce performance of such duties. There is therefore a theoretical basis for allowing recourse to judicial review. It is also true that the Society is a very important charity and its activities (in particular, the inspectorate and its prosecutions for cruelty to animals) are of great value to society. In particular, its inspectorate is the largest non-governmental law enforcement agency in England and Wales. But in carrying out these activities the Society is in law in no different position from that of any citizen or other organisation. Unlike the National Trust, the subject of consideration by Walker J in *Scott's case*, the Society has no statutory or public law role. All I will say is that, though theoretically and in a proper case an application for judicial review may lie, it would not (at any rate in any ordinary case) lie at the instance of disappointed applicants for membership whose interest was insufficient to meet the statutory standard for the institution of charity proceedings. The statutory standard is laid down as a form of protection of charity trustees and the Administrative Court would rarely (if ever) be justified in allowing that protection to be circumvented by the expedient of commencing (in place of charity proceedings) judicial review proceedings. That does not mean that a disappointed applicant for membership is without recourse, for he can complain to the Charity Commission or the Attorney General and request them to take action.

[23] The third issue is the status of Baron Vinson and Ms Atkinson to participate in these proceedings. It is open to the court in any proceedings, and this includes charity proceedings commenced by the trustees of a charity, to permit persons interested in the widest sense of the term to be joined as parties and (whether or not so joined) to permit such persons to make representations to the court. That is the situation in this case. I have permitted counsel for the added defendants to address me and I have found their contribution of the greatest value.

Refusal and return of subscriptions

[24] The second question is whether, upon the true construction of r III.7, the council is vested with power on repayment of the member's subscription to remove a life or annual member from membership and to refuse renewal of an annual member's membership.

[25] The rules have grown over the years like Topsy and the patchwork that exists today is a puzzle to construe. The overriding principle of construction must be, so far as the language used admits (as may be presumed to have been intended by the draftsman), to make a coherent and sensible scheme by giving (so

far as this is possible) effect to all of its provisions and avoiding any contradiction or logical inconsistency or any reading which deprives a provision of any legal effect. a

[26] Rule III.2(a), in the case of an annual member (as r III.1 in case of a life member), provides that on completion of the application form and payment of the required subscription 'subject as hereinafter mentioned' the applicant shall become a member as from the date the council in its absolute discretion accepts the application and his name is entered on the register of members. On their face, rr III.1(a) and III.2(a) provide that the applicant's membership is made subject to the later provisions in the rules and to the exercise by the council of an absolute discretion exercisable according to the best interests of the Society whether or not to accept his application. It is clear from the language of the rules that the council can delegate the exercise of this absolute discretion to a committee. (I shall say something later on the power of delegation.) On its face, r III.2(b) provides that renewal of annual membership is automatic on payment of the required subscription. On its face, r III.7 is a free-standing provision. It says nothing about the effect on membership of the exercise of the power conferred, but the required formalities attaching to the exercise of the power make it highly probable that it is not simply and solely concerned with individual repayments of subscriptions, but was intended to have a substantive effect on membership. It is common ground that the language of r III.7 precludes any delegation by the council to a committee of the exercise of the power conferred by r III.7: the council must alone exercise it. To make sense of the provision it must be implicit in the decision to refuse or return subscriptions that there is the refusal of, or removal from, membership of the person whose subscription is refused or returned. b
c
d
e

[27] The Society contends that r III.7 confers on the council a free-standing right at any time to refuse to accept, or (if paid) to return the subscription tendered, or paid by a life or annual member, and in particular by an annual member exercising his right of renewal of his membership, and thereby remove him from membership. The added defendants contend that the rule is an addendum to, or qualification of, the absolute discretion of the council to accept or refuse applications for membership stipulating how that discretion to refuse an application is to be exercised. I find answering this question exceptionally difficult. The second alternative involves holding that the council itself must make the decision in every case where an application for membership is refused, a scarcely practicable and improbable scenario; it requires reading the words 'subject as hereinafter mentioned' as a gloss, not on the provisions constituting the applicant a member (where the words are to be found), but on the provision conferring an absolute discretion on the council to accept applications for membership (a provision to which the words have no such connection); and it imposes on the provision conferring on the council a delegable absolute discretion whether to accept a member the qualification that the council is not to refuse any application unless the council itself decides that it is contrary to the interests of the Society to accept it. These appear to me to be the most serious obstacles to accepting this construction. When I turn to the Society's construction, I am troubled construing r III.7 as conferring on the council a free-standing right to return life and annual members' subscriptions and to refuse to accept renewal subscriptions by annual members, for this is tantamount to conferring a power to remove them from membership without recourse to the expulsion provisions contained in r XXVIII with the important safeguards there provided. I am also troubled that it means that the exercise of the power in f
g
h
j

- a respect of life members operates to require repayment of their entire subscription with no allowance for their membership to date.

[28] After anxious consideration I have concluded that r III.7 confers upon the council (in addition to the absolute discretion conferred by r III.1 and 2(a) whether to accept any new applicant for life or annual membership) a power at any time to remove from membership and prevent the renewal of any annual membership by returning any subscription paid and refusing any subscription proffered. Rules III.1 and III.2 make it plain that an applicant's life or annual membership constituted by payment of subscription and acceptance of his application for membership is 'subject as hereinafter mentioned' and this must include being subject to r III.7; and though the formula 'subject as hereinafter mentioned' is not to be found in r III.2(b), even as the yearly member's first year of membership is subject to r III.7, so must his annual membership in subsequent years. The possibility of removal from membership under r III.7 is an incident of annual membership, whether original or renewed. The exercise by the council of its power under r III.7 constitutes (for the purposes of r III.8 (c)) the removal of the member from membership of the Society by the council under a power conferred by r III.7. It is of critical importance in this context to underline the procedural safeguards in respect of the exercise of this power which date back to the January 1976 rules. Before this power can be exercised in respect of any member, the council itself must give full consideration whether it would not be advisable to accept or retain the subscription and, accordingly, to continue that member's membership and must have passed a resolution to that effect. This procedure requires the council as part of its full consideration to take into account any representations made to it by the individual to be removed from membership. The merit of each individual's case requires separate consideration as it does in the case and/or exercise of the parallel power under r XXVIII. The existence of these procedural safeguards, which do not fall far short of the safeguards provided by r XXVIII, provide comfort in reaching this conclusion.

d

e

f

Delegation

- [29] I have already said that the council has no power to delegate any part of the decision-making under r III.7, in contrast with the power of the council to delegate to a committee its discretion whether to accept or reject an application for annual or life membership under rr III.1 and 2(a). It is, however, important to recognise the limits under the rules on this latter power of delegation to a committee. The power is limited to delegating the exercise of the discretion to a committee: the council cannot delegate the discretion to anyone else (eg the department) and the committee has itself no power to delegate any discretion delegated to it by the council. The council (or a committee as its delegate) can exercise its discretion by deciding to accept all applicants and giving instructions to this effect to the department; it can lay down fixed criteria for acceptance or rejection which leave no discretion for the department and require the department to refer to the council or a committee all applications where a discretion (or judgment) has to be exercised. The administrative inconvenience occasioned by these constraints can be ameliorated. The byelaws may be amended to reduce the quorum for a committee to which the exercise of the powers and duties arising under rr III.1 and III.2(a) is delegated; or the rules may be changed to permit delegation by the council of these powers and duties to another body or official (eg the department).
- g
- h
- j

Jurisdiction of the court

[30] I must now turn to the question raised whether the court should on this application authorise the council to exercise its powers under the rules to exclude from membership in order to safeguard the Society from damage. There are three stages to be gone through. The first is to decide what is the proper approach of the court on this application for guidance. The second is to decide whether the council can adopt the membership policy. The third is how far the council can implement the membership policy by adopting the scheme.

[31] I turn first to the question of the correct approach to be adopted by the court on this application for guidance and approval. There is a stream of authority to the effect there is a distinction between cases where trustees seek the approval by the court of a proposed exercise by them of their discretion and where they surrender their discretion to the court (see e.g. *Re Allen-Meyrick's Will Trusts*, *Mangnall v Allen-Meyrick* [1966] 1 All ER 740 at 743, [1966] 1 WLR 499 at 503). In cases where there is a surrender, the court starts with a clean sheet and has an unfettered discretion to decide what it considers should be done in the best interests of the trust. In cases where there is no surrender, the primary focus of the court's attention must be on the views of the trustees and the exercise of discretion proposed by the trustees. Though not fettered by those views, the court is bound to lend weight to them unless tested and found wanting and it will not, without good reason, substitute its own view for those of the trustees. Mr Henderson, for the Attorney General, however, submitted that there is no difference between the two situations and that, in both cases, the court is vested with the discretion previously vested in the trustees. In support of this proposition he relies on the speech of Lord Oliver in *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198. In that case the trustees entered into a contract for sale whose binding effect was made conditional upon obtaining the prior approval of the court. The question raised for judicial guidance was, rather, the question of fact whether the price agreed was the best price reasonably obtainable than how a discretion should be exercised. Lord Oliver (giving the opinion of the Privy Council) held that, in that case, the trustees had surrendered their discretion to the court and that the court in such a situation was engaged solely in considering what ought to be done in the best interests of the trust and the beneficiaries, and that for that purpose the parties were obliged to put before the court all the material appropriate to enable it to exercise that discretion. By the terms of the contract, the trustees reposed in the court the decision whether the price was such that the contract should become unconditional and be completed. No question arose as to the distinction between a case where there was a surrender of discretion (as was held to have occurred in that case) and a case where there is no such surrender. My view that Lord Oliver's speech lends no support to Mr Henderson's proposition accords with that expressed by Hart J in *Public Trustees v Cooper* (20 December 1999, unreported). I shall, accordingly, proceed on the basis that there is no surrender of discretion in this case and that my primary focus should be on the views of the council and the exercise of discretion proposed by them.

The membership policy

[32] The council take the view that it is in the best interests of the Society to exclude from membership anyone whose application for membership is, was, or in the future will be, made for the real or predominant purpose to protect field sports for their own sake and not in order to promote animal welfare and that as

- a a means of achieving this there should be excluded anyone whose application for membership is, was, or in the future will be, the result of a campaign by CAWG or any other pro-hunting body to recruit members of the Society. The council, accordingly, proposes to adopt the membership policy that it should treat the existence of the purpose referred to or the fact of such recruitment as constituting grounds for not accepting the applicant as a member under rr III(1)(a) and
- b III(2)(a), for removing life and annual members from membership and for preventing renewal of annual membership under r III.7. (I shall consider later, separately, how the council proposes to implement the membership policy by use of the scheme.) The thinking of the council lying behind the membership policy (as reduced to writing in the course of the hearing) is as follows:
- c 'The Society exists for the purpose of its objects and not for the benefit of its members. The Society does not wish to have as members those who apply to join for an ulterior purpose in circumstances in which damage is being or likely to be caused to the Society. An applicant has an ulterior purpose if his/her real or predominant purpose for applying is to protect
- d field sports for their own sake and not in order to promote animal welfare. Applying to join in response to a Campaign as defined in the Schedule to the Claim Form is evidence of such an ulterior purpose. Damage is caused by the Campaign itself and by those who join in response to it. The damage
- e relied on is that set out in Mr Tomlinson's [witness for the Society] witness statement. The Society does not wish to exclude those who disagree with, or wish to change, its policies, provided they are motivated by animal welfare reasons.'

I shall refer to this writing as 'the policy document'.

- [33] Mr Tomlinson's witness statement sets out the history of the Society's relationship with Mr Meade and the damage occasioned to the Society by
- f campaigns orchestrated by him. Mr Meade has filed evidence in answer. The position may be stated as follows. Since early 1996 Mr Meade (either alone or with a few others) has, under a variety of names, led a campaign directed at persuading the Society to abandon the policy on hunting and expend its energies so released elsewhere, and as the means to this end has encouraged those who support hunting with dogs to join the Society and use their votes and voices as
- g members to this end. The names he has used include the CSAWG, the AWCCA and the CAWG. It is the firmly-held belief of Mr Meade and many others (including a substantial number of members of the Society) that the policy on hunting is highly damaging to the Society and that, in particular, it creates a divide between the Society and those concerned with the countryside. The
- h debate between the two sides on the question whether the Society should abandon the policy on hunting has been acrimonious both within the Society and outside. So long as the policy on hunting continues to be followed, this debate is likely to continue. I may add that no doubt, if the Society at any time abandoned the policy on hunting, that change would likewise be the catalyst for further
- j equally acrimonious debate on whether the policy on hunting should again be adopted.

[34] The council consider that the campaigns and the activities pursued in advancement of the campaigns are damaging to the Society in four ways: (a) they damage the reputation of the Society, most particularly damaging being the claims made in the course of the campaigns that the Society is in the hands of a small group of animal rights supporters and is no longer focused on its proper

concerns of animal welfare; (b) they hinder the work of the Society, most particularly by diluting the impact of the Society's support for a legislative ban on hunting, presenting the Society as divided as to the policy on hunting and obstructing the achievement by the Society of the goal of the policy on hunting, namely procuring the legislative ban; (c) they lead to a waste of the Society's resources in countering the campaigns, and in particular in answering unfair criticism, complaining about unfair advertisements or investigating the genuineness of applications for membership; and (d) the admission of new members, whose reason for joining the Society is to obstruct the widely supported policy on hunting, is calculated to damage the morale of members, volunteers and staff.

[35] The added defendants can, as it seems to me, argue with force that the Society is exaggerating the damage occasioned by the campaigns and underestimates the extent to which the damage of which the Society complains is attributable to the underlying public debate as to the merits of a ban on hunting; and that there is indeed a debate and division amongst members of the Society as to the merits of the policy on hunting, the existence of which cannot, and should not, be covered up. It does appear to me to be questionable whether the damage to the Society as perceived by the council will be greatly alleviated by the steps which the council proposes to take. The division amongst the Society's membership on the policy on hunting will continue none the less, for the supporters of hunting include members who are outside the reach of the council's proposals for exclusion. But having read the whole of the evidence I think that the material before me requires me to find that the council has grounds (rightly or wrongly) for taking the view that the campaigns are damaging to the Society; that the Society is seriously at risk of damage caused by members whose overriding concern is to support hunting with animals and to change the policy on hunting; that the Society should take steps designed to protect itself from this damage; and that a step to this end would be to exclude from membership those members at whom the membership policy is directed. The council can fairly take the view (which may or may not be correct) that this course is in the interests of the Society (amongst others) for two reasons: (i) the incentive for the conduct of campaigns may be seriously reduced if membership is withheld from applicants whom the campaigns persuade to apply for membership to further their objects; and (ii) the exclusion of members who join for this purpose may keep out those who, as members, would prove to be what the council considers to be troublemakers.

[36] The powers of the council to exclude from membership are conferred by rr III.1 and III.2(a) (where the power is expressed to be exercisable at the absolute discretion of the council) and by r III.7 (where the power is expressed in terms of a discretion exercisable 'if the Council shall consider that it would not be advisable to accept or retain [the subscription]'). In both cases the powers are fiduciary and, accordingly, the obligation is upon the council to exercise the powers for the purposes for which they are conferred in what they consider to be the best interests of the Society. I am satisfied that the council is acting in good faith and in what it considers to be the best interests of the Society in deciding that it should adopt the membership policy. It seems to me that, if the trustees honestly take this view and it is one which they can honestly and reasonably take (subject only to one question to which I will next turn), this is a course which they are entitled to take and which I can and should endorse (see e.g. *Gaiman v National Association for Mental Health* [1970] 2 All ER 362, [1971] Ch 317).

[37] The one question which I must consider is whether this proposed course on the part of the council is open to objection under the provisions of the Human

a Rights Act 1998. Mr Martin has submitted that the provisions of the 1998 Act require the council in the exercise of its powers under the rules to respect the human rights of members and applicants for membership, and most particularly their freedom of speech and thought; and the rules must, accordingly, be read as prohibiting the adoption of the membership policy and the scheme, since they contravene those rights. I shall consider in turn the two avenues by which this conclusion is reached.

b (a) The first is s 6(1) of the 1998 Act which makes it unlawful for a 'public authority to act in a way which is incompatible with a Convention right' [the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)]. Section 6(3) provides that 'public authority' includes a court and any person certain of whose functions are of a public nature. Section 6(5) provides that a person is not a public authority by virtue only of s 6(3) if the nature of the act is private. I do not think that s 6 of the 1998 Act is of any assistance. The Society is not a public authority and has no public functions within the meaning of s 6 (see para [21], above); and in any event the acts in question relate to its regulation of membership and that is a private act within the meaning of s 6(5). The court is a public authority, but that status does not impinge on the question whether one party to the proceedings before it has a convention right to which another party is bound to give effect. The court is bound to give effect to such a convention right if established: in this context that is the full extent to which the status of the court as a public authority is engaged.

e (b) The second avenue is s 3 which requires that primary and subordinate legislation must be read and given effect in a way which is compatible with convention rights. Section 21(1)(f) provides that 'subordinate legislation' means any 'order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation'.

f That section also provides that primary legislation includes a private Act. It is possible that the rules constitute subordinate legislation within the meaning of s 3(1) of the 1998 Act in so far as they are 'an instrument made under primary legislation': and that, accordingly, they must so far as possible be read and given effect to in a way which is compatible with convention rights. I have, however, some difficulty accepting that the rules are the sort of 'instrument' which the legislation was intended to cover. But, in any event, the proposed use of the rules is not directed at or calculated to interfere with the freedom of speech or thought of members or prospective members: both members and prospective members are left to think and say whatever they like. The council by the membership policy is not concerned to muzzle members or applicants for membership or censor what they say or do. This is confirmed by the policy document. The council reserve the right to invoke r XXVIII if the conduct of any members is such as to require the council to invoke the power of expulsion, but that is not a matter of concern today. The proposed criterion for exclusion relates to the reason for joining the Society: the Society has a legitimate interest in excluding those whose reasons for joining may render their membership contrary to the interests of the Society. What really is in question in this case is not the freedom of speech or thought of members or applicants for membership, but the freedom of association, under art 11 of the European Convention on Human Rights, of the Society itself: that freedom embraces the freedom to exclude from association those whose membership it honestly believes to be damaging to the interests of the Society (see *Cheall v UK* (1985) 42 DR 178 at 185 and *Gaiman's* case

[[1970] 2 All ER 362 at 374, [1971] Ch 317 at 331). For these reasons the rules do not require to be read as precluding adoption of the membership policy or the scheme: there is no ground for challenge to either of them or the underlying rules of the Society on human rights grounds or other grounds.

The scheme

[38] I turn now to the scheme which the Society proposes to adopt to implement the membership policy. The Society recognises the difficulty of carrying out an investigation into an individual's reasons for joining the Society. To have to determine whether a particular member had or has the 'ulterior purpose' referred to in the policy document is very hard. It is for this reason that the membership policy extends to excluding those who joined as a result of a campaign. But even to investigate whether a member in fact did join, or is joining, as a result of a campaign has its difficulties. For this reason the Society wishes to implement the membership policy by adopting the scheme which lays down as a convenient rule of thumb the principle that any existing member who at the date of his original application for membership fell, and any applicant for membership who now falls, within certain defined categories set out in a schedule to the amended claim form may be treated as falling within the class of persons to be excluded under the membership policy. The preference of the council is to be able to treat the fact that in its opinion a person falls within one or more of the categories as conclusive that he falls within the class of persons to be excluded from membership under the membership policy without any need for consideration of the merits of any particular case. This means that no regard need be paid to any representations by the party affected that he does not fall within the category; that (notwithstanding the fact that he does fall within a category) he does not meet the criterion for exclusion under the membership policy; or that otherwise he should not be excluded.

[39] The categories set out in the schedule to the claim form reads:

'Definitions

In this Schedule the term "a Campaign" means either of the following: (i) The CAWG Campaign: i.e. the current campaign organised by the Countryside Animal Welfare Group ("CAWG"), the immediate aim of which is to increase the number of country sports supporters who are members of the Society (including any attempt to recruit new members of the Society by an individual, body or group which supports the aims of CAWG); (ii) An Associated Campaign: i.e. a campaign organised by any individual, body or group, an aim of which is similar to the immediate aim of the CAWG Campaign, (including any attempt to recruit new members of the Society by an individual, body or group which supports such a campaign).

Categories of Applications

(A) Where the application was made following a request for an application form made on a prepared pro forma which is associated with a Campaign.

(B) Where the application is received from a person who has made a statement, or on whose behalf a statement has been made, indicating that the application is being made in response to a Campaign.

(C) Where (a) it appears that the applicant is a member of the same family, or lives at the same address as an applicant whose application falls within either of the Categories (A) or (B) above or has been assisted to apply by such

- a* an applicant; and (b) the applications were made with three months of each other.
- (D) Where the applicant or the person requesting the application form has an address in an area in respect of which there is evidence of a current local Campaign (which evidence may include an abnormal number of applications for the area).
- b* (E) Where it appears that (a) the application is one of two or more applications made at the same time by members of the same family or by persons living at the same address; or (b) a request was made by one person for two or more application forms; and, in either case, (c) the request or application was made during a Campaign.
- c* (F) Where it appears that (a) the request for the application form or the application itself was made during a Campaign; and (b) either the request or the application shares some unusual attribute or distinguishing feature in common with other requests or applications made in response to a Campaign.
- d* (G) Where the application was made in response to a Campaign on the World Wide Web or by e-mail.
- (H) Where it appears that the applicant (or one of them in the case of a joint application) is an official of a group which is conducting a Campaign either locally or nationally.
- e* (I) Where the application is made by a person who has made an application for membership in the last 2 years which was refused by or on behalf of the Council as falling within one of the Categories (A) to (H) above.'

I comment that the inference that a member or applicant who falls within a category had or has the ulterior purpose or joined or is joining as a result of a campaign is stronger in the case of some categories than others and in each case the inference may be displaced by evidence of the existence of some other explanation. Yet in each case the chance that a member or applicant in the view of the Society falls within a category, without more, entitles the Society to ban that person from membership for two years.

- g* [40] It is in my view quite clear that the council cannot apply the scheme in the exercise of its powers under r III.7 and, accordingly, remove life or annual members or prevent the renewal of membership of annual members. As I have already said, r III.7 requires full consideration by the council whether it would be inadvisable to accept or retain the subscription of the member in question and, accordingly, to allow his membership to continue. It is implicit in this provision that the full merits in respect of each member must be explored. The sole criterion is whether the continued membership of the individual in question is inadvisable, ie against the interests of the Society. For this purpose the council is entitled to decide that it was inadvisable to renew membership of a person because he originally joined with the ulterior purpose or pursuant to a campaign if the council consider that this single factor in the individual case in question justifies this extreme course and that there are no sufficient countervailing circumstances. The date that the member joined is highly relevant, in particular because the further back in history the date he joined, the more difficult it is likely to be to prove the necessary circumstances relating to his joinder, the less relevant those circumstances may be in deciding whether his continued membership is inadvisable and the harsher the impact on the member of removing his membership. But in deciding the individual case it cannot be
- h*
- j*

sufficient that the member in question falls within any one of the categories. If he does so, this may (depending on the facts) constitute *prima facie* evidence of the existence of the ulterior purpose or that his membership resulted from a campaign. But the requirement for full consideration before the power is exercised to remove from membership must imply that the member will be afforded the opportunity to put forward his case (at least in writing) in respect of his categorisation, the existence of the ulterior purpose, whether he joined as the result of a campaign, the countervailing circumstances and whether his continued membership is advisable before the power under r III.7 can be exercised. I have the gravest doubt whether the expenditure of time, effort and costs required can ever justify the adoption of this procedure, save in the most exceptional cases.

[41] I turn now to the question whether in the exercise of the absolute discretion conferred by rr III.1 and III.2(b) to accept or refuse applications for membership the council can apply the scheme in respect of the admission of new members. I have already considered in para [29], above, the extent of the power of delegation. In any particular case where a discretion has to be exercised the council or committee must make the decision. The question raised by the Society is whether the council or committee can treat the fact that an applicant falls within one of the categories or appears to fall in one of the categories as conclusive and should be under no obligation to give the applicant the opportunity to establish that he does not fall into the category in question, that his reason for joining is not one to which the council objects or that, in any event, his membership application should be accepted. This draconian approach proposed by the council is very much the first choice of the council, for it has dual merits of the utmost simplicity and maximum economy in application. It is very much the council's second choice to use the categories as giving rise only to a *prima facie* presumption of the existence of grounds for rejection of those who do, or appear to, fall within them on which the Society can act in the absence of rebutting evidence.

[42] I have given full weight to the first choice of the council, but after long and anxious consideration I have concluded that it is not in the interests of the Society or conducive to its good name to adopt such an arbitrary and unattractive method of implementing the membership policy. To exclude from membership of this important charity persons to whom (if the full facts were allowed to be taken into account) no conceivable objection could be taken, persons who may not only contribute their subscriptions and services but leave legacies to the Society, must be a method of last resort. The significance of a decision to exclude is accentuated by the provision in the scheme that any person whose application for membership is rejected is precluded from making a further application for two years. I have in mind that circumstances may arise where emergency action is required calling for the expulsion of a group of members which includes 'the innocent' as well as 'the guilty', eg where there is an imminent threat of a take-over or other irreparable damage (see eg *Gaiman's case* ([1970] 2 All ER 362 at 381, [1971] Ch 317 at 339)). But that is not the situation here. What is in question is a fully considered long-term policy, and the plight of the 'innocent' must take on greater weight when an alternative course is available. If the damage done to the Society by the admission of persons whom the membership policy is designed to exclude is such as to require measures to preclude them joining the Society, the extra cost and administrative inconvenience involved in adopting the council's second choice must likewise be justified. In the context of a charity of the

- a* standing, size and substance of the Society, this should not prove in any way disproportionate, having in mind the critical importance of the public image and reputation of the Society for fairness and justice. That public image and reputation must be of critical importance to the success of the Society, in particular, in respect of its activities and its attraction of support (financial and otherwise). As I read the evidence in this case this important factor has not been taken into
- b* account or given any or any sufficient consideration or weight by the council when making its choice of method of implementation of the membership policy. If the membership policy is to be adopted in respect of applicants for membership, they should be so informed in the application form or an accompanying document; they should be invited to state whether they fall within any of the categories from which inferences may be drawn; and if they fall within
- c* a category, they should be invited to give their reasons why, none the less, they should be admitted to membership. This does mean that a discretion will need to be exercised in any case where an application is refused. This course will meet the real risk of injustice arising from wrong categorisation and of a categorisation giving a false indication. There is a problem that under the rules as they stand any
- d* exercise of discretion whether to admit or reject an applicant must be made by the council or (as its delegate) a committee. An amendment of the rules is clearly called for enabling delegation, eg to a committee of less than four or to an executive employed by the charity to discharge this function. I am far from clear that such an amendment is not called for as matters stand at present irrespective of the adoption of the membership policy. At the same time consideration should
- e* be given whether and how the rules should be amended generally so that they no longer represent a patchwork of amendments over the years with the inevitable construction difficulties to which such a patchwork gives rise and whether the Society should adopt in their place a set of rules which are clear and consistent and enable it to function effectively.

Order accordingly.

Celia Fox Barrister.

Re Smith (deceased) Smith v Smith and others

CHANCERY DIVISION

ANTHONY MANN QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

2, 3, 9 MAY 2001

Will – Gift – Disclaimer – Deceased's son executing voluntary deed before her death disclaiming all benefit arising on her death – Deceased leaving estate by will to son and his brother – Whether voluntary disclaimer before death of estate owner effective.

In 1979 the defendant, R, executed a voluntary deed disclaiming all benefit in his favour which would arise on his mother's death. However, by her last will, his mother left her personal chattels and residuary estate to R and his brother, F, in equal shares. After her death in 1998, F brought proceedings claiming the entire estate on the grounds that R was bound by the disclaimer. The issue therefore arose whether a voluntary disclaimer made before the death of the estate owner was effective.

Held – A voluntary disclaimer of benefit in a person's estate before that person's death was ineffective. A disclaimer bit on something that could be disclaimed; on a transaction which could in some way be said to be an attempt to make a gift. The testamentary intentions of a living person did not fall within that category. Any existing wills might or might not be revoked or varied. Any existing intestacy might or might not persist until the death of the deceased. There were no proprietary rights or other rights to control the destination of the estate in any way. Accordingly, until the death, there was simply nothing that could be disclaimed, and any attempt to disclaim was therefore invalid and ineffective. That conclusion was supported by the analogy of gifts of expectancies or future property. They were invalid in law, and could at most take effect as a contract to convey the property when it fell in, which equity would enforce if consideration was provided. The absence of a subject matter, which presumably lay behind the invalidity of a gift of future property, prevented the avoidance which underlay a disclaimer as much as it underlay the absence of dispositive effect of an assignment of future property. In the instant case, F had provided no consideration and there was thus no question of his being able to treat the disclaimer as an agreement and enforce it accordingly. It followed that the disclaimer was ineffective to prevent R from claiming under his mother's will (see [10]–[12], below).

Per curiam. A unilateral transaction which is essentially revocable is not made irrevocable merely because it is under seal (see [16], below).

Notes

For disclaimer of a gift by will, see 50 *Halsbury's Laws* (4th edn reissue) para 390.

Cases referred to in judgment

Beesty's Will Trusts, Re, Farrar v Royal Alfred Merchant Seamen's Society [1964] 3 All ER 82, [1966] Ch 223, [1964] 3 WLR 689.

Cranstoun's Will Trusts, Re, Gibbs v The Home of Rest for Horses [1949] 1 All ER 871, [1949] Ch 523.

- a* *Ellenborough, Re, Towry Law v Burne* [1903] 1 Ch 697.
Indian Endurance (No 2), The, Republic of India v India Steamship Co Ltd [1997] 4 All ER 380, [1998] AC 878, [1997] 3 WLR 818, HL.
Johnson v Gore Wood & Co [2001] 1 All ER 481, [2001] 2 WLR 72, HL.
K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt [1985] 2 Lloyd's Rep 28, CA.
- b* *Moorgate Mercantile Co Ltd v Twitchings* [1976] 2 All ER 641, [1977] AC 890, [1976] 3 WLR 66, HL.
Naas v Westminster Bank Ltd [1940] 1 All ER 485, [1940] AC 366, HL.
Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafford [1988] 2 Lloyd's Rep 343, CA.
Paradise Motor Co Ltd, Re [1968] 2 All ER 625, [1968] 1 WLR 1125, CA.
- c* *Stratton's Deed of Disclaimer, Re, Stratton v IRC* [1957] 2 All ER 594, [1958] Ch 42, [1957] 3 WLR 199, CA.
Townson v Tickell (1819) 3 B & Ad 31, [1814–23] All ER Rep 164, 106 ER 575.

Cases also cited or referred to in skeleton arguments

- d* *Brooks' Settlement Trusts, Re, Lloyds Bank Ltd v Tillard* [1939] 3 All ER 920, [1939] Ch 993.
DWS (decd), Re, Re EHS (decd), TWGS (a child) v JMG [2001] 1 All ER 97, [2000] 3 WLR 1910, CA.
Meek v Kettlewell (1843) 1 Ph 342, [1843–60] All ER Rep 1109, 41 ER 662, LC Ct.
- e* *Scott (decd), Re, Widdows v Friends of the Clergy Corp* [1975] 2 All ER 1033, [1975] 1 WLR 1260.
Worrall v Jacob (1817) 3 Mer 256, 36 ER 98.
Young, Re, Fraser v Young [1913] 1 Ch 272.

Administration action

- f* The claimant, Frank Smith, sought, pursuant to RSC Ord 85, r 2 (as applied by CPR Pt 50), the determination of an issue arising in the course of the administration of the estate of his mother, Lily Marion Smith (the deceased), namely whether by a deed of disclaimer made on 2 January 1979 his brother, the first defendant, Raymond Smith, disclaimed his entitlement to any share or interest in the estate
- g* of the deceased, arising under her will dated 17 February 1997 or on her intestacy, and, if so, whether that disclaimer had subsequently been revoked. The second and third defendants, Richard Anthony Carlton and Claire Angela Fitzgerald, the executors of the deceased's will, took no part in the proceedings. The facts are set out in the judgment.
- h* *Anna Clarke* (instructed by *Harris & Cartwright*, Slough) for Frank Smith.
David Blayney (instructed by *Picton Smeathmans*, Hemel Hempstead) for Raymond Smith.

Cur adv vult

- j* 9 May 2001. The following judgment was delivered.

ANTHONY MANN QC.

[1] This application raises two related but apparently hitherto undecided points concerning disclaimers of interests under a will or intestacy. First, is a disclaimer in advance of the death of the relevant estate owner effective as a

disclaimer, and if so, is such a disclaimer when effected by a deed revocable? The case also raises certain estoppel questions on its facts.

[2] Frank and Raymond Smith are the two sons of the late Lily Marion Smith who died on 16 August 1998. Long before her death, on 2 January 1979, Raymond executed a disclaimer document which provided as follows:

‘By this deed I, the undersigned Raymond John Smith ... hereby disclaim all benefit in my favour arising upon the death of my mother Lily Marion Smith including any benefit under a devise in my favour contained in my said mother’s Will or any benefit or interest arising as a result of my said mother dying intestate and Also Disclaim all estate and interest in any property belonging to my said mother at the date of her death.’

[3] The circumstances of the execution of this document are a matter of dispute, to which I will come later, but it is not suggested by Frank that it was executed for any consideration or as part of a bargain. It was therefore a voluntary document.

[4] By her last will Lily Smith appointed the partners in the solicitors firm of Barrett & Thomson of Slough to be her executors, gave her dining room suite to Frank, gave her personal chattels to Frank and Raymond in equal shares with a request that they ‘observe the agreement that has been reached between us’ (probably as to certain small items), gave £12,000 to Frank and then divided the rest of her estate between Frank and Raymond in equal shares. On her death Richard Anthony Carlton and Claire Angela Fitzgerald proved the will on 18 September 1998; they are the second and third defendants to these proceedings but have played no part in them, indicating that they will be bound by my decision.

[5] Frank maintains that Raymond is bound by the disclaimer and claims the entire estate (sworn at just under £150,000 in value) as a result. He is the claimant in these proceedings; Raymond is the first defendant and the matter has been argued between them. Raymond disputes that. He says first that the disclaimer is ineffective as a matter of law and he does not intend to abide by it. Second he says that if it was effective it has been revoked by a deed executed by him in 1992; and third, if there is a problem with the execution then on the facts Frank is prevented by an estoppel from denying the revocation. I shall deal with those issues in turn. These proceedings are, in form, an application by Frank for declarations (in effect) that the disclaimer is operative and that the estate should be administered on the footing that Raymond has no interest in it.

The effect of the disclaimer

[6] In the circumstances of this case this is a short point of law which is not dependent on many facts, and which is certainly not dependent on the resolution of any dispute of facts. It will be remembered that Frank does not rely on any case based on consideration so that the issue arises in this case in relation to a voluntary transaction.

[7] There are a number of authorities which shed light on the operation of disclaimers, but none which cover the question which arises in this case, namely whether a voluntary disclaimer of interests in the estate of the deceased can be operative if executed before the death of the deceased.

[8] The authorities establish the following propositions: (a) A disclaimer of an interest under a will, or indeed, of any other gift, is capable of operating so as to

- a prevent the final vesting of the gift, since a man cannot be required to take a gift he does not wish to have:

‘The law certainly is not so absurd as to force a man to take an estate against his will. Prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift.’ (See *Townson v Tickell* (1819) 3 B & Ad 31 at 36, [1814–23] All ER Rep 164 at 165 per Abbott CJ cited in *Re Stratton’s Deed of Disclaimer, Stratton v IRC* [1957] 2 All ER 594 at 596–597, [1958] Ch 42 at 50.)

- c (b) A disclaimer operates by way of avoidance, not disposition (see *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, [1968] 1 WLR 1125). In that case there was a firm disclaimer of an attempt to give shares, and a question arose as to the applicability of s 53(2) of the Law of Property Act 1925. This was dealt with shortly by Danckwerts LJ: ‘We think that the short answer to this is that a disclaimer operates by way of avoidance, and not by way of disposition’ (see [1968] 2 All ER 625 at 632, [1968] 1 WLR 1125 at 1143).

- d [9] The second of those principles provides some assistance in resolving the question that I am called on to decide. In the normal disclaimer case the disclaimer operates in relation to some actual transaction that has taken place or which a person has taken steps to try to bring about. In the context of wills, the will has been drawn, and the testator has died. In the context of an inter vivos gift, the donor has taken steps in order to divest himself of the property in favour of the donee. At that point there is a real interest which the donee can accept or disclaim, and on which an avoidance can operate.

- e [10] Now contrast a case such as the present. At the date of the disclaimer the intended donee has no interest whatsoever. He or she has a mere expectancy. Any existing wills might or might not be revoked or varied; any existing intestacy might or might not persist until the death of the deceased. There are no proprietary rights, or other rights to control the destination of the estate in any way. What, then, is there to be disclaimed, or (as a matter of analysis) avoided?
- f In my view the answer is nothing. A disclaimer bites on something that can be disclaimed; on a transaction which can in some way be said to be an attempt to make a gift. The testamentary intentions of a living person do not fall within that category. Until the death there is simply nothing that can be disclaimed and any attempt to disclaim is invalid and ineffective.

- g [11] There is a principle in relation to disclaimers that they can only be effective if they are ‘made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it’ (see *Naas v Westminster Bank Ltd* [1940] 1 All ER 485 at 504, [1940] AC 366 at 396, per Lord Russell of Killowen). While I do not rely on the first half of that statement as my principal reason for saying that disclaimers in advance of the death are not operative, it might be said
- j to be a supporting factor. For firmer support I prefer the analogy of gifts of expectancies or future property. They are invalid in law, and can at most take effect as a contract to convey the property when it falls in, which equity will enforce if consideration is provided (see *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697). While *Re Paradise Motor Co* tells us that a disclaimer does not work by means of a dispositive effect, nevertheless I consider that the absence of a subject matter, which presumably lies behind the invalidity of a gift of future property,

prevents the avoidance which underlies a disclaimer as much as it underlies the absence of dispositive effect of an assignment of future property. Since no consideration was provided by Frank (or by anyone else), there is no question of his being able to treat the disclaimer as an agreement and enforce it accordingly. In any event, it is hard to treat it as an agreement when it is on its face a unilateral document without any inter partes or bilateral element. a

[12] I therefore hold that the disclaimer dated 2 January 1979 was and is ineffective to prevent Raymond from claiming under the will of his mother. b

Revocation

[13] That conclusion makes it strictly unnecessary for me to consider the question of revocation in this case, but the point was argued, and evidence was advanced, and in case this matter goes further I should at least make findings of fact on the point. What follows is predicated on the assumption that my primary finding is wrong, and the disclaimer was capable of taking effect according to its tenor. c

[14] Raymond's case on this point was that the disclaimer, if effective, was revoked by a deed entered into in 1985 in which he revoked his prior disclaimer. The deed was not produced; if it existed then it has been lost. It was Frank's case that it was not in fact entered into, and even if it was it was ineffective to revoke this particular disclaimer. d

[15] There is authority for the proposition that a disclaimer of a gift under a will can be revoked at any time before it is acted on. That much was decided in *Re Cranstoun's Will Trusts*, *Gibbs v The Home of Rest for Horses* [1949] 1 All ER 871, [1949] Ch 523. The same is not true of disclaimers of inter vivos gifts—such a disclaimer cannot be recalled once it has taken place (see *Re Paradise Motor Co Ltd*). Ms Clarke, who appeared for Frank, invited me to accept that *Re Cranstoun's Will Trusts* was correct on this point (despite what might be regarded as hints in *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632, [1968] 1 WLR 1125 at 1143 that it might fall to be reconsidered one day). She therefore accepted that if disclaimers of testamentary gifts, made after the death of the testator, could be revoked, then a pre-death disclaimer could also be revoked. However, her case was that no revocation was in fact possible in this case because the disclaimer was by deed, and a deed is irrevocable. In support of this last point she relied on a passage in 13 *Halsbury's Laws* (4th edn reissue) para 56: e

'By executing a deed with all the requirements for such execution, the party whose act and deed it is becomes, as a general rule, conclusively bound by what he is stated in the deed to be effecting, undertaking or permitting.'

She also relied on *Re Beesty's Will Trusts*, *Farrar v Royal Alfred Merchant Seamen's Society* [1964] 3 All ER 82, [1966] Ch 223, a case involving appointments under hand, in which it was said by Wilberforce J: f

'It is clear from the statement in [*Farwell on Powers* (3rd edn, 1916), p 306], and from the reference to the authorities which I find under it, that it is derived from and based on the principle that a deed is by its nature an irrevocable instrument, and the consequence is that an appointment by deed is irrevocable unless in the deed there is contained power to revoke it.' (See [1964] 3 All ER 82 at 86–87, [1966] Ch 223 at 233.) g

[16] One way of testing the question seems to me to be this. Suppose a disclaimer by deed after the death of the testator. Can the beneficiary change his h

- a or her mind and decide to take the gift after all? Does the rule permitting changes of mind prevail, or do the rules relating to the prima facie irrevocability of deeds prevail? The answer to this problem is bedevilled by a little uncertainty as to the basis of the revocability (if that is the right word) of testamentary gift disclaimers when inter vivos disclaimers are once and for all things. The legal basis of this distinction has been rationalised on the footing that 'a will remains an
- b outstanding offer of a gift' (see *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632, [1968] 1 WLR 1125 at 1143, per Danckwerts LJ). If that is the rationale (and with all due respect to Danckwerts LJ it seems a little forced) then it cannot matter whether the disclaimer is under seal or not. The 'offer' continues and is available for 'acceptance' thereafter until someone acts on the basis of the disclaimer. It can make no difference to the existence of that notional offer that what amounts
- c to a notional interim rejection of a continuing offer was made under seal. I appreciate, however, that that analysis might be regarded as forced, but none the less, even if the analysis is wrong, my view is still that the ability to recall a disclaimer survives even a disclaimer under seal. I do not see what the seal adds for these purposes other than a firm indication of the intention of the person
- d disclaiming. In other transactions a seal is necessary for the validity of the document as an effective transaction document itself (for example, a conveyance of a legal estate in land), or it supplies a binding element which turns the transaction from one which is not binding (for absence of consideration) to one that is. In these cases it is not so much the seal that makes the document irrevocable; it is the nature of the transaction itself. Once the transaction has
- e taken place it cannot be undone unilaterally. It may be that in line with *Re Beesty's Will Trusts* the execution of an appointment under seal is different in that that makes irrevocable what would be revocable if merely under hand, but I do not consider that that principle applied in those circumstances means that I am compelled to hold that a unilateral transaction which is essentially revocable is
- f made irrevocable just because it is under seal. I say nothing about transactions which have a bilateral element. Other considerations will come into play in those circumstances.

[17] Those being my conclusions on the legal aspects of the point, I turn to the evidence in this case. The act of revocation relied on is the execution of a deed in 1985 said to have that effect. It is one of the sad features of this case that the

g protagonists are two brothers who have obviously fallen out so badly. Their evidence is at times so irreconcilable that it is necessary to consider whether one or other of them is lying. However, I still have to make some relevant findings and I do so briefly.

- [18] Raymond said that the deed of disclaimer was entered into to ensure that
- h his brother was provided for. He (Raymond) had obtained a larger share of his grandmother's estate than Frank. At the time Frank was living in the mother's house and did not show any inclination to marry and neither Raymond nor his mother wished to see the house sold on the mother's death. Raymond believed that his mother had not made a will at that time so that the property would be
- j split between them. Raymond had the deed prepared and showed it to his mother, explaining that he understood that it gave both of them the opportunity to revoke it, or his mother to modify her dispositions as she wished should the situation change in relation to Frank. He said that his mother did not like wills and as far as he knew intended to die intestate.

[19] By the mid-1980s the situation had changed. Frank had married and moved away from home. At some time in 1985 his mother called Raymond into

the room and said that Frank no longer needed to be the sole beneficiary of her estate, and since she had benefited from her father's estate it was only right that both brothers should benefit from her own. She showed him a typed document which she herself had had prepared, which contained two paragraphs, the first revoking the disclaimer and the second containing an agreement on the part of Raymond that he would not challenge a will which gave Frank more than him. Raymond executed this document in the presence of two witnesses, one of whom is now dead and the other of whom is untraceable. After that incident Lily is known to have executed six wills (including her last), in which the executors varied as between the sons, Raymond alone and then the solicitors who have ultimately proved. The estate was, generally, split between the two sons in differing proportions, but Raymond was intended to take under all of them.

[20] Evidence was given by Mr Alan Collard, a legal executive employed by Barrett & Thomson and who seems to have drawn all of the wills. He said that the deed of disclaimer was held by his firm for Frank. Frank agreed with that, but said that initially it had been lodged with his mother's papers, having been lodged by himself, and only subsequently moved to his file. He played no part in the disclaimer, but his understanding was that it was part of the settlement of a dispute between Frank and Raymond over the administration of the grandmother's estate. Despite holding the retainer from shortly after it was executed, Mr Collard then over the years assisted his client Lily in drawing wills which were inconsistent with it. When asked by me about that he said that that was probably because until one of the more recent wills he had probably forgotten about the disclaimer. He seems to have known nothing about the revocation, which raises the interesting question of who drafted it. He did draft a will at what must have been about the same time in 1985, and there was no clear answer to the question of who would have drafted the deed of revocation, assuming there was one, if it was not him.

[21] Frank's version of events was strikingly different. He said that there was a dispute about the administration of the grandmother's estate. Raymond was the sole executor, and had more than his fair share out of the estate—Frank said he was cheated. Frank went so far as to commence proceedings in relation to that, but Raymond made a scene and in the interests of the family Frank dropped the action. Raymond then executed the deed of disclaimer as a sort of olive branch, and to compensate Frank for the fact that Raymond had received a large part of the grandmother's estate (though not in a way which made any element of compromise consideration for the deed—Ms Clarke disavowed any such case). Before it was executed Raymond provided Frank with a draft which Frank took to Barrett & Thompson for advice that it was legally binding. He did not believe that his mother ever knew that the disclaimer ever existed. Until these proceedings were commenced he had never heard of the deed of revocation, and does not believe that one ever existed. If it had existed, he says, it would have been found with his mother's papers (which it was not—it was not listed on a list of documentary matters which the mother methodically prepared before she died) or lodged with her solicitors.

[22] The evidence of both brothers had unsatisfactory features, and the evidence, and the manner in which it was given, betrayed the animosity which each still clearly feels towards the other. I think that that animosity has, probably in both cases, to some extent clouded the evidence which each gave. For example, I think each sought to distance themselves from suggestions that they had discussions as to the contents of the various wills of the mother, in a way

a which was inconsistent with what the mother told Mr Collard when he drafted a will for her in 1993—she told him that she had been under pressure from her sons to make different wills, and I find that each did from time to time discuss the content of wills, and the extent to which they would respectively benefit, with their mother. Frank adopted a conspicuously defensive attitude, while significant aspects of Raymond's evidence were curious—his account of his reasoning for making the disclaimer does not wholly make sense even allowing for his evidence as to his mother's alleged antipathy to wills, an antipathy which she had clearly overcome by the time she died; and there remains the mystery of who drafted and engrossed the deed of disclaimer. However, despite this, having considered all the evidence and the manner in which it was given, I accept that there was a deed of disclaimer as Raymond alleged. There was either a deed, or Raymond was lying. His evidence on the point contained elaborating detail that either showed him to be a clever liar or showed he was telling the truth—I have in mind particularly his evidence and description of the second clause of the deed. I prefer the latter explanation—I find that he was telling the truth and that there was a revocation deed. The mother knew of the disclaimer and the revocation, and that is why she made the wills that she did. (I appreciate that the mother's making wills would be consistent with Frank's version of events as well, since on his version the mother did not know of either the disclaimer or the revocation, but I prefer Raymond's evidence on the point.) So far as relevant, I also prefer Raymond's evidence that his mother knew of the disclaimer. Whichever brother is right about the genesis of the document, I think it more likely that the existence of such a document would have been made known to the mother than that its existence would have been kept quiet.

[23] It follows from this that, had the question of revocation been relevant, I would have held that the deed of disclaimer was revoked (or rather, its effect was withdrawn) by a deed executed by Raymond.

f [24] For the sake of completeness I would record that it was not argued that its effect was withdrawn in any event by communications between Raymond and the executors after the death.

Estoppel

g [25] Mr Blayney, for Raymond, sought to run an estoppel argument in case he should fail on the first two points. It was raised in a rather unsatisfactory manner. This is a CPR Pt 8 claim with a short claim form and an exchange of affidavits in which the estoppel claim was not made, though much of what became the relevant evidential material was deployed. The point had been raised in a pre-action letter, but not in a full form and the estoppel alleged there was different from the estoppel as it was finally run. Ms Clarke took the point that the matter was not properly raised in these proceedings and I ruled that it could be raised though Mr Blayney should set out the basis of the claim in a particularised document so that Ms Clarke and I could know what it was. That Mr Blayney did.

j While the document did not make the estoppel itself wholly clear, Mr Blayney in argument fairly firmly nailed his colours to the mast of estoppel by convention. I say fairly firmly because in his final speech he sought to rely on a reference to estoppel by convention which appeared in one of the cases, but his reference was, if he will forgive me for saying so, little more than a passing reference and it was not pursued with any vigour at all. His principal case was that Raymond, Frank and Lily all operated on the common assumption that Lily was able to achieve

effective gifts in favour of Raymond and that the matter of the disclaimer was behind them and did not affect the gifts (I paraphrase for these purposes).

[26] I was shown little authority on this point. Before he had elected for estoppel by convention, Mr Blayney in his skeleton had relied merely on the general remarks about estoppel in *Johnson v Gore Wood & Co* [2001] 1 All ER 481, [2001] 2 WLR 72. Once he had plumped for the convention variety, Mr Blayney referred to *The Indian Endurance (No 2)*, *Republic of India v India Steamship Co Ltd* [1997] 4 All ER 380, [1998] AC 878. In that case Lord Steyn said:

‘It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption (see *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd*, *The August Leonhardt* [1985] 2 Lloyd’s Rep 28; *Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd*, *The Vistafford* [1988] 2 Lloyd’s Rep 343 and *Treitel Outline of the Law of Contract* (9th edn, 1995) pp 112–113). It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.’ (See [1997] 4 All ER 380 at 391, [1998] AC 878 at 913.)

Mr Blayney worked from that statement and accepted that he had to show not only that Frank and Raymond shared that belief, but that each knew that the other had had it. He also said that if the mother had known that her testamentary dispositions would be baulked by an outstanding disclaimer then she would have found another way of benefiting Raymond, for example by leaving property to his wife, or by achieving another form of revocation with Raymond.

[27] This point arises only remotely on the facts, and I shall not consider it at length. Suffice it to say that for present purposes I do not consider that Mr Blayney has met the evidential requirements. I am prepared to find that Mr Blayney believed that his mother’s gifts would be effective, and that his mother obviously had that belief, but the matter stops there. I think that Frank believed at all material times that the deed of disclaimer had been operative and (as far as he knew) was still operating. In evidence-in-chief he said that he lodged the deed of disclaimer with Barrett & Thomson and then forgot about it for some years. If he knew about the deed from the outset I do not accept he would have forgotten about it. Bearing in mind the relationship between the brothers it is not the sort of thing he would forget, whichever version of the genesis is correct. He therefore did not share any assumption as to the viability of gifts to Raymond made by his mother’s will. Even if that conclusion is wrong, then on the evidence I do not consider that it is established that each of Raymond and Frank knew enough of what the other was believing. Frank knew that Raymond was discussing wills with his mother from time to time (he admitted as much, but denied knowing that discussions concerned what property was being dealt with) but I do not consider that there is sufficient evidence that Raymond knew what Frank’s belief was. Mr Blayney relied on references in the wills which said that gifts were made for ‘reasons known to my sons’, but that is not sufficient to establish the relevant shared belief. I do not consider that the evidence justifies the existence of this estoppel.

- a [28] As an alternative, Mr Blayney referred to a version of estoppel by acquiescence dealt with in *The Indian Endurance (No 2)* [1997] 4 All ER 380 at 392, [1998] AC 878 at 914 where Lord Steyn refers to a dictum of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1976] 2 All ER 641, [1977] AC 890. I suppose that the starting point of the argument would be an allegation that Frank let his mother make wills which he believed (rightly) to divide her estate between
- b the two sons but did nothing to point out that he would himself scoop the pool as a result of the deed of disclaimer. On Frank's own evidence that was indeed the case, and it might be said that that is prima facie an unattractive position to adopt. However, the matter requires more development than that and Mr Blayney did not develop it further in argument. As a result Ms Clarke did not meet it. In those circumstances I need say no more than that I do not find such
- c an estoppel to exist either.

Conclusions

[29] In the circumstances I decline to make the declarations sought. I will discuss with the parties whether, for the sake of clarity, they would wish me to make alternative declarations.

Order accordingly.

Victoria Parkin Barrister.

Goode v Martin

QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

COLMAN J

7 NOVEMBER, 14 DECEMBER 2000

Pleading – Amendment – Leave to amend after expiry of limitation period – New claim – Claimant unable to rely on facts pleaded in defence but not in statement of case on application for post-limitation amendment to add new claim – Unsatisfactory nature of rule prohibiting such reliance – Limitation Act 1980, s 35(5) – CPR 17.4(2).

Under CPR 17.4(2)^a, the court may only allow a post-limitation amendment, whose effect will be to add or substitute a new claim, if that new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party seeking permission to amend has already claimed a remedy. On the true construction of that provision, it is not open to an applicant seeking permission to amend his claim out of time to rely on facts raised by the defence but which he has not pleaded as at least part of the basis of the claim or substantially the same as facts which are so pleaded. No amount of 'purposive' manipulation can lead to a construction wide enough to cover facts pleaded in a defence but not a claim (see p 568 *b c*, below).

Per curiam. There appears to be no conceptual justification whatever for restricting the court's power to give leave to amend out of time so as to confine the comparator to the facts pleaded as the basis of the original claim. To do so can operate needlessly unfairly to a claimant who is shut out from raising a new cause of action on facts pleaded in a defence but not in the statement of case. The Rules Committee should therefore consider (i) whether s 35(5)^b of the Limitation Act 1980—which empowers the making of rules of court allowing a post-limitation claim involving a new cause of action if that new cause of action arises out of the same facts or substantially the same facts 'as are already in issue on any claim previously made in the original action'—is wide enough to permit reliance by the claimant on facts pleaded in a defence, and (ii) if so, whether CPR 17.4(2) should be amended to permit such reliance. If s 35(5) is too narrow to accommodate such an amendment, the 1980 Act should be amended and the rule amended subsequently (see p 568 *d to f*, below).

Notes

For post-limitation amendment to allow the making of a claim involving new cause of action, see 28 *Halsbury's Laws* (4th edn reissue) para 850.

For the Limitation Act 1980, s 35, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 738.

Cases referred to in judgment

Broadley v Guy Clapham & Co [1994] 4 All ER 439, CA.

Fowell v National Coal Board (1986) Times, 28 May, [1986] CA Transcript 413.

Grimsby Cold Stores Ltd v Jenkins & Potter (a firm) (1985) 1 Const LJ 362, CA.

Henderson v Temple Pier Co Ltd [1998] 3 All ER 324, [1998] 1 WLR 1540, CA.

^a Rule 17.4(2) is set out at p 566 *b*, below

^b Section 35, so far as material, is set out at p 567 *a to f*, below

- a *Leicester Wholesale Fruit Market Ltd v Grundy* [1990] 1 All ER 442, [1990] 1 WLR 107, CA.
Lloyds Bank plc v Rogers (1997) Times, 27 March, [1997] CA Transcript 1904.
Nash v Eli Lilly & Co [1993] 4 All ER 383, [1993] 1 WLR 782, CA.
Welsh Development Agency v Redpath Dorman Long Ltd [1994] 4 All ER 10, [1994] 1 WLR 1409, CA.
- b **Cases also cited or referred to in skeleton arguments**
Alliance and Leicester plc v Pellys (9 July 1999, unreported), Ch D.
Bentley v Bristol and Weston Health Authority [1991] 2 Med LR 359, DC.
Colt Group Ltd v Couchman [2000] ICR 327.
Darlington Building Society v O'Rourke James Scourfield & McCarthy [1999] Lloyd's Rep (PN) 33, CA.
- c *Hancock Shipping Co Ltd v Kawasaki Heavy Industries Ltd, The Casper Trader* [1992] 3 All ER 132, [1992] 1 WLR 1025, CA.
Hydrocarbons Great Britain Ltd v Cammell Laird Shipbuilders Ltd (1991) 53 BLR 84, CA.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, HL.
- d *Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd* (1986) 6 Con LR 11, CA.
Walkley v Precision Forgings Ltd [1979] 2 All ER 548, [1979] 1 WLR 606, HL.

Appeal and application

- e The claimant, Virginia Goode, appealed from the decision of the Admiralty Registrar (Master Miller) on 16 June 2000 dismissing her application for permission to amend her statement of claim in proceedings for negligence against the defendant, Hugh Martin. She also applied for permission to make the amendments on alternative grounds to those relied upon before the registrar. The facts are set out in the judgment.
- f *Peter Ralls QC* (instructed by *Barker Gillette*) for the claimant.
Jervis Kay QC (instructed by *Lester Aldridge*, Bournemouth) for the defendant.

7 November 2000. The appeal and the application were dismissed for reasons to be given later.

- g 14 December 2000. The following judgment was delivered.

COLMAN J. This is an appeal from an order of the Admiralty Registrar made on 16 June 2000 by which he refused permission to the claimant to amend the statement of claim. It is also an application by the claimant for permission to make those further amendments to her statement of claim on grounds alternative to those relied on before the Registrar. It raises an important point on the circumstances in which a claimant should be entitled to amend a statement of case after the expiration of a period of limitation.

- j The claim is in respect of a serious and most unpleasant injury suffered by the claimant in the course of an English Channel cruise on 24 August 1996 when she was a guest on board the defendant's yacht. Because the wind had got up to force six or seven and because the yacht was making slow progress against the flood tide, the defendant decided to turn back and make for a sheltered anchorage at Bucklers Hard in the Beaulieu River. In the course of manoeuvring to turn the yacht back for that purpose, being under mainsail only, the defendant proceeded

to gybe from a starboard gybe to a port gybe. During this change of gybe the claimant was seated in the cockpit behind the mainsheet traveller track. The claimant was powerfully struck by something which caused her to be thrown against the side of the yacht with a severe impact to her head. She was already unconscious when she hit her head. She had to be taken to hospital by helicopter and placed on a life support machine. She remained in a coma for four and a half days. She was not discharged from hospital until 9 September 1996.

The claimant was a law graduate about to commence as a solicitor trainee, but due to the effect of the injury on her head, she could not commence her training for a further two years and had to walk with a stick until January 1998. Her injuries are therefore said to have done severe damage to the commencement of her career in the legal profession.

The statement of claim was served with the writ on 21 October 1997, 14 months after the accident. The chain of events relied upon as causing the accident was described in para 3 in the following words:

'A component of the yacht called a "car" or "traveller" runs in a rail side to side in the yacht. An arrangement of ropes and pulleys is fixed at one end of the car and at the other to the boom. It allows the mainsail to be set at a favourable angle. The car came free of the guide rail in which it was designed to travel, and struck the Plaintiff on the head.'

It was alleged that the blow by the car immediately knocked the claimant unconscious whereupon she fell to the deck again hitting her head.

That pleading was constructed not on the basis of the claimant's recollection of what had happened, for she had no recollection, but upon information given to her by another guest on board, namely Erica Nicholls, who was sitting alongside the claimant at the time. Mrs Nicholls provided a statement in about August 1997 but later withdrew it. Her statement expressed the view that, although she did not see the car strike the claimant, that must have been what happened.

The particulars of negligence set out in para 4 of the original statement of claim alleged that the defendant was negligent in—

(a) Failing to note or to heed the fact that the roller elements of the car were becoming heavily and excessively worn. (b) Failing to note or to heed the fact that the roller elements of the car had become heavily and excessively worn. (c) Failing to note or heed that all four rollers were so worn as to require replacement. (d) Failing to note or heed the vibration and noise which worn rollers cause, giving warning of the need for replacement. (e) Failing to perform any hand check for security of the car, in order to discover whether it or the rollers required replacement. (f) Failing to perform, or failing to perform with enough thoroughness, a regular inspection of the running gear, ropes, pulleys, winches, cleats etc of the yacht. (g) Failing, before putting to sea on the 24th August 1996, to perform, or failing to perform with enough thoroughness, an inspection of the running gear, ropes, pulleys, winches, cleats etc of the yacht. (h) Failing to note or heed that the consequence of (a) would be to permit the outer races of the traveller to displace axially relative to the inner races, placing bending stress on the spigot.'

It is to be observed that these are all allegations of defective maintenance.

a On 22 January 1998 the defendant's solicitors sent to the claimant's then solicitors a draft amended defence. That contained by way of amendment a limitation of liability plea under s 185 and Pts I and II of Sch 7 to the Merchant Shipping Act 1995. In making good that plea the defendant put forward the following chain of events leading to the claimant's injury:

b '... (a) shortly before the time at which the plaintiff was injured the "Ocean Cavalier" was approaching the vicinity of the mouth of the Beaulieu River on a starboard gybe (with the boom out to port); (b) the foresail was lowered and then the defendant who was on the helm warned the crew that he was going to gybe, gave instructions what to do during the gybe and told the crew to be aware of the boom; (c) at that time the plaintiff was seated at the

c aft end of the cockpit to starboard of the helmsman and aft of the mainsheet traveller track (which runs athwart the vessel and to which the mainsheet block and tackle is attached by a moving "car"). The defendant told the plaintiff that she was "fine" where she was; (d) as the gybe commenced one Erica Nicholls was situated in the cockpit taking in the mainsheet (as she had been instructed to do by the defendant); (e) as the said Erica Nicholls was taking

d in the mainsheet the plaintiff leaned over to help Erica Nicholls, the mass of the plaintiff's torso was over the mainsheet track; (f) the defendant shouted a warning to the plaintiff but almost simultaneously the boom swung across and the plaintiff was struck on her side by the mainsheet itself so that she was knocked down and struck her head on the side of the cockpit ...'

e This was news to the claimant. There had never been any previous suggestion to her or her solicitors that she had been struck by the sheet after she had moved from her seated position.

f Leave was not obtained to amend the defence until 16 October 1998 and formal service did not take place until 2 February 1999. Moore-Bick J's order provided for permission to serve an amended statement of claim within 21 days of the service of the amended defence and the three-year limitation period expired on 28 August 1999, but the claimant did not apply to amend her statement of claim until 14 April 2000. This may have been due to the fault of her previous solicitors.

g The amendments eventually applied for included a plea in the alternative of the chain of events leading to the accident relied upon by the defendant in the amended defence, that is:

h 'Alternatively, (as asserted by the Defendant in paragraph 5.1(ii)(f) of the Amended Defence), the Plaintiff was struck by the mainsheet so that she was knocked down and struck her head on the side of the cockpit, as aforesaid.'

Upon these facts the claimant made the following allegations of negligence:

j '... (i) Seating the Plaintiff and/or permitting the Plaintiff to sit in a dangerous position immediately adjacent to the track whilst carrying out the gybe so that she was liable to be struck by the Car and/or the mainsheet. (j) Failing to have sufficient concern for the fact that the Plaintiff was a "novice sailor" and therefore unaware of the inherent dangers in gybing a yacht under mainsail alone in windy conditions. (k) Carrying out a dangerous manoeuvre (ie gybing) with the Plaintiff in a dangerous position as aforesaid rather than either: (i) moving the Plaintiff to a safe position; (ii) wearing ship

(ie tacking through the wind and then bearing away); (iii) dropping the mainsail and proceeding under engine.’

CPR 17.4(2)

It was conceded before the learned Admiralty Registrar that the limitation period had expired. He refused permission to introduce these amendments because he held that the claim could not satisfy the requirements of CPR 17.4(2). This provides as follows:

‘The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.’

It was rightly conceded before Master Miller, as it is conceded before me, that the effect of the proposed amendments was to add ‘a new claim’. There can be no question but that the basis of the negligence allegation and the chain of events leading to the claimant’s injury raised a new cause of action, differing from that pleaded in the original statement of claim, which had been based only on the negligent maintenance of the car and its associated equipment. This is clear from the new allegations of negligence which appear in para 4(i) to (k) and which are essentially allegations of failure to look after the immediate safety of the claimant and dangerous navigation.

Both these groups of allegations are founded on a factual basis which cannot be described as ‘substantially the same’ as the factual basis upon which the original allegations of negligence were founded. The allegation that the claimant was struck by the mainsheet so that she was knocked down and struck her head on the side of the cockpit, having been seated or permitted to sit in an intrinsically dangerous position in the course of a dangerous manoeuvre are facts not substantially the same as the assertion that the car broke free because it had not been properly inspected or maintained and then struck the claimant, knocking her unconscious.

Whether one factual basis is ‘substantially the same’ as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which this qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.

Mr Peter Ralls QC has submitted on behalf of the claimant that, in determining whether the facts relied on are substantially the same as those relied on in the original pleading, the court should have regard to the facts relied upon in the amended defence in response to which the proposed amendments to the statement of claim have been made. Since such facts would necessarily have had to be investigated by the defendant in order to put forward the defence, it would be consistent with the purpose of the rule that such facts should be treated as substantially the same as those originally relied upon.

Neither counsel had been able to find any authority on this point. Nor have I.

Mr Ralls further relied upon the legislative basis of CPR 17.4(2) and its predecessor, RSC Ord 20, r 5(5).

a The relevant legislative provisions are to be found in s 35 of the Limitation Act 1980 which provides:

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
b (b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—(a) the addition or substitution of a new cause of action; or (b) the addition or substitution of a new party; and “third party proceedings” means any proceedings brought in the course
c of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 33 of this Act or by rules of court, neither
d the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim. For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of
e counterclaim by a party who has not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—(a) in
f the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action ...’

It will at once be observed that the wording of the rule differs from that of
g sub-s (5)(a). The latter invites comparison between the facts, out of which the new cause of action arises and those ‘already in issue on any claim previously made in the original action’, whereas the former invites comparison with the facts out of which the original cause of action (RSC Ord 20, r 5(5)) and now the original claim (CPR 17.4(2)) arises. The two comparators may not have an identical meaning. Thus, if in ‘facts already in issue on any claim previously
h made’ the word ‘on’ means ‘in consequence of’, it is clearly wide enough to include not only facts upon which the original cause of action or claim was founded but facts put in issue by any defence to that claim that might subsequently have been served. This would be entirely consistent with the purpose of the prohibition on amendment out of time. After all, if the defendant
j has relied on fact x which was not part of the basis of the original claim, he can hardly suffer evidential prejudice if the claimant then amends out of time to found a new claim substantially on fact x. By parity of reasoning, if the defendant subsequently amends his defence to advance facts not originally relied upon by him, he can suffer no sensible prejudice if the claimant is then permitted to amend out of time to raise a new cause of action based on those same facts. If, however, the word ‘on’ means ‘by reason of forming the basis of’ any claim, the test exactly

reflected by the words of the rule, that imposes an unduly stringent test having regard to the apparent purpose of this prohibition on amendments out of time.

It is unnecessary for present purposes to resolve this problem of construction because, even if the wider construction of s 35(5) is correct, which, especially having regard to the judgment of Hobhouse LJ in *Lloyds Bank plc v Rogers* (1997) Times, 27 March, [1997] CA Transcript 1904, p 154, is my provisional view, the words of s 35(4) 'and subject to any further restrictions the rules may impose' are wide enough to enable the Rules Committee further to restrict the court's power to permit amendments out of time by reference to a more stringent test than that set out in sub-s (5). On the proper construction of the rules—both RSC Ord 25, r 5(5) and CPR 17.4(2) there can be no doubt that it is not open to an applicant for permission to amend his claim out of time to rely on facts raised by the defence but which he has not pleaded as at least part of the basis of the claim or substantially the same as facts which are so pleaded. No amount of 'purposive' manipulation can lead to a construction wide enough to cover facts pleaded in a defence but not in a claim.

Master Miller arrived at that conclusion and was perfectly entitled to do so. He applied exactly the right principles in testing whether the facts upon which the new claim was based were the same or substantially the same as those pleaded as the basis for the original cause of action.

He reached that conclusion 'without any enthusiasm'. I share that view. But I would go further. There appears to be no conceptual justification whatever for restricting the court's power to give leave to amend out of time so as to confine the comparator to the facts pleaded as the basis of the original claim. To do so can operate needlessly unfairly to a claimant who is shut out from raising a new cause of action on facts pleaded in a defence but not pleaded in the statement of case. The Rules Committee should therefore consider: (i) whether s 35(5) of the 1980 Act in its present form is wide enough to permit reliance by the claimant on facts pleaded in a defence, as I believe it to be, and, if so, (ii) whether CPR 17.4(2) should be amended to permit such reliance.

If s 35(5) in its present form is too narrow to accommodate my recommended amendment to CPR 17.4(2), an amendment to the 1980 Act ought to be put through Parliament and the rule subsequently amended.

Before the Admiralty Registrar the claimant had not submitted in the alternative that by reason of ss 11 and 14 of the 1980 Act, the commencement of the limitation period ought to be postponed having regard to the date of knowledge of the claimant of the facts identified in s 14 of the 1980 Act. That point is now taken by way of a fresh application before me.

Nor had it been argued before the Admiralty Registrar that the limitation period ought to be disapplied because it was equitable to allow the action to proceed under s 33 of the 1980 Act. That point is also taken in this court.

I shall now therefore consider these alternative bases for the claimant's application.

Section 14 of the 1980 Act

The starting point is s 11 which provides:

'(1) This section applies to any action for damages for negligence, nuisance or breach of duty ... where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff ...

a (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from—(a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured.’

b Section 14 provides in so far as material:

‘(1) ... references to a person’s date of knowledge are references to the date on which he first had knowledge of the following facts—(a) that the injury in question was significant; and (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence ... and c (c) the identity of the defendant; and (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant ...

d (3) For the purposes of this section a person’s knowledge includes knowledge which he might reasonably have been expected to acquire—(a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of e expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.’

It is also necessary to consider s 35 which by sub-s (1) has the effect of deeming a new claim made by way of amendment to be a separate action which has been f commenced on the same date as the original action. Subsection (3) excludes from the court’s jurisdiction the power to permit a new claim to be made by way of amendment after the expiry of any time limit under the 1980 Act which would affect a new action to enforce that claim, subject to the provisions of s 33 and to the provisions of rules of court. The relevant rules are of course those under s 35(4) and (5), namely CPR 17.4.

g It is submitted on behalf of the defendant that where an application is made for permission to amend a statement of case by raising a new cause of action and the application is heard outside what is accepted to be the primary limitation period and the claim falls outside CPR 17.4(2), then it is not open to a claimant upon such application to rely on a limitation period commencing on the date when the claimant first had knowledge as defined by s 14 of the 1980 Act unless the claimant h establishes at the hearing of the application that the defendant does not have a reasonably arguable case on limitation which would be prejudiced by the amendment being permitted. For this proposition Mr Jervis Kay QC relies on the decision of the Court of Appeal in *Welsh Development Agency v Redpath Dorman j Long Ltd* [1994] 4 All ER 10, [1994] 1 WLR 1409.

This submission is, at least at first sight, surprising. A claimant is normally given permission to amend if his new cause of action is arguable and refused if it is hopeless, the assumption being that the issue will be determined at the trial. However, the 1980 Act gives rise to a procedural problem not encountered elsewhere. Once permission to amend to add a new cause of action is given, the effect of s 35(1) is to deem the new claim to have been a separate action which

was commenced on the same date as the original claim. It follows that if, in a case where the primary limitation period has clearly expired, a court were to proceed to give permission to raise a new cause of action on the basis that it was merely arguable that the primary limitation period had been displaced by ss 11(4)(b) and 14, the effect of s 35(1) would be to shut out the defendant from challenging at trial the applicability of those provisions and asserting that the new claim was time-barred. Since that limitation issue could not ordinarily be tried as part of the application for permission to amend, the only available procedural route for the issue to be determined would be for the claimant to be required to start a new action simply raising the new cause of action and for the defendant to take the point by way of defence that it was time-barred—a matter which would ordinarily be determined as a preliminary issue. The only exception to this procedural solution would be where it was plain that the limitation defence would be bound to fail.

Support for this submission is to be derived from the judgment in the *Welsh Development* case. That case was concerned in part with an application to add causes of action in respect of which the limitation period had expired between the date of issue of the summons and the date of the hearing. The question arose whether the ordinary amendment test stated above should apply to applications where a limitation issue was in play, as held obiter in *Leicester Wholesale Fruit Market Ltd v Grundy* [1990] 1 All ER 442, [1990] 1 WLR 107, or whether, as had been held by Purchas LJ in *Grimsby Cold Stores Ltd v Jenkins & Potter (a firm)* (1985) 1 Const LJ 362 at 370—

‘Leave to add a new party should not be given unless it can be shown that the defendant did not have a reasonably arguable case on limitation which would be prejudiced by the additional new claim. I agree with Watkins L.J. that, as a result of the new evidence in the form of the report attached to the affidavit, the appellants have at least a strong arguable case that the damage was suffered more than six years before the date of the application to amend and that, therefore, this application should not be granted. Any prejudice to the applicant plaintiff can to a large extent be mitigated, if it exists, by having recourse to the ordinary process of issuing a fresh writ.’

The Court of Appeal held in *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 4 All ER 10 at 26, [1994] 1 WLR 1409 at 1425, that the test in the *Grimsby* case was the correct test: the plaintiff should not be given leave to amend unless he could show that the defendant did not have a reasonably arguable case on limitation which would be prejudiced by the new claim. In other words, the claimant has to surmount the relatively high hurdle of establishing on the hearing of the application that if the issue of limitation were fully tried as a preliminary issue the defendant would have no reasonable prospect of success. This is a high hurdle because a claimant can discharge the burden of proof only by adducing sufficient evidence to demonstrate that his reliance on ss 11(4)(b) and 14 is in effect not reasonably challengeable at a full trial on limitation.

The requirements for the relevant knowledge for the purposes of postponement of the commencement of the limitation period are set out in s 14(1) and (3).

The degree of specificity of knowledge has been held by the Court of Appeal in *Broadley v Guy Clapham & Co* [1994] 4 All ER 439 at 448, to require the following approach:

a '... one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based.'

b It is to be observed that by sub-s (3), it is not only actual knowledge that has to be taken into account, but also knowledge that the claimant might reasonably have expected to acquire from facts ascertainable by the claimant personally or from facts ascertainable by the claimant with the help of appropriate expert advice which it is reasonable for him to seek, except that a claimant is not fixed with the knowledge of a fact ascertainable by him only with the help of expert advice so long as he has taken all reasonable steps to obtain that advice.

c The claimant has suffered from pre-accident amnesia extending for about ten minutes. She has therefore never had any actual recollection of what struck her and precisely how she was rendered unconscious and how her head came to be so badly injured. The only knowledge of those matters relevant for the purposes of s 14 is therefore that subsequently ascertained or ascertainable by her.

d The claimant's position is that until the defendant's draft amended defence was received in January 1998 by her then solicitor she did not have the requisite knowledge of the facts giving rise to the new cause of action on which her own proposed amended defence is founded. If time did not start to run until then, it would not expire until three years later (January 2001) and therefore the application for permission to amend would be within the limitation period.

e It is therefore necessary to investigate whether, as the claimant submits, it was not until January 1998 that she had the requisite knowledge and that it is not reasonably arguable that she had the requisite knowledge more than three years before the hearing of the application, namely before November 1997.

f The defendant submits that, if one goes through the facts relied upon in the proposed amended statement of claim, the presently available evidence suggests that the claimant had the following actual knowledge before November 1997: (i) that the defendant knew that she was a novice sailor; (ii) that the yacht was met by deteriorating weather and increasing wind and that the defendant thereupon decided to sail up the Beaulieu River; (iii) that the claimant was seated in the cockpit at the after end of the yacht; and (iv) that the defendant commenced to execute a gybe but did not warn the claimant to move from where she was seated.

g The vital pleaded matters missing from her actual knowledge are therefore the fact that she was struck by the mainsheet and, less importantly, the wind speed of force seven from the west south west. It is submitted, however, on behalf of the defendant that these facts were ascertainable by the claimant by October 1997.

h The claimant consulted solicitors in about October 1996. There were six other passengers on board in addition to the defendant and the claimant. In October 1996 the claimant had been contacted by Elly Smedley, one of those on board, and, before August 1997 by Erica Nicholls who provided the addresses of those on board at a much earlier date. The only statement obtained was that from the latter in August 1997. It seems somewhat improbable that nobody else on board, apart from the defendant, saw what had happened to the claimant. Certainly, it appears that at least two of those on board—in addition to Erica Nicholls—had given statements to the defendant on the day after the accident.

j By 19 November 1996 the claimant's solicitors had changed to Georgiou Nicholas, but it appears to have been only in October 1997, some 14 months after the accident, that the latter approached any of those on board for statements

other than Erica Nicholls. None of them provided assistance at that stage. There is no evidence as to what their response would have been if they had been approached soon after the accident.

Nor is there evidence, from which it can be inferred that, if such attempt had been made, evidence that the claimant was struck by the mainsheet would not have been obtained from others on board.

It has been suggested in argument that it is to be inferred from the withdrawal of her statement by Erica Nicholls that there was some kind of concerted action by the defendant's friends aimed at protecting him by withholding evidence from the claimants and that consequently any earlier attempt by the claimant's solicitors to obtain additional evidence from those on board would have been futile. I decline to draw either inference. The fact is that it was only in October 1997 that Erica Nicholls withdrew her statement. If there was any such concerted action, she would not appear to have been aware of it until then.

There is clear authority that, for the purposes of s 14(3), if facts are reasonably ascertainable by a solicitor acting with reasonable diligence and the solicitor acts in a dilatory manner in obtaining that information knowledge of that information will be imputed to the claimant, and he will not be entitled to the protection of the proviso at the end of s 14(3) unless perhaps it can be shown that in obtaining the particular facts, the solicitor could be said to be providing expert advice: see *Fowell v National Coal Board* (1986) Times, 28 May, [1986] CA Transcript 413, *Nash v Eli Lilly & Co* [1993] 4 All ER 383 at 399–400, [1993] 1 WLR 782 at 800 and *Henderson v Temple Pier Co Ltd* [1998] 3 All ER 324 at 329–330, [1998] 1 WLR 1540 at 1545.

On the state of the evidence that has been adduced on this application, it is in my judgment quite impossible to conclude that on a full investigation in the course of the trial of a preliminary issue as to limitation, the defendant would have no reasonably arguable case that by October 1997 the claimant did have constructive knowledge under s 14(3) that she had been struck by the mainsheet. Once she had obtained that information, it would have been relatively straightforward to obtain expert advice on the defendant's conduct with regard to care of the claimant in the course of navigation and to do so by October 1997.

Accordingly, the claimant has not discharged the burden of showing that the defendant has no reasonably arguable case that commencement of the limitation period was not postponed until October 1997 under ss 11 and 14 of the 1980 Act.

Section 33 of the 1980 Act

The claimant also relied on s 33 of the 1980 Act to the effect that the court should disapply the time bar because it would be equitable to allow the action to proceed. The same procedural considerations must apply to reliance on s 33 on an application to amend by adding a new cause of action as apply to reliance on ss 11 and 14. Once the primary limitation period has expired, the claimant can obtain leave only if it can be shown that the defendant has no reasonably arguable case that the court should not disapply the limitation period.

The evidential problem confronting the claimant on this point is considerable. If her advisers had acted with reasonable diligence when the draft amended defence was received in January 1998 or when that pleading was eventually served in February 1999, the statement of claim could have been amended in the manner now proposed *before* the primary limitation period expired (August 1999). No satisfactory explanation has been given for the omission to apply to amend at that time.

- a* It follows that it cannot be said on the evidence adduced on this application that a successful challenge by the defendant to the application of s 33 of the 1980 Act is not reasonably arguable.

Conclusion

- b* In these circumstances, the claimant's application must be refused. If she is to rely on the new cause of action she must start fresh proceedings confined to reliance on that cause of action. The defendant can then defend on the basis of the claim being time-barred and the claimant can then raise reliance in postponement of the commencement of the limitation period under ss 11 and 14 and alternatively on disapplication of the time bar under s 33. These points can then be properly and fairly investigated. This may seem a remarkably cumbersome procedure, but, having regard to the effect of relation back under s 35, it is the only available means of conducting a full and proper investigation into these matters which is fair and just to both parties.
- c*

For these reasons the claimant's appeal from the Admiralty Registrar's order will be dismissed and the claimant's fresh application before me will be refused.

Appeal dismissed. Application refused.

Celia Fox Barrister.

Practice Note

a

CHANCERY DIVISION

SIR ANDREW MORRITT V-C

1 MAY 2001

b

Practice – Chancery Division – Trusts – Applications in relation to administration of trusts – Prospective costs orders – CPR Sch 1, RSC Ord 85.

SIR ANDREW MORRITT V-C gave the following direction at the sitting of the court.

1. This practice statement is about the costs of applications by trustees, or beneficiaries, or other persons concerned, in relation to the administration of a trust including questions of construction, questions relating to the exercise of powers conferred by the trust, or questions as to the validity of the trust.

2. Where trustees have power to agree to pay the costs of some other party to such an application, and exercise properly such a power, CPR 48.3 applies. In such a case, an order is not required and the trustees are entitled to recover out of the trust fund any costs which they pay pursuant to the agreement made in the exercise of such power.

3. Where the trustees do not have, or decide not to exercise, a power to make such an agreement, the trustees or the party concerned may apply to the court at any stage of proceedings for an order that the costs of any party to the application referred to in para 1 above (including the costs of the trustees) shall be paid out of the fund (a 'prospective costs order').

4. The court, on an application for a prospective costs order, may (a) in the case of the trustees' costs, authorise the trustees to raise and meet such costs out of the fund; (b) in the case of the costs of any other party, authorise or direct the trustees to pay such costs (or any part of them, or the costs incurred up to a particular time) out of the trust fund to be assessed, if not agreed by the trustees, on the indemnity basis or, if the court directs, on the standard basis, and to make payments from time to time on account of such costs. A model form of order is set out at the end of this practice direction.

5. The court will always consider whether it is possible to deal with the application for a prospective costs order on paper without a hearing and in an ordinary case would expect to be able to do so. The trustees must consider whether a hearing is needed for any reason. If they consider that it is they should say so and explain why in their evidence. If any party to the application referred to in para 1 above (or any other person interested in the trust fund) considers that a hearing is necessary (for instance because he wishes to oppose the making of a prospective costs order) this should be stated, and the reasons explained, in his evidence, if any, or otherwise in a letter to the court.

6. If the court would be minded to refuse the application on a consideration of the papers alone, the parties will be notified and given the opportunity, within a stated time, to ask for a hearing.

7. The evidence in support of an application for a prospective costs order should be given by witness statement. The trustees and the applicant (if different) must ensure full disclosure of the relevant matters to show that the case is one which falls within the category of case where a prospective costs order can properly be made.

- a 8. The model form of order is designed for use in the more straightforward cases, where a question needs to be determined which has arisen in the administration of the trust, whether the claimants are the trustees or a beneficiary. The form may be adapted for use in less straightforward cases, in particular where the proceedings are hostile, but special factors may also have to be reflected in the terms of the order in such a case.

b

Manjit Gheera Barrister.

Model form of prospective costs order

- UPON THE APPLICATION, etc
 c AND UPON HEARING, etc
 AND UPON READING, etc
 AND UPON the Solicitors for the Defendant undertaking to make the repayments mentioned in paragraph 2 below in the circumstances there mentioned
 d IT IS [BY CONSENT] ORDERED THAT:

1. The Claimants as trustees of ('the [settlement/scheme]') do
 - (a) pay from the assets of the [settlement/scheme] the costs of and incidental to these proceedings incurred by the Defendant such costs to be subject to a detailed assessment on the indemnity basis if not agreed and (for the avoidance of doubt) to
 - e (i) include costs incurred by the Defendant from and after [date] in anticipation of being appointed to represent any class of persons presently or formerly beneficially interested under the trusts of the [settlement/scheme] irrespective of whether [he/she] is in fact so appointed; and
 - f (ii) exclude (in the absence of any further order) costs incurred in prosecuting any Part 20 claim or any appeal
 - (b) indemnify the Defendant in respect of any costs which he may be ordered to pay to any other party to these proceedings in connection therewith
- g 2. Until the outcome of the detailed assessment (or the agreement regarding costs) contemplated in paragraph 1 above, the Claimants as trustees do pay from the assets of the [settlement/scheme] to the Solicitors for the Defendant monthly (or at such intervals as may be agreed) such sums on account of the costs referred to in paragraph 1(a) of this Order as the Solicitors for the Defendant shall certify
 - h (i) to have been reasonably and properly incurred and not to exceed such amount as is likely in their opinion to be allowed on a detailed assessment on the indemnity basis; and
 - j (ii) to have accrued on account of the present proceedings in the period prior to the date of such certificate and not to have been previously provided for under this Order.

PROVIDED ALWAYS that the solicitors for the Defendant shall repay such sums (if any) as, having been paid to them on account, are disallowed on a detailed assessment or are otherwise agreed to be repaid and any such sums

shall be repaid together with interest at 1% above the base rate for the time being of [Barclays] Bank plc from and including the date of payment to those Solicitors up to and including the date of repayment, such interest to accrue daily

3. Any party may apply to vary or discharge paragraphs 1 and 2 of this Order but only in respect of costs to be incurred after the date of such application.

Note: this form of order assumes that the trustees are the claimants. If, in an appropriate case, the claimant is a beneficiary and the trustees are defendants, references to the parties need to be adapted accordingly.

R v Lambert

[2001] UKHL 37

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD CLYDE AND LORD HUTTON

30 APRIL, 1, 8, 9 MAY, 5 JULY 2001

Criminal law – Appeal – Appeal against conviction – Whether person convicted of offence before implementation of human rights legislation entitled to rely in post-implementation appeal on breach of convention right by trial court – Human Rights Act 1998, ss 6(1), 7(1)(b), (6), 22(4).

The defendant, L, was arrested in possession of a bag containing over £140,000 worth of cocaine. He was charged with an offence of possession of a controlled drug with intent to supply contrary to s 5^a of the Misuse of Drugs Act 1971. At his trial, which took place in April 1999, L relied on the defence provided by s 28(2)^b and (3)(b) of the 1971 Act, asserting that he had not believed or suspected, or had reason to suspect, that the bag had contained cocaine or any controlled drug. The judge directed the jury, in accordance with the accepted view of the law at the time, that the prosecution had to prove only that L had knowingly had the bag in his possession and that it had contained a controlled drug, and that thereafter the burden was cast upon L to bring himself within s 28 and to prove, on the balance of probabilities, that he had not known that the bag had contained a controlled drug. In short, the judge directed the jury that s 28 imposed a legal rather than a merely evidential burden upon the defendant. L was convicted, and his appeal was dismissed by the Court of Appeal. On his appeal to the House of Lords, which was heard after the implementation of the Human Rights Act 1998 on 2 October 2000, L contended, inter alia, that the judge's direction that the accused had a legal burden to establish the s 28 defence violated the presumption of innocence in art 6(2)^c of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). The issue therefore arose whether an appellant could rely on the 1998 Act at a time when it was in force in respect of a conviction at a date when it was not in force. In contending that that question should be answered in the affirmative, L relied on s 6(1)^d of the 1998 Act which rendered it unlawful for a public authority—a term which included a court and the House of Lords in its judicial capacity—to act in a way that was incompatible with convention rights. Alternatively, he relied on the combined effect of ss 7^e and 22^f of the 1998 Act. Under s 7(1)(b), a person who claimed that a public authority had acted in a way which was made unlawful by s 6(1) could rely on the convention right concerned in any legal proceedings. Section 22(4) provided that s 7(1)(b) applied to proceedings brought by or at the instigation of a public authority whenever the act in question

^a Section 5, so far as material, is set out at [20], below

^b Section 28, so far as material, is set out at [20], below

^c Article 6(2) is set out at [19], below

^d Section 6 is set out at [23], below

^e Section 7, so far as material, is set out at [23], below

^f Section 22, so far as material, is set out at [23], below

had taken place, but that otherwise that subsection did not apply to an act taking place before the coming into force of that section. By virtue of s 7(6), 'legal proceedings' in sub-s (1)(b) included proceedings brought by or at the instigation of a public authority and an appeal against a decision of a court or tribunal.

Held – Where a person appealed subsequent to the implementation of the 1998 Act against a conviction before the implementation of that Act, he could not (Lord Steyn dissenting) rely on an alleged breach of his convention rights by the trial court. Section 7(6) distinguished between proceedings brought by a public authority and an appeal against a decision of a court, whereas s 22(4) extended the application of s 7(1)(b) only where proceedings were brought by a public authority. That indicated that an appeal by an unsuccessful defendant was not to be treated as a proceeding brought by or at the instigation of a public authority within the meaning of s 22(4). Moreover, it would be surprising if s 6(1), which, unlike s 7(1)(b), had no express provision extending its effect, produced a contrary result so as to be applicable to acts which had taken place before convention rights became part of domestic law. It followed in the instant case that L could not rely on the 1998 Act to challenge the judge's direction to the jury on the nature of the burden imposed upon him by s 28 of the 1971 Act. In any event (Lord Steyn concurring), even if the trial judge had given a direction that the burden on L was only an evidential burden, the jury would have reached the same result. Accordingly, the appeal would be dismissed (see [9]–[11], [14], [18], [43], [52], [116], [117], [140], [144], [146]–[148], [160], [161], [169], [172], [176], [203], below).

Per curiam. (1) Although, on its ordinary meaning, s 28 of the 1971 Act imposes a legal burden upon the accused, it is to be read as imposing only an evidential burden in cases where the accused is entitled to rely on art 6(2) of the convention. Such a reading, in contrast to the ordinary meaning of s 28, is compatible with art 6(2) (see [17], [41], [42], [72], [94], [117], [132], [156], [157], [182], below).

(2) Where a person, who has been charged with an offence of possessing a controlled drug contrary to s 5 of the 1971 Act, claims that he was unaware that the bag he was carrying contained a controlled drug, the prosecution does not have to prove that the accused knew that the bag contained such a drug, let alone a particular controlled drug. It is left to the accused to raise the issue of lack of knowledge as a defence (see [16], [61], [65]–[69], [117], [123], [128], [181], [203], below); *R v McNamara* (1988) 87 Cr App R 246 approved.

Decision of the Court of Appeal [2001] 1 All ER 1014 affirmed on different grounds.

Notes

For reliance on convention rights in legal proceedings, see 17(2) *Halsbury's Laws* (4th edn reissue) para 1268.

For the Misuse of Drugs Act 1971, ss 5, 28, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 681, 701.

For the Human Rights Act 1998, ss 6, 7, 22, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 504, 505, 521.

Cases referred to in opinions

A-G of Hong Kong v Lee Kwong-kut, *A-G of Hong Kong v Lo Chak-man* [1993] 3 All ER 939, [1993] AC 951, [1993] 3 WLR 329, PC.

A-G of the Gambia v Momodou Jobe [1984] AC 689, [1984] 3 WLR 174, PC.

AG v Malta App No 16641/90 (10 December 1991, unreported), E Com HR.

- Ashingdane v UK* (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.
- a** *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713, [2001] 3 All ER 393.
- B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.
- B v B (matrimonial proceedings: discovery)* [1979] 1 All ER 801, [1978] Fam 181, [1978] 3 WLR 624.
- b** *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2001] 2 WLR 817, PC; *rvsg* 2000 JC 328, HC of Just.
- DPP v Brooks* [1974] 2 All ER 840, [1974] AC 862, [1974] 2 WLR 899, PC.
- Hardy v Ireland* App No 23456/94 (29 June 1994, unreported), E Com HR.
- Hoang v France* (1992) 16 EHRR 53, [1992] ECHR 13191/87, ECt HR.
- Lambie v HM Advocate* 1973 JC 53, Ct of Just.
- c** *Lockyer v Gibb* [1966] 2 All ER 653, [1967] 2 QB 243, [1966] 3 WLR 84, DC.
- McIntosh v Lord Advocate* [2001] UKPC D1, [2001] 2 All ER 638, [2001] 3 WLR 107.
- Minister of Home Affairs v Fisher* [1979] 3 All ER 21, [1980] AC 319, [1979] 2 WLR 889, PC.
- Minto v Police* [1990–92] 1 NZBORR 208, NZ HC.
- d** *Parker v DPP* [2001] RTR 240, DC.
- R v A* [2001] UKHL 25, [2001] 3 All ER 1, [2001] 2 WLR 1546, HL.
- R v Ashton-Rickardt* [1978] 1 All ER 173, [1978] 1 WLR 37, CA.
- R v Aziz* [1995] 3 All ER 149, [1996] AC 41, [1995] 3 WLR 53, HL.
- R v Boyesen* [1982] 2 All ER 161, [1982] AC 768, [1982] 2 WLR 882, HL.
- R v Champ* (1981) 73 Cr App R 367, CA.
- e** *R v Downey* (1992) 90 DLR (4th) 449, Can SC.
- R v DPP, ex p Kebeline* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL; *rvsg* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 175, DC.
- R v Duncan* (1981) 73 Cr App R 359, CA.
- R v Edwards* [1974] 2 All ER 1085, [1975] QB 27, [1974] 3 WLR 285, CA.
- f** *R v Forbes* [2001] 1 All ER 686, [2001] 1 AC 473, [2001] 2 WLR 1, HL.
- R v Hallam* [1957] 1 All ER 665, [1957] 1 QB 569, [1957] 2 WLR 521, CCA.
- R v Hunt* [1987] 1 All ER 1, [1987] AC 352, [1986] 3 WLR 1115, HL.
- R v John* [1974] 2 All ER 561, [1974] 1 WLR 624, CA.
- R v Kansal* [2001] EWCA Crim 1260.
- R v McNamara* (1988) 87 Cr App R 246, CA.
- g** *R v Oakes* (1986) 26 DLR (4th) 200, Can SC.
- R v Osolin* (1993) 109 DLR (4th) 478, Can SC.
- R v Sharp* [1988] 1 All ER 65, [1988] 1 WLR 7, HL.
- R v Stevens* (1988) 51 DLR (4th) 394, Can SC.
- R v Togher* [2001] 3 All ER 463, CA.
- h** *R v Watson* [1992] Crim LR 434, CA.
- R v Whyte* (1988) 51 DLR (4th) 481, Can SC.
- Ross v HM Advocate* 1991 JC 210, HC of Just.
- Salabiaku v France* (1988) 13 EHRR 379, [1988] ECHR 10589/83, ECt HR.
- Salmon v HM Advocate* 1999 JC 67, HC of Just.
- j** *State v Coetzee* [1997] 2 LRC 593, SA Con Ct.
- State v Manamela* [2000] 5 LRC 65, SA Con Ct.
- State v Mbatha* [1996] 2 LRC 208, SA Con Ct.
- Sweet v Parsley* [1969] 1 All ER 347, [1970] AC 132, [1969] 2 WLR 470, HL.
- Vasquez v R* [1994] 3 All ER 674, [1994] 1 WLR 1304, PC.
- Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256, [1968] 2 WLR 1303, HL.

Wilson v First County Trust Ltd [2001] EWCA Civ 633, [2001] 3 All ER 229, [2001] 3 WLR 42. a

Woolmington v DPP [1935] AC 462, [1935] All ER Rep 1, HL.

X v UK App No 5124/71 (19 July 1972, unreported), E Com HR.

Yearwood v R [2001] UKPC 31.

Appeal b

The appellant, Stephen Lambert, appealed with leave of the Appeal Committee of the House of Lords given on 31 January 2001 from the order of the Court of Appeal (Lord Woolf CJ, Rougier and Bell JJ) on 31 July 2000 ([2001] 1 All ER 1014, [2001] 2 WLR 211) dismissing his appeal against his conviction on 9 April 1999 after a trial before Judge Hale and a jury in the Crown Court at Warrington of an offence of possessing a class A drug with intent to supply contrary to s 5(3) of the Misuse of Drugs Act 1971. The Court of Appeal certified that three questions of general public importance, set out at [24], below, were involved in its decision. The facts are set out in the opinion of Lord Steyn. c

Tim Owen QC, Keir Starmer and Rebecca Trowler (instructed by *Birds Solicitors*) for the appellant. d

David Perry and Duncan Penny (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration. e

5 July 2001. The following opinions were delivered.

LORD SLYNN OF HADLEY.

[1] On 9 April 1999 the appellant was convicted of possession of a controlled drug, cocaine, with intent to supply, contrary to s 5 of the Misuse of Drugs Act 1971 and was sentenced to seven years' imprisonment. He relied on s 28(3)(b)(i) of that Act asserting that he did not believe or suspect, or have reason to suspect that the bag which he carried contained a controlled drug and in particular cocaine. The judge directed the jury in accordance with what was accepted to be the law at the time, that the prosecution had to prove only that he had and knew that he had, the bag in his possession and that the bag contained a controlled drug. To establish the defence under s 28(3) he had to prove on the balance of probabilities that he did not know that the bag contained a controlled drug. This was thus the legal rather than the merely evidential burden. f

[2] The Court of Appeal held that a defendant did not have to know that he was in possession of controlled drugs or the precise controlled drug which was the subject of the offence. It was also clear that Parliament had intended to provide a defence on which a defendant could rely if he could establish that he had no suspicion as to the nature of the contents of the container in which drugs had been found. Moreover there was an objective justification for the provisions of the 1971 Act which were not disproportionate so that they did not contravene art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). The appeal was accordingly dismissed. g

[3] The Court however certified three questions. The first in substance is whether it is an essential element of the offence of possession of a controlled drug under s 5 of the 1971 Act that the accused knew that he had a controlled drug in h

- a his possession; secondly whether in a charge contrary to s 5 the judge was right to direct the jury that the onus of proving the defence under s 28(2) imposed a legal rather than an evidential burden of proof that the accused neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. The third question asked whether the accused could, on an appeal after the Human Rights Act 1998 came into force, rely on an alleged breach of convention rights by the investigating or prosecuting authority at a trial which took place before the 1998 Act came into force.

- b [4] On this appeal to your Lordships the appellant has contended that the direction by the judge, that the burden on the accused to establish the defence was a legal burden, violated art 6 of the convention rights set out in Sch 1 to the 1998 Act. The essential preliminary question in the appeal, and it is an important question, is therefore whether an appellant can rely on the 1998 Act at a time when the 1998 Act is in force (ie after 2 October 2000) in respect of a prosecution and conviction at a date when the 1998 Act was not in force. In a sophisticated and forceful argument Mr Starmer has contended that he plainly can. He takes two different routes. The first is that s 6 of the 1998 Act provides '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right' (and by virtue of s 6(3) and (4) 'public authority' includes a court and the Judicial Committee of the House) unless by sub-s (2) as the result of or in the case of 'one or more provisions of primary legislation, the authority could not have acted differently'.

- d [5] A second route is by combination of ss 7 and 22 of the 1998 Act. They read:
- e '7.—(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act ...

- f 22.—... (4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.'

- g [6] It is clear that the 1998 Act must be given its full import and that long or well entrenched ideas may have to be put aside, sacred cows culled. Since, however, the 1998 Act did not come into force (apart from limited provisions) until the Secretary of State had appointed a day or days for the Act or parts of it to come into force, and since there is a presumption against retrospectivity in legislation, it is not to be assumed a priori that convention rights, however commendable, are to be enforceable in national courts in respect of past events. The question is whether the 1998 Act has provided for rights to be enforceable in respect of such past events or more precisely whether a court reviewing the legality of a direction to a jury at a criminal trial given before the 1998 Act came into force, which was in accordance with the law at the time, has to be judged by the standards of the convention.

- j [7] Section 6 does not deal specifically with pre-October 2000 acts. Section 22 does and so it is appropriate to begin with s 22. It is on the face of it of limited scope. It provides that s 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place. By s 7(1)(b) a person who claims that a public authority has acted (or purports to act)

in a way which s 6(1) makes unlawful may 'rely on convention rights in any legal proceedings'. But otherwise s 7(1)(b) 'does not apply to an act taking place before the coming into force of that section'. Section 7(1)(a) is not applicable. For the purpose of s 7(1)(b) only, the expression 'legal proceedings includes (a) proceedings brought by or at the instigation of a public authority; and (b) an appeal against the decision of a court or tribunal'.

[8] Thus for s 7(1)(b) to apply 'whenever the Act took place' (by virtue of s 22(4)) the proceedings must have been brought by or at the instigation of a public authority. Here the prosecuting authority brought the proceedings in the first place though the claim is not that that authority acted in a way which s 6(1) makes unlawful. The claim is really that the judge in summing up acted contrary to art 6 of the convention rights by his summing up that the burden provided for in s 28(4) of the 1971 Act was a legal burden.

[9] It is to be noted that s 7(6) distinguishes between proceedings brought by a public authority and 'an appeal against the decision of a court' whereas s 22(4) extends the application of s 7(1)(b) only where proceedings are brought by a public authority. This appears to indicate that an appeal by an unsuccessful defendant is not to be treated as a proceeding brought by or at the instigation of a public authority albeit in other contexts an appeal may be considered to be part of the proceedings initiated by a particular party.

[10] After a fuller consideration of this point than that which took place in *R v DPP, ex p Kebeline* [1999] 4 All ER 801, [2000] 2 AC 326 it seems to me that Parliament was not intending in this case that on an appeal convention rights could be relied upon in respect of a conviction which took place before the 1998 Act came into force. It cannot be said that there is no good policy reason for this result since it may well have been thought undesirable that convictions lawful when made, should have to be set aside as a result of considering convention rights only subsequently enforceable in national courts. Moreover it is plain as Mr Perry contended that the effect of opening up an examination of convictions prior to the coming into force of the 1998 Act, could lead to great confusion and uncertainty.

[11] If this is right, where there is a specific time extension of the applicability of a convention right, which is limited in content and which does not apply to an appeal like the present, it would be surprising if s 6 which has no express provision extending its effect, produced a contrary result so as to be applicable to acts which took place before the convention rights became part of domestic law. Equally, it would be surprising if s 3, which again has no express retroactive effect, could succeed where ss 22(4) and 7(1)(b) fail. The fact that convention rights could be relied on at the European Court of Human Rights does not make such a result less surprising.

[12] Moreover, even if there is a basis for the contention that the appellant's argument based on ss 7 and 22 do not involve retrospectivity, it seems to me that the obvious effect of s 6 as interpreted by the appellant is to impose on the House the current duty of quashing retrospectively a conviction which was good as the law stood at the time.

[13] Even of course accepting that a trial today must observe art 6 of the convention rights and that an appeal court and the House in the way it proceeds must give effect to art 6, it is a very different thing to say that the words 'It is unlawful for a public authority to act in a way which is incompatible with convention rights' (my emphasis) means that the House must rule that had the convention been in force (which it was not) the direction of the judge to the jury would have been incompatible with convention rights and that means that 'it is

a unlawful' for the judge to have directed as he did. I agree with Sir Andrew Morritt V-C in *Wilson v First County Trust Ltd* [2001] EWCA Civ 633 at [21], [2001] 3 All ER 229 at [21], [2001] 3 WLR 42 in which he said:

b 'Nor should the decisions of courts and tribunals made before those sections had come into force be impugned on the ground that the court or tribunal was said to have acted in a way which was incompatible with convention rights.'

[14] On that basis the appellant cannot rely on the 1998 Act to challenge the judge's direction to the jury.

c [15] Two other principal points have been argued relating to the 1971 Act. Since the issues which they raise have been analysed in detail by your Lordships it seems appropriate to set out my own views briefly.

d [16] The first question asks whether it is an essential element of the offence of possession of a controlled drug under s 5 of the 1971 Act that the accused knows that he has a controlled drug in his possession. Bearing fully in mind the importance of the principle that the onus is on the prosecution to prove the elements of an offence and that the provisions of an Act which transfer or limit that burden of proof should be carefully scrutinised, it seems to me that the Court of Appeal in *R v McNamara* (1988) 87 Cr App R 246 rightly identified the elements of the offence which the prosecution must prove. I refer in particular to the judgment of Lord Lane CJ (at 252). This means in a case like the present that the prosecution must prove that the accused had a bag with something in it in his custody or control; and that the something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided in ss 5(4) or 28 of the 1971 Act.

e [17] The second question in effect asks whether, if the prosecution has proved the three elements to which I have referred, it is contrary to art 6(2) of the convention rights for a judge to direct a jury that 'the defendant is guilty as charged unless he discharges a legal, rather than an evidential, burden of proof to the effect that he neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug'. If read in isolation there is obviously much force in the contention that s 28(2) imposes the legal burden of proof on the accused, in which case serious arguments arise as to whether this is justified or so disproportionate that there is a violation of art 6(2) of the convention rights (see *Salabiaku v France* (1988) 13 EHRR 379 at 388 (para 28)). In balancing the interests of the individual in achieving justice against the needs of society to protect against abuse of drugs this seems to me a very difficult question.

h but I incline to the view that this burden would not be justified under art 6(2) of the convention rights. For my part I do not think it is necessary to come to a conclusion on these arguments since even if s 28(2) read alone were thought prima facie to violate art 6(2) the House must still go on to consider s 3(1) of the 1998 Act. That section provides: 'So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights.' This obligation applies to primary legislation 'whenever enacted'. Even if the most obvious way to read s 28(2) is that it imposes a legal burden of proof I have no doubt that it is 'possible', without doing violence to the language or to the objective of that section, to read the words as imposing only the evidential burden of proof. Such a reading would in my view be compatible with convention rights since, even if this may create evidential difficulties for the

j

prosecution as I accept, it ensures that the defendant does not have the legal onus of proving the matters referred to in s 28(2) which whether they are regarded as part of the offence or as a riposte to the offence *prima facie* established are of crucial importance. It is not enough that the defendants in seeking to establish the evidential burden should merely mouth the words of the section. The defendant must still establish that the evidential burden has been satisfied. It seems to me that given that that reading is 'possible' courts must give effect to it in cases where convention rights can be relied on.

[18] In the present case, however, I would dismiss the appeal on the ground that the appellant cannot rely on convention rights in a national court in respect of a conviction before the 1998 Act came into force. I am also of the view that even if the trial judge had given a direction on the basis that the burden on the accused was only an evidential burden the jury would have reached the same result and that it cannot be said that the conviction of this appellant was unsafe.

LORD STEYN.

(I) *The questions*

[19] My Lords, this appeal raises two important questions. The first is whether a defendant is entitled to rely on convention rights when the court is hearing an appeal from a decision which was taken before the Human Rights Act 1998 came into effect. The second is whether a reverse burden provision in s 28(2) and (3) of the Misuse of Drugs Act 1971 is compatible with the presumption of innocence contained in art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). Article 6(2) provides: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

(II) *The factual context and the Misuse of Drugs Act 1971*

[20] On 25 November 1998 in a car park outside Runcorn Station the police arrested the appellant. He was in possession of a duffle bag. It contained two kilograms of cocaine worth over £140,000. He was charged with the offence of possessing a controlled drug of class A with intent to supply, contrary to s 5(3) of the 1971 Act. Section 5(3) provides as follows:

'Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another ...'

Section 5 must be read with s 28. The material parts of this section are:

'(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—(a) shall not be acquitted of the offence

- a charged by reason only of providing that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but (b) shall be acquitted thereof—(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or (ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.’
- b

- c The relationship between sub-ss (2) and (3) was analysed in a careful judgment of the High Court of Justiciary in *Salmon v HM Advocate* 1999 JC 67. For my purposes this point is not of critical importance. It is, however, a material matter that the maximum term of imprisonment for possession with intent to supply (the offence created by s 5(3)) is life imprisonment.

- d [21] In April 1999 the appellant stood trial in the Crown Court at Warrington. In his defence the appellant relied upon s 28 of the 1971 Act and asserted that he did not believe, or suspect, or have reason to suspect that the bag contained cocaine, or any controlled drug. In his summing up the judge applied the law as stated in the decision of the Court of Appeal in *R v McNamara* (1988) 87 Cr App R 246. The judge directed the jury that in order to establish possession of a controlled drug the Crown merely had to prove that the appellant had the bag in his possession and that the bag in fact contained a controlled drug, in this case cocaine. Thereafter the burden was cast upon the appellant to bring himself within s 28 and prove, on the balance of probabilities, that he did not know that the bag contained a controlled drug.
- e

- f [22] The jury convicted the appellant of the offence under s 5(3). The judge sentenced the appellant to a term of seven years’ imprisonment.

(III) *The Court of Appeal decision and the Human Rights Act 1998*

- g [23] The appellant appealed to the Court of Appeal (Criminal Division) ([2001] 1 All ER 1014, [2001] 2 WLR 211). His appeal was heard together with two other appeals towards the end of July 2000. The Human Rights Act 1998, except for four sections, was due to come into operation on 2 October 2000. The defence invited the court to proceed as if the 1998 Act was already in operation. On this assumption the issues before the Court of Appeal were as follows. First, whether knowledge on the part of an accused that he was in possession of a controlled drug is an essential element of the offence of possession. Secondly, whether h construed according to its natural and ordinary meaning, s 28 of the 1998 Act (and accordingly the trial judge’s direction to the jury) violates art 6(2) of the European Convention on Human Rights since it requires the appellant to disprove an important element of the offence. The third is based on s 3 of the 1998 Act, which provides: ‘(1) So far as it is possible to do so, primary legislation and subordinate j legislation must be read and given effect in a way which is compatible with the Convention rights.’ It raises the question whether it is possible to read s 28 compatibly with art 6(2) in accordance with s 3(1) of the 1998 Act by holding that the words ‘if he proves’ merely require a defendant to discharge an evidential burden of proof rather than a legal or persuasive burden. Fourthly, whether a defendant whose criminal trial took place before the coming into force of the 1998 Act can rely, in the course of an appeal, on a breach of his convention rights

by the trial court or prosecuting authority. This involved the interpretation of the provisions of ss 6, 7 and 22(4) of the 1998 Act. So far as relevant those provisions read as follows:

'6.—(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity ...

7.—(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act ...

(6) In subsection (1)(b) "legal proceedings" includes—(a) proceedings brought by or at the instigation of a public authority; and (b) an appeal against the decision of a court or tribunal ...

22.— ... (4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.'

The Court of Appeal gave judgment on 31 July 2000. Notwithstanding that the 1998 Act was not yet in operation, the Court of Appeal assumed that the Act was in force. The Court of Appeal observed that it was entitled to do so 'because if it had been necessary we could have deferred entering our judgment until after the 1998 Act came into force' ([2001] 1 All ER 1014 at 1024, [2001] 2 WLR 211 at 222). Dismissing the appeal of the appellant, the Court of Appeal rejected his first three submissions. It was therefore unnecessary for the Court of Appeal to rule definitively on the fourth submission.

[24] The Court of Appeal refused leave to appeal but certified the following questions as points of general importance involved in the decision, namely:

'(1) Is it an essential element of the offence of possession of a controlled drug under s 5 of the Misuse of Drugs Act 1971 that the accused knows he has a controlled drug in his possession?

(2) In a charge contrary to s 5 of the 1971 Act, is it a violation of art 6(2) of the convention for a trial judge to direct a jury that upon proof by the prosecution that a defendant was in possession of a container and that the defendant knew the container contained something and that the container in fact contained a controlled drug, the defendant is guilty as charged unless he discharges a legal, rather than an evidential, burden of proof to the effect that

a he neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug?

(3) Is a defendant whose trial took place before the coming into force of ss 6 and 7(1)(b) of the Human Rights Act 1998 entitled, after they come into force, to rely, in the course of an appeal, on an alleged breach of his convention rights by the trial court or an investigating or prosecuting authority?

b [25] An appeal committee granted leave to appeal.

(IV) *The issues before the House*

[26] In broad terms the written and oral arguments canvassed the issues identified in the certification of the Court of Appeal. I would, however, change the order: the issue of retrospectivity involves a jurisdictional question and ought to be considered first. If the appellant's submission on this issue fails the other issues do not arise. Having heard full argument on the substantive issues of law it would nevertheless be right to rule on them. It will be convenient to consider in turn (i) the significance of the presumption of innocence under art 6(2);
 c (ii) whether s 5(3) of the 1971 Act, read with s 28, makes an inroad on the presumption of innocence; (iii) and, if it does, to consider whether the inroad is both justified and proportionate; (iv) and, if not, whether in accordance with s 3 of the 1998 Act it can be read in a way which makes it compatible with convention rights. Finally, it may be necessary to consider what on the facts the correct disposal of this appeal is.
 d

e (V) *Issue (1): retrospectivity*

[27] The first issue can conveniently be formulated as follows. Can an accused whose trial took place before the coming into force of the 1998 Act rely, in the course of an appeal, on a breach of his convention rights by the trial court or
 f prosecuting authority?

[28] The language of s 6(1) must be examined. It is to be observed that it provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. The Court of Appeal and the House in its judicial capacity are courts and therefore public authorities within the meaning of s 6(1): see s 6(3). For simplicity one can therefore recast s 6(1) as follows: 'It is unlawful for [an appellate court] to act in a way which is incompatible with a Convention right.' From 2 October 2000 this provision bound the Court of Appeal (Criminal Division) and the House. In the present case the appeal in question was heard in the Court of Appeal before 2 October 2000 but in the House after that date. It binds the House. It will be noted that the effect of s 6(1)
 g is to provide that it is *unlawful* for the House *to act* in a way which is incompatible with a convention right. The question is whether this provision applies to the appeal before the House. Given that it is expressed to limit the way in which a court may act, it is difficult to escape the conclusion that in the relevant sense no appellate court may act incompatibly with a convention right. Surely, for an
 h appellate court to uphold a conviction obtained in breach of a convention right, must be *to act* incompatibly with a convention right. It is unlawful for it to do so. So interpreted no true retrospectivity is involved. Section 6(1) regulates the conduct of appellate courts *de futuro*. The only qualification to the general wording of s 6(1) is contained in s 6(2). The latter provision is, however, inapplicable because s 28(2) and (3) of the 1971 Act can be read compatibly with art 6(2) under the interpretative obligation in s 3 of the 1998 Act, viz by reading s 28(2) and (3) as
 j

creating only an evidential presumption. It follows thus that in the language of s 6 itself there is nothing to qualify the generality of the wording of s 6(1). There is also nothing in s 7 which expressly or by necessary implication qualifies the ordinary and plain effect of s 6(1). Counsel for the Director of Public Prosecutions sought to extract a contrary meaning from s 22(4). I agree with Clayton and Tomlinson *The Law of Human Rights* (2000) vol 1, p 142 (para 3.75) that 'the effect of section 22(4) is obscure'. In any event it does not qualify the court's obligation under s 6(1). The language of the statute points in one direction only: the House may not act unlawfully by upholding a conviction which was obtained in breach of a convention right. It will be observed that this interpretation reads nothing into s 6(1); it implies nothing into the language of s 6(1); it simply gives effect to the obvious meaning of plain words. It is the contrary view which needs to find a legitimate basis for restricting the natural meaning of the words. And there is no legitimate basis in the language or purpose for cutting down the natural effect of s 6(1).

[29] It is necessary to consider the rationale of s 6(1) in the broader framework of an Act which was undoubtedly intended 'to bring home' the adjudication on fundamental rights. If my reading of s 6(1) is adopted, this legislative purpose is achieved. If the contrary view is adopted the stark consequence is that in appeals on and after 2 October 2000 the Court of Appeal and the House will contrary to the wording of s 6(1) have 'to act in a way which is incompatible with a convention right'. Those matters will then have to go to the European Court of Human Rights. In the recent language of the Court of Appeal (Civil Division), 'The alternative, which will have been apparent to Parliament, is a continuing residue of non-compliant decisions of public authorities kept indefinitely in effect by their own antiquity' (see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713 at [7], [2001] 3 All ER 393 at [7]). Instead of the Court of Appeal and the House in such cases applying and developing convention principles in the light of our legal system it will be necessary to await the decisions of the court in Strasbourg. In my view such an interpretation is inconsistent with the plain terms of s 6(1) and a purposive approach to the construction of the statute.

[30] Counsel for the Director of Public Prosecutions advanced consequentialist arguments of an alarmist nature: he predicted great uncertainty if s 6(1) is interpreted as I have suggested. That is not how the matter struck Lord Bingham of Cornhill CJ in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 812–813, [2000] 2 AC 326 at 341; see also my judgment ([1999] 4 All ER 801 at 832, [2000] 2 AC 326 at 367–368); Lord Slynn of Hadley ([1999] 4 All ER 801 at 827, [2000] 2 AC 326 at 362); and Lord Cooke of Thorndon was in general agreement ([1999] 4 All ER 801 at 836–837, [2000] 2 AC 326 at 372). Moreover one is reminded of the unfounded predictions that the 1998 Act would cause chaos in our legal system. A healthy scepticism ought to be observed about practised predictions of an avalanche of dire consequences likely to flow from any new development. My view is that, if s 6(1) is interpreted as I have suggested, the orderly development of convention principles in our country will be advanced.

[31] It follows that I would hold that the House has jurisdiction to rule on the substantive issues.

(VI) *The presumption of innocence*

[32] The approach of the common law to the presumption of innocence was memorably stated by Viscount Sankey LC in *Woolmington v DPP* [1935] AC 462 at 481,

- a [1935] All ER Rep 1 at 8 to be that 'Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.' The *Woolmington* principle was, however, subject to Parliament legislating to the contrary. It is a fact that the legislature has frequently and in an arbitrary and indiscriminate manner made inroads on the basic presumption of innocence. Ashworth and Blake 'The Presumption of
- b Innocence in English Criminal Law' [1996] Crim LR 306 at 309 found 219 examples, among 540 offences triable in the Crown Court, of legal burdens or presumptions operating against the defendant. They observed that no fewer than 40% of the offences triable in the Crown Court appear to violate the presumption. In 1972 a most distinguished Criminal Law Revision Committee had observed that
- c 'we are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only': *Eleventh Report of the Criminal Law Revision Committee: Evidence (General)* (Cmnd 4991 (1972)), para 140. Nevertheless, the process of enacting legal reverse burden of proof provisions continued apace.

- d [33] In the meantime the human rights movement came into existence. The foundation of it was the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226), which has been the starting point of subsequent human rights texts. In art 11(1) it provided: 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law.' Borrowing this language almost verbatim, art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms
- e (1950) provided: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' Article 14(2) of the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) which was signed by the United Kingdom in 1966 is to the same effect. Nevertheless, and despite the right of petition to the European Court of
- f Human Rights created for the United Kingdom in 1961, there was no constraint in our domestic law to legislative incursions on the presumption of innocence. But by the 1998 Act Parliament has provided that, subject to the ultimate constitutional principle of the sovereignty of Parliament, inroads on the presumption of innocence must be compatible with art 6(2) as properly construed. If incompatibility arises, the subtle mechanisms of the 1998 Act come into play.

- g [34] In *McIntosh v Lord Advocate* [2001] UKPC D1, [2001] 2 All ER 638, [2001] 3 WLR 107 Lord Bingham of Cornhill recently referred to the judgment of Sachs J of the South African Constitutional Court in *State v Coetzee* [1997] 2 LRC 593. It is worth setting out the eloquent explanation by Sachs J (at 677–678 (para 220)) of the significance of the presumption of innocence in full:

- h 'There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional
- j rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book ... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new

or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.' a
b

The logic of this reasoning is inescapable. It is nevertheless right to say that in a constitutional democracy limited inroads on the presumption of innocence may be justified. The approach to be adopted was stated by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 at 388 (para 28) as follows: c

'Presumptions of fact or of law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law ... Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence' d

This test depends upon the circumstances of the individual case. It follows that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed. e

(VII) *Does s 5(3) read with s 28(2) and (3) make an inroad on art 6(2)?*

[35] Counsel for the appellant submitted that the defence put forward by the appellant under s 28 is an ingredient of the offence under s 5(3). His argument was that knowledge of the existence and control of the contents of the container is the gravamen of the offence for which the legislature prescribed a maximum sentence of life imprisonment. The contrary argument advanced on behalf of the Director of Public Prosecutions relied on the observation of Lord Woolf CJ in the Court of Appeal ([2001] 1 All ER 1014 at 1024, [2001] 2 WLR 211 at 221) that 'What the offence does is to make the defendant responsible for ensuring that he does not take into his possession containers which in fact contain drugs'. Taking into account that s 28 deals directly with the situation where the accused is denying moral blameworthiness and the fact that the maximum prescribed penalty is life imprisonment, I conclude that the appellant's interpretation is to be preferred. It follows that s 28 derogates from the presumption of innocence. I would, however, also reach this conclusion on broader grounds. The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance. I do not have in mind cases within the narrow exception 'limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with f
g
h
j

a specified qualifications or with the licence or permission of specified authorities': *R v Edwards* [1974] 2 All ER 1085 at 1095, [1975] QB 27 at 40; *R v Hunt* [1987] 1 All ER 1, [1987] AC 352; and s 101 of the Magistrates' Courts Act 1980. There are other cases where the defence is so closely linked with mens rea and moral blameworthiness that it would derogate from the presumption to transfer the legal burden to the accused, e.g. the hypothetical case of transferring the burden of disproving provocation to an accused. In *R v Whyte* (1988) 51 DLR (4th) 481 the Canadian Supreme Court rejected an argument that as a matter of principle a constitutional presumption of innocence only applies to elements of the offence and not excuses. Giving the judgment of the court Dickson CJ observed (at 493):

c 'The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.'

e I would adopt this reasoning. In the present case the defence under s 28 is one directly bearing on the moral blameworthiness of the accused. It is this factor alone which could justify a maximum sentence of life imprisonment. In my view there is an inroad on the presumption even if an issue under s 28 is in strict law regarded as a pure defence.

f (VIII) *Justification*

[36] It is now necessary to consider the question of justification for the legislative interference with the presumption of innocence. I am satisfied that there is an objective justification for some interference with the burden of proof in prosecutions under s 5 of the 1971 Act. The basis for this justification is that sophisticated drug smugglers, dealers and couriers typically secrete drugs in some container, thereby enabling the person in possession of the container to say that he was unaware of the contents. Such defences are commonplace and they pose real difficulties for the police and prosecuting authorities.

(IX) *Proportionality*

h [37] That is, however, not the end of the matter. The burden is on the state to show that the legislative means adopted were not greater than necessary. Where there is objective justification for some inroad on the presumption of innocence the legislature has a choice. The first is to impose a legal burden of proof on the accused. If such a burden is created the matter in question must be taken as proved against the accused unless he satisfies the jury on a balance of probabilities to the contrary: *Eleventh Report of the Criminal Law Revision Committee: Evidence (General)* (Cmnd 4991 (1972)), para 138. The second is to impose an evidential burden only on the accused. If this technique is adopted the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the prosecution have the burden of satisfying the jury as to the matter beyond

reasonable doubt in the ordinary way: *Eleventh Report*, para 138. It is important to bear in mind that it is not enough for the defence merely to allege the fact in question: the court decides whether there is a real issue on the matter: *Eleventh Report*, para 138. A transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden on the accused. The former requires the accused to establish his innocence. It necessarily involves the risk that, if the jury are faithful to the judge's direction, they may convict where the accused has not discharged the legal burden resting on him but left them unsure on the point. This risk is not present if only an evidential burden is created.

[38] The principle of proportionality requires the House to consider whether there was a pressing necessity to impose a legal rather than evidential burden on the accused. The effect of s 28 is that in a prosecution for possession of controlled drugs with intent to supply, although the prosecution must establish that prohibited drugs were in the possession of the defendant, and that he or she knew that the package contained something, the accused must prove on a balance of probabilities that he did not know that the package contained controlled drugs. If the jury is in doubt on this issue, they must convict him. This may occur when an accused adduces sufficient evidence to raise a doubt about his guilt but the jury is not convinced on a balance or probabilities that his account is true. *Indeed it obliges the court to convict if the version of the accused is as likely to be true as not.* This is a far reaching consequence: a guilty verdict may be returned in respect of an offence punishable by life imprisonment even though the jury may consider that it is reasonably possible that the accused had been duped. It would be unprincipled to brush aside such possibilities as unlikely to happen in practice. Moreover, as Justice has pointed out in its valuable intervention, there may be real difficulties in determining the real facts upon which the sentencer must act in such cases. In any event, the burden of showing that *only* a reverse legal burden can overcome the difficulties of the prosecution in drugs cases is a heavy one.

[39] A new realism in regard to the problems faced by the prosecution in drugs cases have significantly reduced their scope. First, the relevant facts are usually peculiarly within the knowledge of the possessor of the container and that possession presumptively suggests, in the absence of exculpatory evidence, that the person in possession of it in fact knew what was in the container. This is simply a species of circumstantial evidence. It will usually be a complete answer to a no case submission. It is also a factor which a judge may squarely place before the jury. After all, it is simple common sense that possession of a package containing drugs will generally as a matter of simple common sense demand a full and adequate explanation. Secondly, the statutory provisions enabling a judge to comment on an accused's failure to mention facts when questioned or charged has strengthened the position of the prosecution: s 34 of the Criminal Justice Act 1994. Thirdly, I turn to the fears centred on the ability of an accused in a drugs case to manipulate the system by providing a mixed statement containing a self-serving explanation that he did not know what was in the package. The perceived difficulty is that the whole statement may be introduced as evidence and he may not testify. In the leading case of *R v Duncan* (1981) 73 Cr App R 359 at 365, Lord Lane CJ observed:

'... where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any

- a reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence.'

This guidance has twice been approved by the House: *R v Sharp* [1988] 1 All ER 65, [1988] 1 WLR 7; and *R v Aziz* [1995] 3 All ER 149, [1996] AC 41. Cumulatively, these considerations significantly reduce the difficulties of the prosecution in drugs cases. Specifically, it should not be possible for an accused, in a case where his conduct calls for an explanation, to advance a submission at the end of the prosecution case that the prosecution have not eliminated a possible innocent explanation. Such submissions should generally in practice receive short shrift.

- c [40] Returning to the relative merits of the transfer of a legal burden on an important element or issue to the accused, as opposed to the creation of a mere evidential burden, there have been noteworthy developments in England and in cognate legal systems. In *Ex p Kebilene* in the Divisional Court, Lord Bingham of Cornhill CJ had no doubt that, in the context of a serious offence (terrorism), a reverse legal burden of proof provision on a matter central to the wrongdoing alleged against the defendant would breach art 6(2). On the appeal to the House a majority suggested that, once the 1998 Act was in force, reverse legal burden provisions may have to be interpreted as imposing merely an evidential burden on the defendant. Responding to *Ex p Kebilene* Parliament enacted the Terrorism Act 2000 which in s 118(1) and (2) provides that the reverse onus of proof is satisfied if the person adduces evidence which is sufficient to raise an issue with respect to the matter unless the prosecution can prove the contrary beyond reasonable doubt. Comparative experience in constitutional democracies underlines the vice inherent in transfer of legal burden provisions, and the utility, in appropriate contexts, of evidential presumptions. This distinction has been explored in depth in the context of the presumption of innocence contained in s 11(d) of the Canadian Charter of Rights and Freedoms in judgments of the Canadian Supreme Court: see in particular *R v Oakes* (1986) 26 DLR (4th) 200; *R v Whyte* (1988) 51 DLR (4th) 481; *R v Downey* (1992) 2 SCR 10; *R v Osolin* (1993) 109 DLR (4th) 478; and Hogg *Constitutional Law of Canada* (4th edn, 1997) pp 1178–1183. For present purposes the interest lies not in the results of these decisions, but in the approach enunciated in respect of reverse burden provisions and evidentiary presumptions. The view has prevailed that if by the provisions of the statutory presumptions, an accused is required to establish, that is to say prove or disprove, on a balance of probabilities either an element of the offence or an excuse, then it contravenes s 11(d). Such a provision would permit a conviction in spite of a reasonable doubt: *R v Osolin* (1993) 109 DLR (4th) 478 per Cory J (majority judgment). On the other hand, a permissive or evidentiary presumption from which a trier of fact may (as opposed to must) draw an inference of guilt will not infringe s 11(d): *R v Osolin*. The same point emerges from jurisprudence of the South African Constitutional Court: *State v Mbatha* [1996] 2 LRC 208; *State v Manamela* [2000] 5 LRC 65. In *Manamela*'s case the majority of the South African Constitutional Court held that a reverse burden provision in respect of handling recently stolen goods was incompatible with a constitutional presumption of innocence. On the other hand, an evidential burden requiring the accused to explain his possession of the goods would not have amounted to a violation of the constitutional right of silence. The majority observed (at 88 (para 49)):
- j

‘... the state has failed, in our view, to discharge the onus of establishing that the extent of the limitation is reasonable and justifiable and that the relation between the limitation and its purpose is proportional. It equally failed to establish that no less restrictive means were available to Parliament in order to achieve the purpose. The imposition of an evidential burden on the accused would equally serve to furnish the prosecution with details of the transaction at the time of acquisition or receipt. Accordingly, there is a less invasive means of achieving the legislative purpose which serves to a significant degree to reconcile the conflicting interests present in this case ...’

The jurisprudence in Canada and South Africa reinforces the view that a reverse legal burden is a disproportionate means of addressing the legislative goal of easing the task of the prosecution in cases under s 5(3) of the 1971 Act.

[41] In these circumstances I am satisfied that the transfer of the legal burden in s 28 does not satisfy the criterion of proportionality. Viewed in its place in the current legal system, s 28 of the 1971 Act is a disproportionate reaction to perceived difficulties facing the prosecution in drugs cases. It would be sufficient to impose an evidential burden on the accused. It follows that s 28 is incompatible with convention rights.

(X) *The interpretative obligation*

[42] The question is therefore whether, in accordance with s 3 of the 1998 Act, it is possible to read s 28 in a way which is compatible with convention rights: see my speech in *R v A* [2001] UKHL 25 at [44], [2001] 3 All ER 1 at [44], [2001] 2 WLR 1546 for a detailed explanation of the import of s 3(1). Specifically, the question is whether the words ‘to prove’ in s 28(2) and ‘if he proves’ in sub-s (3) may be read as placing only an evidential burden on the accused as Professor Glanville Williams suggested in ‘The Logic of “Exceptions”’ [1988] CLJ 261 at 264–265. If the answer is in the affirmative the burden of proof rests on the prosecution to disprove beyond reasonable doubt the defence. In *Ex p Kebilene* I described this as a respectable argument ([1999] 4 All ER 801 at 835, [2000] 2 AC 326 at 370). Lord Slynn agreed ([1999] 4 All ER 801 at 827, [2000] 2 AC 326 at 362). Lord Cooke of Thorndon regarded the distinguished author’s view as a possible meaning under s 3. Specifically, Lord Cooke stated that ‘unless the contrary is proved’ can be taken to mean ‘unless sufficient evidence is given to the contrary’ ([1999] 4 All ER 801 at 837, [2000] 2 AC 326 at 373). I respectfully adopt Lord Cooke’s observation. Applying s 3 I would therefore read s 28(2) and (3) as creating an evidential burden only. In particular this involves reading the words ‘prove’ and ‘proves’ as meaning giving sufficient evidence. I am in agreement with the observations of Lord Hope of Craighead in para [94] of his speech.

(XI) *Disposal of the appeal*

[43] My Lords, this is a case of an accused found in possession of two kilograms of cocaine worth over £140,000. It must be comparatively rare for a drug dealer to entrust such a valuable parcel of drugs to an innocent. In any event, the appellant’s detailed story stretches judicial credibility beyond breaking-point. Even if the judge had directed the jury in accordance with law as I have held it to be, the appellant’s conviction would have been a foregone conclusion. I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD.

- a** [44] My Lords, on 9 April 1999 in the Crown Court at Warrington the appellant was convicted of possessing a controlled drug of class A with intent to supply contrary to s 5(3) of the Misuse of Drugs Act 1971. He was sentenced to seven years' imprisonment. He appealed against his conviction, but on 31 July 2000 the Court of Appeal (Criminal Division) (Lord Woolf CJ, Rougier and Bell JJ) dismissed his appeal: [2001] 1 All ER 1014, [2001] 2 WLR 211. The principal issue in the appeal, which was heard together with two other appeals which raised the same issue but from which on 20 December 2000 an Appeal Committee refused leave to appeal to this House, was the effect of the Human Rights Act 1998 on various statutory provisions which fell into a familiar category. These are provisions which, as Lord Woolf CJ put it ([2001] 1 All ER 1014 at 1018, [2001] 2 WLR 211 at 215), provide a benefit to a defendant who is being tried for a criminal offence but require him to prove certain facts which the statute specifies before he can obtain that benefit.

- [45] The 1998 Act received the Royal Assent on 9 November 1998 but the majority of its provisions were not in force at the date of the appellant's trial.
- d** Sections 18, 20, 21(5) and 22 came into force on the passing of that Act: s 22(2). The other provisions of the 1998 Act came into force on the days appointed by the Secretary of State by order under s 22(3). The majority of its provisions were brought into force on 2 October 2000: Human Rights Act 1998 (Commencement No 2) Order 2000, SI 2000/1851. Lord Woolf CJ said that, in giving its judgment, the Court of Appeal had assumed that the 1998 Act was in force at the time when it gave judgment. He also said that, although it had been accepted by all parties that because of s 22(4) together with ss 7 and 8 of the 1998 Act the court had to approach the safety of the conviction as if the 1998 Act had been in force when the judge summed up, the court had reservations as to whether Parliament could have intended such a result: [2001] 1 All ER 1014 at 1024, [2001] 2 WLR 211 at 222.
- e** [46] Now the appellant appeals to your Lordships' House. All the provisions of the 1998 Act are in force, so it is no longer necessary to make any assumptions. But among the issues of general public importance for which a certificate was given by the Court of Appeal under s 33(2) of the Criminal Appeal Act 1968 was the following:

- g** 'Is a defendant whose trial took place before the coming into force of ss 6 and 7(1)(b) of the Human Rights Act 1998 entitled, after they come into force, to rely, in the course of an appeal, on alleged breach of his convention rights by the trial court or an investigating or prosecuting authority?'

- h** This issue may be described for short as the issue of retrospectivity. It is the third issue in the statement of facts and issues.

- [47] But there are two other issues which are also of general public importance. The first is whether it is an essential element of the offence of possession of a controlled drug under s 5 of the 1971 Act that the accused knows that he has a controlled drug in his possession. The second is whether it is compatible with art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) for a trial judge to direct a jury, under reference to the defence which is available under s 28 of the 1971 Act, that there is a legal, or persuasive, burden on the accused to prove that he neither believed nor suspected that the substance in question was a controlled drug.

[48] The second issue can only affect the appellant's case if he succeeds on the third issue as to retrospectivity. But the appellant does not need to succeed on the third issue if he is to succeed on his first issue. If he is right on the first issue, which has nothing to do with his art 6(2) convention right, it must follow that there was a fundamental defect in the summing up by the trial judge.

The facts

[49] The Crown case against the appellant depended upon the evidence of police officers who said that on 25 November 1998 they were in the railway station at Runcorn. Prior to the arrival of the London to Liverpool train at 1.30pm they saw two men in the reception hall. One of them was carrying a duffle bag. When the train arrived the appellant got off the train, crossed the bridge and went into the booking hall. The two men who had been waiting outside came into the booking hall and approached him. One of them said 'Steve', and the appellant acknowledged that this was his name and shook hands. All three men then left the booking hall and went to two cars which were in the car park. The appellant and one man got into one car and the other man got into another. About two minutes later the appellant returned to the reception area with a duffle bag. He tried to make a call from his mobile phone. He then went into a phone kiosk, where the police went up to him, identified themselves as police and asked him what he had in the bag. The appellant said, 'I don't know, I've just been paid to pick it up.' The bag contained two kilogrammes of cocaine at 76% purity which was worth over £140,000.

[50] The appellant's defence was that he did not know what was in the duffle bag. He said in evidence that he had had a phone call the previous evening from a man named John who was in the business of printing tee shirts. He later met John and received from him an envelope which he assumed to contain money. He said that he had in the past driven up to Liverpool to drop off money for him. He got onto the train thinking that he was going to Liverpool. While he was on the train John phoned him and told him to get off at Runcorn. When he got off the train he walked over to a man named Jebb whom he knew and to whom he had also spoken when he was on the train. What normally happened when he met Jebb was that he gave the money to him and took back from him a few packages of tee shirts. On this occasion Jebb was with another man, who handed the appellant the duffle bag. The appellant said that when he asked, 'What's this?', Jebb said that it was a bit of scrap for John and then that it was scrap gold. When he was in the car he looked into the bag and Jebb said that it was scrap jewellery but told him to stop rooting about in the bag. When the appellant said that he was just having a look, Jebb threatened him, pointing to something under his left arm. The appellant thought that he was going to be shot. As he got out of the car Jebb said that he was to take the bag or he would shoot him and his girlfriend. He went to the telephone to warn his girlfriend and to ask John why he had to take the duffle bag. His case was that at no stage did he suspect that the bag contained controlled drugs and that in any event he was acting under duress.

[51] The trial judge (Judge Hale) told the jury in the course of his summing up that the real issue in the case was that raised by the defendant who said that, while he accepted all that the prosecution had to prove, he had a defence because he did not know what was in the bag. He gave the following direction:

'Now, members of the jury the law is this. A person who is in possession of a controlled drug shall be acquitted if he proves that he neither believed

- a nor suspected nor had reason to suspect that the substance in question was a controlled drug. He doesn't have to know the type of drug but he must prove that he neither believed nor suspected nor had reason to suspect that the substance or product was a controlled drug. Now whenever the criminal law requires a defendant to prove a defence of this type, then he does not have to prove it to the same high standard that the prosecution have to prove their burden. The prosecution have to make you sure of anything that they have to prove. A defendant has a lower standard of proof. Is it more probable than not, on the balance of probability. So you will have to consider whether the defendant probably didn't know or believe or had reason to suspect that the bag contained controlled drugs of some sort. If you think he probably didn't know, having considered all the evidence, you will find him not guilty and you need not go on to consider any of the other matters I am about to refer to.'
- b
- c

- He then told the jury that if the defendant had not proved that defence on the balance of probabilities they would have to consider the question of duress, but that it was for the prosecution to prove that he was not acting under duress so that they were sure that he was not.
- d

- [52] The jury's verdict shows that they must have held that the appellant had failed to show on a balance of probabilities that he did not know or believe or have reason to suspect that the duffle bag contained controlled drugs and that they were also sure that he was not acting under duress. I think that it is unclear what they would have made of the case if they had been told that proof of knowledge that the bag contained controlled drugs was an essential element of the offence of possession which the prosecution had to prove to the required standard so that they were sure of what was being alleged. On the other hand I take a different view as to what the position would have been if they had been told that that it was for the appellant to provide evidence to support his defence of lack of knowledge that the product or substance was a controlled drug but that this was an evidential burden only which did not require him to prove anything. In that event the direction as to where the burden of proof lay would have been indistinguishable from that which the trial judge gave as to the defence of duress. As the jury rejected that defence, the weight to be attached to which depended crucially upon what they made of the appellant's evidence, it is safe to assume that they would have reached the same decision with regard to this defence also. I have no doubt that Mr Owen QC for the appellant was right not to take the opportunity which was offered to him to contend otherwise.
- e
- f
- g

- h *'Possession' under the 1971 Act*

- [53] Before I turn to the first issue I must say something about the structure of the 1971 Act with particular reference to the question of possession. It is necessary for me to do this in order to set the scene for an examination of the first and second issues.

- j [54] Section 5 of the 1971 Act is one of a group of sections containing various restrictions relating to controlled drugs. These include restrictions on their importation and exportation and their production and supply. Section 5 restricts the possession of controlled drugs. The leading provision is that in sub-s (1) which provides that, subject to regulations for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession. The offences are created by sub-s (2), which provides that it is an offence for a person to have

a
a controlled drug in his possession, and sub-s (3), which provides that it is an offence for a person to have a controlled drug, whether lawfully or not, with intent to supply it to another in contravention of s 4(1) of the 1971 Act. Schedule 4 to the 1971 Act, which deals with the prosecution and punishment of offences, lays down more severe penalties for a s 5(3) offence when it is prosecuted on indictment than it does for a s 5(2) offence.

b
c
[55] There are also differences in regard to the penalties for a s 5(2) offence which is prosecuted summarily. These depend upon whether the drug involved is a class A, B or C drug. As my noble and learned friend Lord Steyn has pointed out, the maximum sentence for the s 5(3) offence is one of life imprisonment. But that is so only in the case of a class A drug. In the case of a class B drug, the maximum sentence is 14 years' imprisonment. In the case of a class C drug, it is five years' imprisonment. In practice the sentences which are imposed for this offence are determinate rather than indeterminate sentences. But it is right to say that the offence sometimes attracts very long periods of imprisonment. The periods of imprisonment vary according to the class of drug involved.

d
[56] The 1971 Act also provides a person who is found to be in possession of a controlled drug with a number of defences. Section 5(4) contains a defence which is available in the case of a charge of simple possession under s 5(2) of the 1971 Act. It is a defence which proceeds on the assumption that the person knew or suspected that the thing which was in his possession was a controlled drug. Section 28 deals with the defences of lack of knowledge.

e
f
g
[57] The 1971 Act does not contain a definition of 'possession', except that s 37(3) provides that for the purposes of the 1971 Act the things which a person has in his possession shall be taken to include any thing subject to his control which is in the custody of another. But it is well settled that the expression embraces both a factual and a mental element. The factual element is that of control, as s 37(3) indicates. Unless the thing is in the person's control, albeit while it is in the custody of another, it cannot be said to be in his possession. The mental element is that of knowledge. It is the extent of the knowledge which has to be established that is in dispute in this case. This is the point raised by the first issue. The directions which were given to the jury by the trial judge were to the effect that, while it was necessary for the prosecution to prove that the person knew that the thing was in his control, it was not necessary for the prosecution to prove that he knew that the thing was a controlled drug.

h
[58] I shall have to examine the provisions of the 1971 Act and the meaning of the word 'possession' further when I am dealing with the first and second issues. For the time being it is sufficient to notice that at the time of the trial the directions which were given to the jury by the trial judge were in accordance with the law as it was understood to be at that time. According to this understanding, the mental element is satisfied if it is proved that the person knew that he had the thing in or subject to his control or, if it was in a container such as a bag, that it contained the thing which upon examination was found to be a controlled drug.

j
[59] As the Lord Justice General (Rodger) said in *Salmon v HM Advocate* 1999 JC 67 at 78, after a careful review of the English and Scottish authorities including *R v McNamara* (1988) 87 Cr App R 246, the prosecution discharge their initial burden by proving that the accused knew that there was something in the bag and that it contained something which turned out to be the controlled drug and that the bag and its contents were under his control. It is not necessary for the prosecution to prove that he knew that the thing was in law a controlled drug for him to be found to be in possession of it. Then there are the statutory defences.

- a If the accused says that he did not know or suspect or have reason to suspect that the bag contained the substance which turned out to be a controlled drug (s 28(2)) or that he did not know or suspect or have reason to suspect that the substance or product was a controlled drug (s 28(3)(b)(i)), the judge's task is to direct the jury to consider whether they are satisfied, on the balance of probabilities, that the defence has been made out: *Salmon v HM Advocate* 1999 JC 67 at 79. That, as
- b I have said, is what the law was understood to be at the date of the trial.

The first issue: the ingredients of the offence

- [60] As I have just observed, the directions which the trial judge gave on this matter were in accordance with the law as it was understood to be at the time of the trial. Mr Owen QC for the appellant submitted that this understanding was
- c wrong. Relying to a great extent on the speech of Lord Reid in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256 and your Lordships' decision in *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428, he said that the mental element in the offence of possession of a controlled drug was not satisfied unless the prosecution proved that the defendant knew that the substance or
- d product in his possession was a controlled drug. He said that the offences described in s 5 of the 1971 Act required proof of possession not of a container or an article of whose character the defendant was unaware but of a controlled drug. Knowledge that it was a controlled drug must be taken to be an essential element in the mens rea of the offence.

- e [61] I would reject this argument. I consider the settled law to be correct on this point. As far as the 1971 Act is concerned, there are two elements to possession. There is the physical element, and there is the mental element. The physical element involves proof that the thing is in the custody of the defendant or subject to his control. The mental element involves proof of knowledge that the thing exists and that it is in his possession. Proof of knowledge that the thing
- f is an article of a particular kind, quality or description is not required. It is not necessary for the prosecution to prove that the defendant knew that the thing was a controlled drug which the law makes it an offence to possess. I observe that Mr Owen did not submit that it was necessary for the prosecution to prove that the defendant was aware that the thing was a class A, B or C drug, as the case may be, although the class into which the drug falls will usually be relevant to any
- g sentence he may receive.

- [62] The long title of the 1971 Act states that it is an Act to make new provision with respect to dangerous or otherwise harmful drugs. It was enacted against the background of two important decisions of this House relating to legislation which it repealed: the Drugs (Prevention of Misuse) Act 1964 and the Dangerous
- h Drugs Act 1965. In *Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256, in which the appellant had been convicted of an offence contrary to s 1 of the 1964 Act, it was held by the majority (Lord Reid dissenting) that the prosecution had only to prove that the accused knew of the existence of the thing and that it was in general not a defence for him to say that he believed the thing
- j to be something else such as scent and not drugs. Lord Pearce said:

'I think that the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word "possess".' (See [1968] 2 All ER 356 at 388, [1969] 2 AC 256 at 305.)

[63] In *Sweet v Parsley* [1969] 1 All ER 347, [1970] AC 132 the appellant was convicted of a contravention of the 1965 Act in that she was concerned in the management of premises which were used for the smoking of cannabis although this was a farmhouse which she visited infrequently and the prosecutor conceded that she was unaware that the premises were used for that purpose. The conviction was quashed on the ground that the offence of which she had been convicted was not an absolute offence. Lord Reid observed that there were at least two possible ways in which the public scandal of persons being convicted on a serious charge who were in no way blameworthy could be avoided without placing on the prosecutor the full burden of proving mens rea in cases where to do so would lead to many acquittals which were unjust:

'Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that, on balance of probabilities, he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method ... The other method would be in effect to substitute in appropriate classes of cases gross negligence for mens rea in the full sense as the mental element necessary to constitute the crime.' (See [1969] 1 All ER 347 at 351, [1970] AC 132 at 150.)

[64] The structure of the 1971 Act shows that what Parliament decided to do was to follow what Lord Pearce said was needed to satisfy the meaning of the word 'possession' and to adopt the first of the two methods suggested by Lord Reid for avoiding the conviction of those who are not blameworthy. This is indicated most clearly by the words used to describe the defences mentioned in s 5(4) of the 1971 Act. This subsection provides:

'In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove—(a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or (b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.'

[65] The defences afforded by this subsection depend upon proof that the accused who is proved to have had a controlled drug in his possession acted as he did 'knowing or suspecting it to be a controlled drug'. The burden of 'proving' that this is what he knew or suspected is placed on the accused. The inclusion of these words in each of paras (a) and (b) of sub-s (4) confirms that proof that the controlled drug was in the possession of the accused does not depend upon proof that the accused knew or suspected that the thing was a controlled drug. If it did, the words which I have quoted would have been omitted as they refer to something which, on this hypothesis, the prosecution would have to establish in every case in order to prove that the accused had the controlled drug in his

a possession. The words of the statute are wholly inconsistent with the appellant's argument.

[66] Further confirmation that this was the approach selected by Parliament can be found in the wording of s 28. Subsection (2) of this section provides:

b 'Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.'

c [67] The function of this provision, which has often been overlooked, was explained by the Lord Justice General (Rodger) in *Salmon v HM Advocate* 1999 JC 67. He said (at 73–74):

d '... it is perhaps worth emphasising that subsec (2) of sec 28 is concerned with the accused's state of knowledge as to some fact which the Crown must prove if it is to succeed in the prosecution rather than with the fact itself. So, for instance, in [*R v McNamara* (1988) 87 Cr App R 246] it was necessary for the Crown to prove that there was organic matter in the box on the back of the appellant's motorcycle and that it was cannabis resin. The function of subsec (2) is to give an accused person in the position of McNamara a defence—which subsec (3) does not afford him—if he proves that he neither

e knew nor suspected nor had reason to suspect that the organic matter was in the box ... Subsections (2) and (3) of sec 28 are both designed to come into play at a stage when the Crown have proved all that they need to prove in order to establish guilt either of a contravention of sec 4(3)(b) or of a contravention of sec 5(3). So the Crown will have proved that the accused

f was delivering a package containing cocaine, for example, and was thus concerned in the supplying of cocaine; or that he was in possession of a package containing ecstasy with intent to supply it. At that stage section 28(2) provides that the accused is nonetheless to be acquitted if he proves that he neither knew nor suspected nor had reason to suspect the existence of a fact which the Crown required to prove, for example, that there was

g powder—which proved to be cocaine—or that there were tablets—which proved to be ecstasy—in the package which he was delivering or in the package which he possessed.'

[68] The contrast which is drawn in these passages between the facts that the Crown must prove and the state of knowledge of the accused is to be found in the language of s 28(2) itself. It demonstrates that what Parliament chose to do was to define the offence in such a way as to require the Crown to prove the facts from which, in appropriate cases, the inference could be drawn that the accused was in possession of the thing which, upon examination and analysis, was shown to be a controlled drug. It left it to the accused to raise the question of lack of knowledge as a defence. In *B (a minor) v DPP* [2000] 1 All ER 833 at 836, [2000] 2 AC 428 at 460, Lord Nicholls of Birkenhead said that the starting-point for a court as to the necessary mental element in the case of statutory offences is the established common law presumption that mens rea is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. I would hold that the necessary contrary intention has been indicated in the present case.

j

[69] I do not think that it is surprising that Parliament made that choice in view of the difficulties which the prosecution would face if it had to prove in every case that the accused knew that the thing was a controlled drug. Taken to its logical conclusion, a requirement to prove mens rea as to the gravamen of the offence would extend to proof of knowledge that it was a controlled drug of the class alleged, as different penalties apply to each class. The legislation has clearly not gone that far, as s 28(3)(a) shows. As it is not a defence for the accused to prove that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged, it is plain that this is not something that the prosecution need establish. Proof of possession of the substance or product is sufficient. Strict liability follows, subject to the defences which are provided for by the statute.

[70] In most cases possession of a container such as a bag or a tin will enable the inference to be drawn that the accused was in possession of its contents, and in most cases where the substance or product is out in the open such as where it is found on the accused's mantelpiece or at his bedside there will be other facts and circumstances from which that inference can be drawn. The problem arises in regard to proof that he knew that the thing in the container, on the mantelpiece or at his bedside was a controlled drug. The fact that the tablet or powder was a controlled drug may be capable of being proved only after careful examination and analysis. Inferences can be drawn if it is found in the company of other material which is used in connection with the supplying or use of controlled drugs. But if it is found on its own and its appearance is all that there is to go by, it may be very difficult for the prosecution to prove that the accused knew that it was a controlled drug.

[71] I think that there are sound reasons of policy for construing the legislation in such a way as not to put the initial burden of proving knowledge of that fact on the Crown. On this issue therefore I would reject the appellant's argument. But this brings me to the question whether the burden which then rests on the accused to raise the question of his knowledge as a defence is a persuasive burden—in which case he must establish his defence on the balance of probabilities—or an evidential burden only which leaves the burden of proof throughout on the Crown.

[72] As I have said, the view hitherto has been that the burden on the accused is a persuasive burden. The wording of s 28(2) and (3), in which the words 'to prove' and 'if he proves' are used, supports this view. The ordinary meaning of these words is that there is a persuasive burden that must be discharged. But the appellant has raised the question whether this reading of the words used in these subsections is compatible with his art 6(2) convention right. This is the second issue.

THE SECOND ISSUE: THE BURDEN ON THE ACCUSED

(a) *Introduction*

[73] Article 6(2) of the convention provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. There is an important question as to whether a statutory provision which transfers the burden of proof to the accused can ever be compatible with that presumption. But for the purposes of this case it is necessary only to answer the particular questions which have been raised. They are (a) whether the provisions of s 28(2) and 28(3)(b)(i) of the 1971 Act, which according to the ordinary meaning

- a of the words used require the accused to prove the defences mentioned there on the balance of probabilities, are incompatible with the convention right; and (b), if so, whether they can be read and given effect to under s 3 of the 1998 Act in a way which is compatible with it.

[74] Mr Owen made it clear that the arguments which he presented on these questions were not directed to the defences which are mentioned in s 5(4) of the 1971 Act. This was because s 5(4) relates to things which the accused must establish if he wishes to avoid conviction but are not an essential element of the offence: see *R v Edwards* [1974] 2 All ER 1085 at 1095, [1975] QB 27 at 39–40. In that case the Court of Appeal said that, where an enactment prohibits the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications, it is for the defendant to prove that he was entitled to do the prohibited act. In *R v Hunt* [1987] 1 All ER 1 at 11, [1987] AC 352 at 375 Lord Griffiths said that he had little doubt that the occasions upon which a statute would be construed as imposing a burden of proof on a defendant which did not fall within that formulation would be exceedingly rare. It was to cases falling outside that formulation that Mr Owen directed his argument.

- d [75] The s 5(4) defence has not been raised in this case, but I would not wish to be taken as accepting that exceptions of that kind are always immune from challenge on convention grounds. As I see it, there are three distinct questions, and all three questions need to be asked and answered.

[76] The first question is whether, upon the construction of the enactment, the defence is an exception of the kind described in *R v Edwards*. The second is whether the language used by Parliament, according to its ordinary meaning, has modified the golden thread rule as described by Viscount Sankey LC in *Woolmington v DPP* [1935] AC 462 at 481, [1935] All ER Rep 1 at 8. This rule requires that, subject to the defence of insanity and to any statutory exception which transfers the burden of proof in the case of a particular offence laid down in an enactment, the prosecution must always prove its entire case beyond reasonable doubt. This question too is a question of construction. In a case of a provision such as that found in s 5(4), where the words used are 'it shall be a defence for him to prove', the answer to it is plain on the face of the enactment. A provision which takes this form is understood to be an express statutory exception to the golden thread rule.

- g [77] But there is a third question, which was the subject of some debate in the light of *Hunt's* case but has now been brought right out into the open by ss 3(1) and 6(1) of the 1998 Act. It used to be whether placing the burden on the accused by the particular statute can be justified by broader considerations of policy: see Peter Mirfield 'The Legacy of *Hunt*' [1988] Crim LR 19; DJ Birch 'Hunting the Snark: the Elusive Statutory Exception' [1988] Crim LR 221; Peter Mirfield 'An Ungrateful Reply' [1988] Crim LR 233. It can now be expressed in the language which is appropriate to an examination of the convention rights.

(b) *Making use of s 3(1)*

- j [78] Section 3(1) of the 1998 Act provides that, so far as it is possible to do so, primary and secondary legislation must be read and given effect in a way which is compatible with the convention rights. I should now like to explain how, as I see it, this important and far-reaching new approach to the construction of statutes should be employed consistently with the need (a) to respect the will of the legislature so far as this remains appropriate and (b) to preserve the integrity of our statute law so far this is possible.

[79] The first point, as I said in my speech in *R v A* [2001] UKHL 25 at [108], [2001] 3 All ER 1 at [108], [2001] 2 WLR 1546, is that the effect of s 3(1) is that the interpretation which it requires is to be achieved only so far as this is possible. The word 'must', which s 3(1) uses, is qualified by the phrase 'so far as it is possible to do so'. The obligation, powerful though it is, is not to be performed without regard to its limitations. Resort to it will not be possible if the legislation contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it compatible. The same consequence will follow if legislation contains provisions which have this effect by necessary implication. Further justification for giving this qualified meaning to s 3(1) is to be found in the words 'read and given effect'. As the side note indicates, the obligation is one which applies to the interpretation of legislation. This function belongs, as it has always done, to the judges. But it is not for them to legislate. Section 3(1) preserves the sovereignty of Parliament. It does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislator.

[80] The second point, as I said in *R v A* [2001] 3 All ER 1 at [110], [2001] 2 WLR 1546, is that great care must be taken, in cases where a different meaning has to be given to the legislation from the ordinary meaning of the words used by the legislator, to identify precisely the word or phrase which, if given its ordinary meaning, would otherwise be incompatible. Just as much care must then be taken to say how the word or phrase is to be construed if it is to be made compatible. The justification for this approach to the use of s 3(1) is to be found in the nature of legislation itself. Its primary characteristic, for present purposes, is its ability to achieve certainty by the use of clear and precise language. It provides a set of rules by which, according to the ordinary meaning of the words used, the conduct of affairs may be regulated. So far as possible judges should seek to achieve the same attention to detail in their use of language to express the effect of applying s 3(1) as the parliamentary draftsman would have done if he had been amending the statute. It ought to be possible for any words that need to be substituted to be fitted in to the statute as if they had been inserted there by amendment. If this cannot be done without doing such violence to the statute as to make it unintelligible or unworkable, the use of this technique will not be possible. It will then be necessary to leave it to Parliament to amend the statute and to resort instead to the making of a declaration of incompatibility.

[81] As to the techniques that may be used, it is clear that the courts are not bound by previous authority as to what the statute means. It has been suggested that a strained or non-literal construction may be adopted, that words may be read in by way of addition to those used by the legislator and that the words may be 'read down' to give them a narrower construction that their ordinary meaning would bear: Clayton and Tomlinson *The Law of Human Rights* (2000) Vol 1, p 168, para 4.28. It may be enough simply to say what the effect of the provision is without altering the ordinary meaning of the words used: see *Brown v Stott* 2000 JC 328 at 355 per Lord Justice General Rodger. In other cases, as in *Vasquez v R* [1994] 3 All ER 674, [1994] 1 WLR 1304, the words used will require to be expressed in different language in order to explain how they are to be read in a way that its compatible. The exercise in these cases is one of translation into compatible language from language that is incompatible. In other cases, as in *R v A*, it may be necessary for words to be read in to explain the meaning that must be given to the provision if it is to be compatible. But the interpretation of a statute

- a by reading words in to give effect to the presumed intention must always be distinguished carefully from amendment. Amendment is a legislative act. It is an exercise which must be reserved to Parliament.

(c) *Application of s 3(1) in this case*

- [82] The haphazard way in which reverse burden of proof provisions have been introduced into legislation by Parliament has been identified and persuasively criticised: Andrew Ashworth and Meredith Blake 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306. As they say (at 314) nothing could be clearer than *Eleventh Report of the Criminal Law Revision Committee: Evidence (General)* (Cmnd 4991 (1972)), para 140 where the committee stated 'we are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only'. It is generally accepted that *Woolmington* changed the law as to the burden of proof in the case of common law defences such as self-defence and non-insane automatism: Professor JC Smith 'The Presumption of Innocence' (1987) 38 NILQ 223 at 226; *Vasquez v R* [1994] 3 All ER 674 at 678–679, [1994] 1 WLR 1304 at 1309.
- d The same approach has been taken in Scotland to where the onus lies in the case of all common law pleas and defences other than the plea of diminished responsibility and the defence of insanity: *Lambie v HM Advocate* 1973 JC 53 (incrimination); and *Ross v HM Advocate* 1991 JC 210 (non-insane automatism).

- [83] The lack of clarity and the inconvenience of applying a different rule to defences created by statute is obvious in the present case. Section 28(4) of the 1971 Act provides that nothing in that section shall prejudice any defence which it is open to a person when charged with an offence to which that section applies to raise apart from that section. In this case the appellant did raise such a defence. It was his defence of duress. That defence was intimately bound up with his defence under the statute, as it depended entirely upon what the jury made of his evidence. But the trial judge had to direct the jury that the onus as regards the defence of duress rested on the prosecution. The jury were not told why there was a difference as to where the onus lay. There was no need for this information to be given to them. But it would not be surprising if they found it hard to maintain a clear distinction between the two positions as to onus when they examined the evidence.

- g [84] There is no doubt that it is possible, in the light of s 3(1) of the 1998 Act, to read s 28(2) and 28(3) of the 1971 Act in such a way as to impose no more than an evidential burden on the accused. As it is a rule of construction, the exercise which s 3(1) prescribes makes it necessary to identify the words used by the legislature which would otherwise be incompatible with the convention right and then to say how these words are to be construed according to the rule to make them compatible. But in this case there is no difficulty. As Lord Cooke of Thorndon said in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 837, [2000] 2 AC 326 at 373:

- j '... for evidence that it is a *possible* meaning one could hardly ask for more than the opinion of Professor Glanville Williams in "The Logic of 'Exceptions'" [1988] CLJ 261 at 265 that "unless the contrary is proved" can be taken, in relation to a defence, to mean "unless sufficient evidence is given to the contrary;" and that the statute may then be satisfied by "evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence".'

[85] In *Vasquez v R* [1994] 3 All ER 674, [1994] 1 WLR 1304 the Privy Council were asked to consider the question whether s 116(a) of the Belize Criminal Code which placed the burden on the defendant to prove extreme provocation as a defence to murder contravened the defendant's right under s 6(3)(a) of the Constitution of Belize to be presumed innocent until he was proved guilty. Applying the principles described in *A-G of the Gambia v Momodou Jobe* [1984] AC 689 at 700, [1984] 3 WLR 174 at 182 by Lord Diplock and in *A-G of Hong Kong v Lee Kwong-kut*, *A-G of Hong Kong v Lo Chak-man* [1993] 3 All ER 939 at 944, [1993] AC 951 at 962 by Lord Woolf, the board held that s 116(a) was in conflict with the constitution and that it had to be modified to conform to it. The words 'if either of the following matters of extenuation be proved on his behalf' were to be construed as though they read 'if there is such evidence as raises a reasonable doubt as to whether' (see [1994] 3 All ER 674 at 683, [1994] 1 WLR 1304 at 1314 per Lord Jauncey of Tullichettle). It was by this means that Belize was brought into line with the other Commonwealth countries of the Caribbean, where the onus of proof of unprovoked killing was placed on the prosecution. It provides a good example of the use of an interpretative obligation of the kind that has now been written into our domestic law by s 3(1) of the 1998 Act.

[86] More recently, in *Yearwood v R* [2001] UKPC 31 the board held that s 239 of the Grenada Criminal Code, which is in the same terms as s 116 of the Belize Criminal Code, had to be read and given effect to in a way that was compatible with the provisions for the protection of the fundamental rights and freedoms to which every person is entitled under the Constitution of Grenada, and in particular with s 8(2)(a) of the constitution which entitles a person who is accused of a criminal charge to the presumption of innocence. It held that the words 'are proved on his behalf' in s 239 must be read and given effect to as if for those words there were substituted the words 'are the subject of such evidence as to raise a reasonable doubt'.

[87] Of course, the fact that it is possible for a statutory provision to be read in this way does not mean that it must be so read. The first question is whether, leaving aside s 3(1), there would be a breach of the convention. For the reasons which I sought to explain in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 846–850, [2000] 2 AC 326 at 383–388, I do not think that a reverse onus provision will inevitably give rise to a finding of incompatibility. In *Salabiaku v France* (1988) 13 EHRR 379 at 388 (para 28) the European Court of Human Rights said:

'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law ... Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'

[88] Mr Owen said that the court was not concerned in *Salabiaku's* case with a provision applicable to a person charged with a serious criminal offence which placed the burden of proof on him with respect to an essential element of it. That is true, but I do not think that this deprives it of value as a statement of principle. What it means is that, as the art 6(2) right is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality:

- a *Ashingdane v UK* (1985) 7 EHRR 528; see also *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2001] 2 WLR 817. It is now well settled that the principle which is to be applied requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.
- b [89] The statutory objective is to penalise the unauthorised possession of dangerous or otherwise harmful drugs. But the statute recognises, among other things, that it would be wrong to penalise those who neither knew nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged (s 28(2)) or that the substance or product in question is a controlled drug (s 28(3)(b)(i)).
- c That being so, it is hard to see why a person who is accused of the offence of possessing a controlled drug and who wishes to raise this defence should be deprived of the full benefit of the presumption of innocence. The systems of control and prosecution might well be in jeopardy if there were to be an initial onus on the prosecution to establish that the accused
- d knew these things. The right to silence and the covert and unscrupulous nature of drug-related activities must be taken into account in the assessment as to whether a fair balance had been achieved. But we are not concerned here with the initial onus. As I have said in my answer to the first issue, the prosecution do not need to prove that the accused knew that the thing in his possession was a controlled drug. This is a matter which must be raised by the defence.
- e [90] The choice then is between a persuasive burden, which is what the ordinary meaning of the statutory language lays down, and an evidential burden, which is the meaning which it is possible to give to the statutory language under s 3(1) of the 1998 Act. If the evidential burden were to be so slight as to make no difference—if it were to be enough, for example, for the accused merely to
- f mention the defence without adducing any evidence—important practical considerations would suggest that in the general interest of the community the burden would have to be a persuasive one. But an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence. That is what Professor Glanville Williams envisaged when
- g he was giving this meaning to the words ‘unless the contrary is proved’: ‘The Logic of “Exceptions”’ [1988] CLJ 261 at 265. It is what the Judicial Committee envisaged in *Vasquez v R* [1994] 3 All ER 674 at 683, [1994] 1 WLR 1304 at 1314 and in *Yearwood v R* [2001] UKPC 31. It is what the common law requires of a defendant who wishes to invoke one of the common law defences such as
- h provocation or duress.
- [91] The practical effect of reading s 28(2) and (3) as imposing an evidential burden only on the accused and not a persuasive burden as they have been understood to impose hitherto is likely in almost every case that can be imagined to be minimal. In *Salmon v HM Advocate* 1999 JC 67 at 75, the Lord Justice General
- j (Rodger) said this as to the effect on the accused of the persuasive burden:

‘It is perhaps worth stating explicitly that, even though subsecs (2) and (3) speak of the accused proving something, this does not imply that, to establish a defence, the accused must necessarily give evidence. Doubtless, that would often be the simplest mode of proof, but the necessary evidence might come, for example, from a “mixed” statement or from witnesses speaking to

what the accused was told was in the container or to the accused's apparent astonishment when the contents of the container were revealed and found to be a controlled drug.'

Those words are equally in point as an explanation of what the evidential burden requires of the accused. The change in the nature of the burden is best understood by looking not at the accused and what he must do, but rather at the state of mind of the judge or jury when they are evaluating the evidence. That is why, in the interests of clarity and convenience as well as on grounds of principle, a fair balance will be struck by reading and giving effect to these subsections as imposing an evidential burden only on the accused.

[92] It is worth noting in this connection that Parliament itself has recently recognised the force of the argument that as a general rule statutory provisions which require the accused to prove something as a defence to the offence with which he has been charged should be read and given effect to as if they imposed only an evidential burden on him and not a probative one. The Terrorism Act 2000 contains several provisions which say that it shall be a defence for a person charged with an offence to prove something. For example, s 57(2) provides that it shall be a defence for him to prove that his possession of an article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism. But s 118(2), which applies to a number of provisions in the Act including s 57(2) which say that it is a defence for a person to prove something, provides:

'If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.'

[93] Section 53(3) of the Regulation of Investigatory Powers Act 2000 is to the same effect. It provides a defence to the offence of possession described in s 53(2). It places the onus of proving the contrary beyond a reasonable doubt on the prosecutor if sufficient evidence of that fact is adduced to raise an issue with respect to it. It is not unreasonable to think that, if Parliament were now to have an opportunity of reconsidering the words used in s 28(2) and (3) of the 1971 Act, it would be content to qualify them in precisely the same way.

[94] I would therefore read the words 'to prove' in s 28(2) as if the words used in the subsection were 'to give sufficient evidence', and I would give the same meaning to the words 'if he proves' in s 28(3). The effect which is to be given to this meaning is that the burden of proof remains on the prosecution throughout. If sufficient evidence is adduced to raise the issue, it will be for the prosecution to show beyond reasonable doubt that the defence is not made out by the evidence. The question whether these provisions must be read and given effect to in that way in this case depends on the issue of retrospectivity, to which I now turn.

THE THIRD ISSUE: RETROSPECTIVITY

(a) *Introduction*

[95] The appellant's argument on this issue was presented under two main heads, which were stated as alternatives. The first was based upon the provisions of s 6(1) of the 1998 Act, read together with those of ss 7(1)(b) and 22(4). The second was based upon the provisions of s 6(1) of the 1998 Act without reference

a to s 22(4). Section 6(1) provides the starting point for each of these two alternative heads of argument. It provides: 'It is unlawful for a public authority to act in a way which is incompatible with a convention right.'

[96] Each of these two alternatives raises questions about the structure of the 1998 Act. So I must now try to describe that structure, with particular reference to the issue about the extent to which its provisions were intended to be retrospective.

b [97] It is first necessary to have regard to the convention. Article 13 of the convention provides that everyone whose rights and freedoms as set forth in the convention are violated shall have an effective remedy before a national authority. This article is not one of the convention rights to which effect is given by the 1998 Act, but this was no accident. As I observed in *Brown v Stott* (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97 at 125, [2001] 2 WLR 817 at 847, the reason which was given for its omission from the articles set out in Sch 1 to the 1998 Act was that ss 7 to 9 of the 1998 Act were intended to lay down an appropriate remedial structure for giving effect to the convention rights as defined by s 1(1) of the 1998 Act. The state's obligation to provide an effective remedy before a national tribunal in the event of a violation of the convention rights is part of the background against which the provisions of sub-ss (2) to (4) of s 22 were enacted.

[98] The relevant subsections of s 22 are in these terms:

e '(2) Sections 18, 20, 21(5) and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

f (4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.'

[99] These provisions provide important guidance as to the application of the 1998 Act to events occurring or legislation passed prior to its coming into force.

g As a general rule the approach which was taken by Parliament was to apply the 1998 Act prospectively as from the date when the relevant provisions were brought into force and not retrospectively. The purpose of the government, as the White Paper which introduced the Bill explained, was to see 'rights brought home': *Rights Brought Home: The Human Rights Bill* (Cm 3782 (1997)), para 1.19. The provisions of ss 7 to 9 of the 1998 Act which deal with proceedings, judicial acts and judicial remedies were for the most part designed to apply to events occurring or legislation passed after the 1998 Act came into force. In general it was as from the date of the coming into force of the 1998 Act that the rights were intended to be brought home.

j [100] But this not the whole story, as can be seen from an examination of ss 3 and 22(4) of the 1998 Act. Section 3(2)(a) provides that the interpretative obligation which s 3(1) lays down applies to primary and secondary legislation 'whenever enacted'. Section 22(4) provides that s 7(1)(b) applies to proceedings brought by or at the instigation of a public authority 'whenever the act in question took place'. It is these provisions which open the door to the appellant's first alternative argument on retrospectivity.

(b) *The first argument*—s 22(4)

[101] This argument depends upon s 22(4), and it was presented in two ways. That subsection applies only to proceedings brought by or at the instigation of a public authority. The appellant's first approach was to apply the subsection to the prosecuting authority. The second was to apply it to the court as a public authority.

[102] Had the appellant's complaint been that the prosecutor had acted in a way which was inconsistent with his art 6(2) convention right the statutory route would have been easy to follow. The certified question refers to 'an investigating or prosecuting authority', and there is a reference to the 'prosecuting authority' in the relevant paragraph of the statement of facts and issues. The Crown Prosecution Service, which was the prosecuting authority in this case, is a public authority within the meaning of ss 7 and 22(4) of the 1998 Act. Prosecutions brought by the CPS are proceedings brought by a public authority within the meaning of s 22(4). So s 7(1)(b) applies to proceedings brought by the CPS whenever the act in question—that is, the act on its part which is made unlawful by s 6(1)—took place.

[103] As for s 7(1)(b), it enables a person who claims that a public authority has acted in a way which is made unlawful by s 6(1) of the 1998 Act to rely on the convention right or rights concerned in any legal proceedings. The expression 'legal proceedings' in this paragraph is defined in s 7(6), which provides:

'In subsection (1)(b) "legal proceedings" includes—(a) proceedings brought by or at the instigation of a public authority; and (b) an appeal against the decision of a court or tribunal.'

[104] The effect of s 22(4) is to limit the extent to which s 7(1)(b) can be applied retrospectively. It can be used retrospectively in proceedings brought by or at the instigation of public authorities—that is to say, to enable a person to rely on the convention right or rights defensively. This may be done at the stage of any appeal against the decision of any court. So the retrospective use of s 7(1)(b) is permitted by s 22(4) at each stage of an appeal, including an appeal to your Lordships' House. The appeal is treated by the 1998 Act as if it were part of the same legal proceedings as those brought by or at the instance of the public authority, irrespective of the person at whose instance the appeal is brought. But it is plain that s 7(1)(b) may not be used with retrospective effect in proceedings brought against a public authority. That is the effect of the concluding words of s 22(4).

[105] This was the route for the giving of retrospective effect to a convention right which I had in mind when I said in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 839, [2000] 2 AC 326 at 375:

'If the Human Rights Act 1998 were in force, the appropriate remedy would be to raise at the trial or on appeal under s 7 of that Act the question whether, in terms of s 6(1) of the Human Rights Act 1998, he was acting or had acted in a way which was incompatible with a convention right. That in turn would require s 16A of the 1989 Act [the Prevention of Terrorism (Temporary Provisions) Act 1989] as amended to be construed, in terms of s 3(1) of the Human Rights Act 1998, so far as it was possible to do so in a way which was compatible with convention rights. But, as the legislation is not yet in force, we have not reached that stage.'

a [106] Mr Starmer sought to rely on this passage in support of his argument. But in that case the court was being asked to review an exercise of the discretion of the Director of Public Prosecutions in giving his consent to the prosecution of the applicants under s 16A of the 1989 Act as amended. There was no doubt that the court was dealing there with proceedings brought by or at the instigation of a public authority. Nor was it in question that it was his act in consenting to the proceedings that had led to the alleged incompatibility with the applicants' convention right. The situation was the same in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713, [2001] 3 All ER 393. In that case it was conceded that the questions whether the Parochial Church Council was a public authority within the meaning of s 6 of the 1998 Act and, if so, whether its action in serving notice upon the defendants was unlawful by reason of art 1 of the First Protocol, read either alone or with art 14 of the convention, were open to the defendants to raise although the impugned notice was served on 12 September 1994—long before the 1998 Act was brought into force. That too was a case where a potential victim was seeking to rely on an alleged breach of a convention right in legal proceedings brought by a public authority within the meaning of s 22(4). It was a case where a public authority, which was what the Parochial Church Council was held to be, was seeking to rely on acts of its own which were lawful under the domestic law at the time when they were done but were incompatible with the convention right.

b

c

d

[107] In so far as the question raised by this issue relates to a breach of convention rights by the prosecuting authority, I would answer it in the affirmative. I consider that an accused whose trial took place before the coming into force of the 1998 Act is entitled to rely in an appeal after the coming into force of that Act on an alleged breach of his convention rights by the prosecuting authority. But that is not the situation in the present case. The proceedings were brought by a public authority, but it is not the bringing of those proceedings nor any other act on its part that is said to have led to the alleged incompatibility. The appellant's case is that it was the directions that the trial judge gave in his summing up which were incompatible with his art 6(2) convention right. That was an act of the court. It was not an act of the prosecuting authority.

e

f

[108] The appellant's alternative argument based upon ss 22(4) and 7(1)(b) seeks to apply those provisions to enable effect to be given to the obligations in ss 3(1) and 6(1) retrospectively to the acts of the trial judge when he was delivering his summing up in the trial court, or alternatively to the acts of the appeal court when it was considering the safety of the appellant's conviction in the light of that summing up. Section 6(3)(a) provides that in that section 'public authority' includes a court or tribunal. There is no doubt therefore that, if s 6(1) of the 1998 Act had been in force at the time of the trial, the obligation which is set out in that subsection would have been binding on the trial judge. He would also have been obliged by s 3(1) to read and give effect to s 28 of the 1971 Act in a way which was compatible with convention rights.

g

h

[109] I am unable to construe s 22(4) read with s 7(1)(b) in this way. I do not have any difficulty in reading the expression 'public authority' in these provisions as including a court or tribunal. The meaning which is given to that expression for the purposes of s 6 by s 6(3) must be read into ss 7(1), 7(6) and 22(4), as all these provisions are interlinked. But a court or tribunal is not a public authority by or at the instigation of which proceedings are brought. Section 7(1) contemplates proceedings to which a public authority is a party. A court or tribunal is not a party to the proceedings which are brought before it in its judicial capacity. In my

j

opinion the words of the statute are incapable of supporting this part of the appellant's argument. a

[110] Mr Starmer said that the interpretative obligation in s 3(1) applies to the provisions of the 1998 Act in exactly the same way as it applies to any other statute. I agree. Section 3(2)(a) provides that the section applies to primary legislation whenever enacted. So it applies to the 1998 Act, even although that Act was enacted before s 3 itself was brought into force on 2 October 2000. b Where s 3(1) applies it may have the effect of altering the effect of prior legislation retrospectively. But the obligation which s 3(1) lays down is to read and give effect to legislation compatibly with convention rights 'so far as it is possible to do so'. This will not be possible if the legislation expressly contradicts the meaning which it would have to be given if it is to be made compatible.

[111] Section 22(4) provides expressly that s 7(1)(b) does not apply to an act taking place before the coming into force of that section 'otherwise' than in the case of proceedings 'brought by or at the instigation of' a public authority. I would hold that this provision expressly contradicts Mr Starmer's argument. In any event I am unable to identify any respect in which it is incompatible with any of the convention rights mentioned in s 1(1) of the 1998 Act. A deliberate choice was made by Parliament as to the extent to which s 7(1)(b) could be given effect to retrospectively in order to provide a person whose convention rights have been violated with an effective remedy. But art 13 of the convention, to which s 7 gives effect, is not one of the convention rights mentioned in s 1(1). I do not think that it is open to the court to make a different choice from that which was made by Parliament. To do so would not be to construe the enactment in the way which s 3(1) contemplates. It would be to do something which it does not permit, which is to legislate. c

(c) The second argument—s 6(1)

[112] The appellant's second alternative argument on retrospectivity is based entirely upon the provisions of s 6(1). His proposition is simply this. Section 6(1) provides that it is unlawful for a public authority to act in a way that is incompatible with a convention right. A court, including an appellate court, is a public authority: see s 6(3)(a). The House of Lords is a public authority when it is acting in its judicial capacity: see s 6(4). It is unlawful for the House of Lords in that capacity to act in a way that is incompatible with the appellant's art 6(2) convention right. Section 6 is now in force. This means that the House must give effect to that convention right in the hearing of any appeal. Giving effect to it involves examining the question whether the summing up by the trial judge was incompatible with the convention right, irrespective of the question whether s 3(1) of the 1998 Act was in force at the time of the summing up. If it is found that the summing up was incompatible the House must take account of that fact in its consideration of the question whether the appellant's conviction was unsafe. In my opinion this argument is inconsistent with the scheme of the 1998 Act. d

[113] What s 6(1) declares to be unlawful is an 'act' of a public authority. The 1998 Act tells us that an act for this purpose includes a failure to act: s 6(6). In contrast to s 3(1), which is expressed in terms of an obligation, s 6(1) is expressed in terms of a prohibition. It imposes a duty on a public authority not to act in a way which is incompatible with a convention right. The word 'act' suggests that the prohibition is concerned with conduct. Conduct by a public authority is usually preceded by some process of reasoning or decision-taking, but it is the act rather than the decision which precedes it which is the subject of the prohibition. e

- a When the word is applied to things done by a court, it is not difficult to apply the prohibition to the conduct of the proceedings. They must not be conducted in a way which is incompatible with the art 6 convention right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. But what of the court's decision-taking function and the process of reasoning that leads up to it? Peter Mirfield 'Regulation of Investigatory Powers Act 2000 (2): Evidential Aspects' [2001] Crim LR 91 at 92–93 has suggested that it is open to question whether these aspects of what a court does are included within the word 'act'.

- [114] I would be inclined to give the word 'act' a broad and purposive meaning in this context, for the reasons indicated by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 at 25–26, [1980] AC 319 at 328–329. It seems to me that it is not only the manner of the decision-taking exercise that is brought under scrutiny. I would hold that the prohibition applies also to the interpretative obligation in s 3(1). The court is prohibited from carrying out the 'act' of statutory construction otherwise than in accordance with that obligation. A decision which is based on the application and development of the common law also is an act by the court, so I think that it must follow that this too is subject to the prohibition in s 6(1). Thus it is unlawful for a court to conduct a hearing in a way which is incompatible with a person's art 6 convention rights. But the prohibition in s 6(1) also affects matters of substance. So it will be unlawful within the meaning of s 6(1) for a court to determine a criminal charge on an interpretation of a statute which ignores the interpretative obligation in s 3(1), or on a proposition of law which is incompatible with a convention right. It will be unlawful in the convention sense for an appellate court to do likewise. The remedy for decisions of that kind lies in the domestic law which provides for, or sets limits to, an appeal against or the review of decisions of the lower courts: see s 9(1). The defendant's convention rights are protected so long as the basis upon which the appeal process itself is conducted is not incompatible with the convention rights. Thus far I am at one with the appellant's argument.

- [115] The appellant maintains that it would be incompatible with his art 6(2) convention right for an appellate court not to read and give effect to s 28 of the 1971 Act in a way that was compatible with it. As soon as s 3(1) was brought into force the interpretative obligation was binding on all courts irrespective of the date when the legislation was enacted. I agree that it would have been binding on the trial court had the section been in force at the date of the trial. But there is nothing in the 1998 Act to indicate that that subsection is to be applied retrospectively to acts of courts or tribunals which took place before the coming into force of s 3(1). The provisions of s 22(4) are to the contrary. There would have been no point in enacting that s 7(1)(b) was to have retrospective effect in the way which that subsection provides *but not otherwise* if appellate courts were to be obliged by s 6(1) to give retrospective effect to that subsection in all cases where they were required to adjudicate upon acts by courts or tribunals as public authorities.

- j [116] In my opinion the position was correctly stated by Sir Andrew Morritt V-C in *Wilson v First County Trust Ltd* [2001] EWCA Civ 633 at [20], [2001] 3 All ER 229 at [20], [2001] 3 WLR 42, when he said:

'The effect of s 22(4) is not in doubt. It provides (by the second limb of the section) that, in general, s 7(1) does not apply to an act taking place before 2 October 2000. So, for example, a person who claims that a public authority

has acted in a way which is incompatible with a convention right (contrary to s 6(1) of the 1998 Act) cannot bring proceedings against the authority under the 1998 Act (pursuant to s 7(1)(a)) if the unlawful act took place before 2 October 2000. Nor, it seems, can a person who claims that a court or tribunal has acted in a way which is incompatible with a convention right (contrary to s 6(1) of the 1998 Act) rely on that as a ground of appeal against the decision of that court or tribunal in a case where the decision complained of was made before 2 October 2000—see s 7(1)(b) and s 7(6)(b) of the 1998 Act.’

I agree with Sir Andrew Morritt V-C that the answer to this argument is to be found in s 22(4). Parliament made its choice as to the extent to which the 1998 Act should have effect retrospectively. It did so by express enactment, and in my opinion no other reading of s 22(4) than that which I have indicated is possible. I would not base my decision on this point on any views one might have as to whether or not the right choice was made. Our function is to construe the statute. For the reasons which I have given I would hold that the appellant’s argument fails on this point. I would therefore answer the question whether an accused whose trial took place before the coming into force of the 1998 Act is entitled to rely in an appeal after the coming into force of that Act on an alleged breach of his convention rights by the trial court in the negative.

CONCLUSION

[117] I would hold that the trial judge was right to tell the jury that it was not necessary for the prosecution to prove that the appellant knew that the thing that was in the bag was a controlled drug. I would also hold that a direction that it is for the accused to prove his defence of lack of knowledge under s 28 of the 1971 Act on the balance of probability is not compatible with the art 6(2) convention right. But this finding does not provide the appellant with a remedy under s 6(1) of the 1998 Act, as the relevant provisions of that Act were not in force at the time of his trial. Had it been necessary to do so, I would have held that his conviction was not unsafe on the ground that the jury would have reached the same result if a direction had been given to them which was compatible with the convention right. I would dismiss the appeal.

LORD CLYDE.

[118] My Lords, the appellant was convicted of an offence under s 5(3) of the Misuse of Drugs Act 1971. That section provides:

‘Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.’

Section 28 of the 1971 Act provides in sub-s (2) that subject to sub-s (3)—

‘it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged ...’

- a Subsection (3) deals with the situation where in order for a conviction to be obtained the prosecution has to prove that—

‘some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug.’

- b The subsection then proceeds to detail one case in which the accused is not to be acquitted, namely where he proves that he did not know, suspect nor have reason to suspect that the substance or product was the particular controlled drug, and two cases where he shall be acquitted. The first of these is ‘if he proves that he neither believed nor suspected nor had reason to suspect that the substance or
- c product in question was a controlled drug’. The second deals with the case, far removed from the present, where a person may lawfully possess certain controlled drugs.

- d [119] The appeal raises firstly a question about the essential elements of the offence of possession of a controlled drug, and secondly certain questions relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) and the Human Rights Act 1998. I turn first to the construction of ss 5 and 28 of the 1971 Act.

Possession

- e [120] The focus of the argument in relation to the statutory offence contained in s 5(3) has been on the element of possession. In that respect the argument may also extend to the offence set out in s 5(2), simple possession of a controlled drug. But what is exactly comprehended in the concept of possession may vary in accordance with the context in which the word is used. It may be accompanied
- f by other expressions which may colour the substance of what is intended, as for example the expression ‘possession, custody or power’ (*B v B (matrimonial proceedings: discovery)* [1979] 1 All ER 801, [1978] Fam 181). There may be some qualification, adjectival or adverbial, attached to the language, such as for example ‘actual’ possession, or ‘knowingly’ possess, which may attract a particular meaning. But even if the word stands alone it does not necessarily follow that the meaning
- g is in every context identical or that precisely the same elements have to be proved in order to establish possession of the thing with which the offence is concerned. The context may well colour the meaning. In the present case it is the analysis of the concept of possession under s 5 of the 1971 Act which is essentially in issue. While it may well be safe to state in a general way that possession in the context
- h of the criminal law comprises the elements of control and knowledge, the critical question of the substance of the knowledge which is one of the ingredients of the offence may not be open to the same answer in the context of different statutory provisions.

- j [121] This observation relates particularly to the existence of any mental element in the offence. Some care may have to be taken in the present context with the use of the expression ‘mens rea’. While the label is convenient as referring to the mental element or elements which may be comprised in any particular offence it may be difficult to find any single common definition of it applicable to all cases. It may indeed, as Sir J F Stephen *History of the Criminal Law* (1883) vol 2, p 95, quoted in Gordon *Criminal Law* (3rd edn, 2000) p 249 (para 7.08) observed, mean—

'no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes.'

The precise substance of the mental element in the offences involving possession under the 1971 Act may not necessarily be the same as the mental element in other statutory offences involving possession. So I would restrict the scope of the present decision to the statute with which we are concerned.

[122] The first of the certified questions asks whether it is an essential element of the offence of possession of a controlled drug that the accused knows that he has a controlled drug in his possession. This question requires consideration of the ingredients of possession for the purposes of s 5(2) and (3). In my view the word has the same meaning which it has always had in the context of the legislation relating to controlled drugs, that is to say that the accused has control of the thing and knows that he has it in his control. That these two elements are necessary can be found in the decision in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256 which concerned the Drugs (Prevention of Misuse) Act 1964 and there is nothing to show that Parliament intended any other meaning to be given to the word in the later legislation (*R v Ashton-Rickardt* [1978] 1 All ER 173 at 177, [1978] 1 WLR 37 at 42). The meaning of possession for the purposes of the 1971 Act is now well established. The first of the two elements, control, involves a physical control. The concept is enlarged by s 37(3) of the 1971 Act which states that 'things which a person has in his possession shall be taken to include any thing subject to his control which is in the custody of another'. The second element involves that the defendant knows that the thing in question is under his control. He need not know what its nature is, but so long as he knows that the thing, whatever it is, is under his control, it is in his possession (*R v Ashton-Rickardt*). The prosecution requires to prove that the defendant had control of the thing, that he knew he had control of it, and that the thing was the controlled drug which the prosecution allege it to have been. In addition, of course, for s 5(3) the prosecution must prove that the defendant had the intent to supply the thing.

[123] The particular question is whether it is necessary for possession of a controlled drug that the accused knows that the thing is of the nature which it is alleged to be. The answer to that question is in my view evident from other provisions of the 1971 Act, in particular ss 5(4) and 28(3)(b)(i). Section 5(4) applies to proceedings for an offence under s 5(2) where 'it is proved that the accused had a controlled drug in his possession'. The offence under s 5(2) is one of having a controlled drug in his possession unlawfully, that is to say, contrary to any regulations under s 7 authorising the possession of controlled drugs (see s 5(1)). The defence which is made available by s 5(4) expressly includes the ingredient that the accused knew or suspected that what he possessed was a controlled drug. It deals with cases where it is proved that the accused had a controlled drug in his possession but that 'knowing or suspecting it to be a controlled drug' he possessed it for certain specified purposes. That that fact may come in after it has been proved that he had a controlled drug in his possession demonstrates that such knowledge or suspicion is not an ingredient of possession. The words which I have quoted would be unnecessary if the knowledge or suspicion was already an ingredient of the possession which has been proved. Section 28(3)(b)(i) deals with cases where the accused neither believed nor suspected nor had reason to suspect that the substance or product in issue was a controlled drug. In such a case he is

- a to be acquitted. But that provision would be unnecessary if proof of possession of a controlled drug necessarily entailed proof of knowledge that the thing in question was a controlled drug.

[124] The matter is one of the construction of the particular legislation. A contrast may be made with *DPP v Brooks* [1974] 2 All ER 840, [1974] AC 862. That case concerned a statutory provision in Jamaica which provided that 'every person who ... has in his possession any ... ganja ... shall be guilty of an offence'. The Privy Council held that the prosecution had to prove that the defendant knew that the thing which he had in his van was ganja. That view was reached in light of long-standing authority on the meaning of the provision and the particular wording of the Jamaican statute. There the statute was silent on the matter of the precise knowledge of the accused.

- c [125] I note that the word 'knowingly' is not found in s 5(3). It is a word expressly used in s 8 and I believe that its absence in s 5(3) does have some significance. In *Sweet v Parsley* [1969] 1 All ER 347 at 350, [1970] AC 132 at 149, Lord Reid observed that it is—

- d 'firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly", is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence.'

But in the context of offences of possession the matter is somewhat more delicate in so far as the substance of the knowledge involved may be of different kinds of things. Knowingly to possess something seems to my mind to require that there is knowledge of what the thing is, at least in its general nature, which one has in possession. The offence of knowingly possessing explosives implies knowledge that the things in possession are explosives (*R v Hallam* [1957] 1 All ER 665, [1957] 1 QB 569). The distinction between that case and possession of drugs where the word 'knowingly' does not occur was noted in *Lockyer v Gibb* [1966] 2 All ER 653, [1967] 2 QB 243, where it was held that it did not have to be proved that the accused knew that what she had in her hold-all was a drug. The absence of the word 'knowingly' in s 5(3) of the 1971 Act fits with the understanding that the word 'possession' does not involve knowledge of the nature of the thing possessed.

- g [126] In some cases the drug may be found on the accused's person or in his house in a state or situation from which it is immediately obvious that it is a controlled drug. In such cases it may well be that no question about the accused's knowledge of the nature of the substance may arise. A more difficult problem arises where the drug in question is within some container, such as a box or a bag. But the law here is clear to the effect that if the defendant is in possession of the container and knows that there is something in it, he will be taken to be in possession of the contents of the container. That was clearly affirmed in *R v McNamara* (1988) 87 Cr App R 246. Where the drug is in a container, it is sufficient for the prosecution to prove that the defendant had control of the container, that he knew of its existence and that there was something in it, and that the something was in fact the controlled drug which the prosecution alleges it to be.
- j The prosecution does not require to prove that the accused knew that the thing was a controlled drug.

[127] The appellant placed some reliance upon *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428. In that case this House affirmed that mens rea was an essential element of every criminal offence unless Parliament expressly or by necessary implication provided to the contrary. The case was one of an alleged

breach of s 1(1) of the Indecency with Children Act 1960. In *B (a minor) v DPP* what was required to be proved by the prosecution was the absence of a genuine belief on the part of the defendant that the victim was 14 years old or more. The section was silent on the matter of knowledge or belief, and the House held that the offence must be taken to include the mental element of genuine belief. The importance of the decision to my mind is that it has affirmed a rule of general application to all statutory offences, not simply to statutory sexual offences. One must then approach statutory offences with the understanding that there is necessarily a mental element in the offences there contained, unless there is a clear indication to the contrary.

[128] But I do not consider that *B (a minor) v DPP* is of particular assistance in the present case. The mental element of the offence under s 5(3) is partly built into the concept of possession and the element of the intent to supply, and partly set out in s 28 of the 1971 Act. The mental element respecting knowledge or suspicion of the nature of the thing has been expressly catered for in s 28. It only arises for consideration on the assumption that the facts which the prosecution requires to prove in order to obtain a conviction have been proved. If the accused did not know or suspect or have reason to suspect any of those facts, then s 28(2) provides him or her with a defence. I entirely agree with the recognition by the High Court of Justiciary in *Salmon v HM Advocate* 1999 JC 67 of the priority to be given to sub-s (2) of s 28 over sub-s (3). Subsection (3) expressly only comes into play if it is proved that the substance or product in question was the controlled drug which it was necessary for the prosecution to have proved it to have been. Section 28 provides an escape for the defence by adding a qualification to the strict operation of the definition of possession. It affords a defence to an accused person where no defence had previously existed under the earlier legislation (*R v Ashton-Rickardt* [1978] 1 All ER 173 at 178, [1978] 1 WLR 37 at 43). If knowledge or ignorance of the accused is brought into issue, s 28 opens up that further mental element in the possession in the particular case. But when notice is taken of all these elements in the statute there is no room to infer any additional element of guilty intention in s 5(3).

The burden of proof

[129] The second of the certified questions asks whether s 28(3) of the 1971 Act is compatible with art 6(2) of the convention. This question raises in the first place a consideration of the nature of the burden of proof imposed on the accused by s 28 of the 1971 Act. It should be noticed at the outset that in some cases this problem may not arise at all since no question of the accused's knowledge or ignorance that the thing was a controlled drug may be put in issue. To prove the possession of a controlled drug it is sufficient for the prosecutor to prove that the defendant had control of a thing, that he knew of the existence of the thing, and that the thing was in fact a controlled drug. The evidence may stop at that point and the offence, so far as possession is concerned, may be thereby established. In such a case there is no question of any burden on the accused under s 28. But in some cases more elaboration may be required. That is the qualification upon the scope of s 5(3) which is imported by the words 'subject to section 28'. In cases where s 28 arises the offence is not established simply by proof of possession. These more elaborate cases may arise particularly where the drug is within a container and, while it is clear that the container contains something, it is not evident from looking at the container what its contents may be.

- a [130] Section 28(2) uses the words 'it shall be a defence for the accused to prove'. It is tempting to hold that this implies merely what is referred to as an 'evidential' burden, that is to say, the adducing of evidence sufficient to put the matter in issue. That course is recognised in the case of a variety of common law defences. Here we are dealing with a statutory offence. But even there it may sometimes be possible to preserve the whole burden upon the prosecution,
- b although whether that can be done or not depends on a construction of the particular language used in the statute. In *R v John* [1974] 2 All ER 561, [1974] 1 WLR 624 for example in relation to a statutory offence of a failure to provide a specimen 'without reasonable excuse', it was recognised that while it was for the defendant to state the excuse it was for the prosecution to negative it.
- c [131] In the ordinary case, where the presumption of innocence has been recognised at common law long before its embodiment in the convention, I should be slow to construe a criminal provision so as to impose a persuasive burden upon him. While the Act uses the word 'prove' it is perfectly possible to construe that as implying an evidential burden rather than a persuasive one.
- d Section 5(2), the offence of simple possession, is qualified by s 5(4). The essential ingredients for a conviction under s 5(2), as I have already mentioned, are that the accused should have had control of the drug, knew that he had control of it, and that it was in fact a controlled drug, even although he did not know that the thing he possessed was a controlled drug. Section 5(4) applies where 'it is proved that the accused had a controlled drug in his possession'. It applies then where
- e there was control and knowledge of the existence of the thing, even although the accused did not know that the thing was a controlled drug which in fact it was. Section 5(4) continues that 'it shall be a defence for him to prove (a) that, knowing or suspecting it to be a controlled drug' he took possession of it to prevent another from committing an offence. I did not understand it to be
- f contended that that provision imposed a persuasive burden on the accused. But if that provision does not do so it is not immediately easy to see why s 28 should do so, when it also only comes into operation when the ingredients of the offence have all been proved. In neither case is one dealing with the essential ingredients of the statutory offence.
- g [132] But this approach appears to run counter to what has become generally recognised as the proper construction in England. That approach is fortified by the language of s 28(2) that 'it shall be a defence for the accused to prove'. The ordinary meaning of those words imply a persuasive burden of proof even although the accused has only to establish his defence to the standard of a balance of probabilities. There is some force in the argument that the word 'prove' is not
- h apt to describe an evidential burden in which the accused is not required to prove anything but simply raise an issue. The legislation may well have been inspired by the observations of Lord Reid in *Warner's* case and in *Sweet v Parsley*. In the former case he observed:
- j 'In a case like this Parliament, if consulted, might think it right to transfer the onus of proof so that an accused would have to prove that he neither knew nor had any reason to suspect that he had a prohibited drug in his possession ...' (See [1968] 2 All ER 356 at 367, [1969] 2 AC 256 at 280.)

The reference in *Sweet v Parsley* is [1969] 1 All ER 347 at 351, [1970] AC 132 at 150. It is likely that his Lordship had in mind a persuasive burden of proof. In *R v*

Boyesen [1982] 2 All ER 161 at 163, [1982] AC 768 at 773 which concerned a conviction under s 5(1) and (2), Lord Scarman stated:

'The statutory offence may be described as an absolute one in the sense that the prosecution establish it by proving possession without authority: see s 5(1) and (2) of the Act. Section 28 provides for certain defences which, if they are to succeed, the defendant must prove on a balance of probabilities.'

In *R v Champ* (1981) 73 Cr App R 367 it was a matter of express decision that once the prosecution had proved the elements of an offence under s 6 of the 1971 Act, namely that the defendant was cultivating a plant of the genus *cannabis*, it was for her to prove that she did not know that the plant was *cannabis*. It was held that the judge had correctly directed the jury that it was not necessary for the prosecution to prove that she knew the nature of the drug she was cultivating. The defendant failed to establish that defence under s 28.

[133] I proceed accordingly on the basis that s 28(2) imposes a persuasive burden of proof on the accused. But it is to be noted that the practical effect of the burden on the defendant may not be very significant. I agree with the observations of the Lord Justice General (Rodger) in *Salmon v HM Advocate* 1999 JC 67, that s 28 does not require that the accused gives evidence. There may, for example, only be evidence of surprise on the part of the defendant on the discovery of the presence of the controlled drug. Or there may only be the exculpatory part of a mixed statement which he gave to the police at some stage. On the other hand, if the burden is a persuasive one the defendant may be ill advised in practice to rest his defence at trial on such a single slender piece of evidence alone. To be persuaded even on a balance of probabilities a jury might well require fortification of such an isolated indication of the defence.

The Human Rights Act 1998

[134] It is only at this stage in the argument in the present case that considerations of the convention, and in particular of art 6(2) of the convention, arise. The appellant contends that the offence contained in s 5(3) involves the imposition on the accused of a burden of proof such as would be contrary to the provisions of art 6 of the convention, and in particular art 6(2) which states that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. The route adopted by the appellant involves a direct invocation of the 1998 Act. But a problem immediately arises. The 1998 Act only came into full effect on 2 October 2000. The appellant's trial and conviction took place before that date. Indeed the determination of his appeal occurred before that date. So he has to show that nevertheless he can invoke the provisions of the 1998 Act.

[135] In approaching the problem of the retrospectivity of the 1998 Act it is to be remembered at the outset that the 1998 Act did not incorporate the rights set out in the convention into the domestic laws of the United Kingdom. The purpose of the 1998 Act, as set out in its preamble, was 'to give further effect to rights and freedoms' guaranteed under that convention. The convention rights have not become part of the constitution so as to obtain any superiority over the powers of Parliament or the validity of primary legislation. The 1998 Act requires in s 3 that the language which Parliament has used be construed so as to secure that it is compatible with the convention rights, so far as it is possible to do so. Section 4 of the 1998 Act, which enables the courts to pronounce a declaration of incompatibility, expressly provides in sub-s (6) that such a declaration does not

- a affect the validity, continuing operation or enforcement of the legislation declared to be incompatible. But it is left to the discretion of a minister to make a remedial order under s 10 when an incompatibility is identified. One principle achievement of the 1998 Act is to enable the convention rights to be directly invoked in the domestic courts. In that respect the 1998 Act is important as a procedural measure which has opened a further means of access to justice for the citizen, more immediate and more familiar than a recourse to the court in Strasbourg.

- [136] The questions then arise: when did Parliament intend that this new procedure should be available, and in respect of what acts should it operate? Parliament had to resolve a question of procedural importance in which considerations of practicality and convenience should be significant. The substance of the convention rights remained unchanged. For many years they had been directly accessible in Strasbourg. It was considered desirable to allow a period of time to elapse after the passing of the 1998 Act and its full effectiveness. One reason for that was no doubt the practical reason of enabling all those concerned with the application of the 1998 Act to prepare for the responsibility of that work.
- d Parliament also had to consider how far, if at all, acts done prior to the 1998 Act coming into full effect ought to fall within the scope of the new domestic jurisdiction. The line had to be drawn at some point and Parliament had to decide where the line should be drawn for the purposes of the jurisdiction of the courts after the 1998 Act came into effect. How Parliament decided to do that is a question of construction of the 1998 Act. But in approaching that question it is in my view proper to keep in mind the essentially procedural nature of the question.

- [137] Two routes were suggested by the appellant by which he might invoke the provisions of the 1998 Act even although his trial, conviction and appeal had all occurred before the 1998 Act came fully into effect. One route is by s 22(4).
- f That section applies to the right provided by s 7(1)(b) of someone who claims that a public authority has acted in a way incompatible with a convention right (and so under s 6(1) has acted unlawfully) to rely on the convention right concerned in any legal proceedings provided that he is the victim of the unlawful act. Section 22(4) extends the application of s 7(1)(b) to proceedings brought by or at the instigation of a public authority whenever the act in question took place. So an act contrary to the convention done by a public authority before 2 October 2000 may be relied upon by the victim in legal proceedings brought by or at the instigation of a public authority from 2 October 2000. If the appellant is seeking to found on s 7(1)(b) he must qualify as, to quote the opening words of s 7, 'a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1)'.

- [138] The first question is to identify that public authority. Plainly the public authority here cannot be this House, because the House has not yet acted at the stage of the hearing and it will at that stage be far from certain whether the House is proposing to act in an unlawful way. The prosecutor may qualify as a public authority. But the act complained of is not the bringing of the prosecution but the act of the trial judge in directing that a persuasive burden of proof lay on the appellant to establish a defence under s 28(2) or of the Court of Appeal in refusing his appeal. The public authority here must presumably be the trial judge or the Court of Appeal. So the proposed application of these provisions here is to the effect that since the present proceedings are an appeal arising out of a criminal prosecution brought by a public authority (the public prosecutor), the appellant

is claiming that a public authority (the trial judge or the Court of Appeal) has acted in a way which is incompatible with his art 6(2) right, and that he may rely on that right in these proceedings. a

[139] I do not find it necessary to determine the question whether the public authority referred to in ss 7(1), 7(6) and 22(4) requires to be the same public authority. It may be that the public authority referred to in s 7(1) can be a different public authority from that in ss 7(6) and 22(4). I would proceed upon two other considerations. First, s 22(4) relates only to s 7(1)(b). So s 7(1)(a) does not apply to an act taking place prior to 2 October 2000. In so far as the act for the purposes of s 7(1)(a) is a judicial act, the proceedings must be one or other of those set out in s 9(1). The first of those is the exercising of a right of appeal. So it would appear that a remedy by way of appeal under s 7(1)(a) is not to apply to acts prior to 2 October 2000. It does not appear likely that there should be a retrospectivity under s 7(1)(b) in respect of an appeal heard from 2 October 2000 against a decision given prior to that date, if there is none under s 7(1)(a). b c

[140] Secondly, in terms of s 22(4) the only acts contravening the convention prior to 2 October 2000 which can be considered are acts on which reliance may be placed in terms of s 7(1)(b). Section 22(4) states expressly that 'otherwise that subsection does not apply to an act taking place before the coming into force of that section'. That subsection applies to 'legal proceedings' as defined in s 7(6), that is both 'proceedings brought by or at the instigation of a public authority' and an appeal. But the provision admitting reliance on earlier acts in s 22(4) is limited to 'proceedings brought by or at the instigation of a public authority'. The use of the same language as was used in s 7(6) is significant. In my view the intention is that s 22(4) should not extend to the other kind of 'legal proceedings' mentioned in s 7(6), namely an appeal. I am not persuaded that s 22(4) can avail the appellant. d e

[141] The second route which is suggested by the appellant is by a simple application of s 6(1). Here the House in its judicial capacity is to be seen as the public authority. The argument runs that it is bound to apply the convention in the present appeal. Its decision must be compatible with the convention. This is not strictly a point of retroactivity at all. The argument focuses upon an act taking place from 2 October 2000. f

[142] The usual understanding of the appeal process is that the correctness of the decision appealed against should be determined in accordance with the law as it stood when the case was decided by the lower court. But on the appellant's approach it would seem that any case either of a civil or a criminal nature, decided according to the law as construed in the ordinary way prior to 2 October 2000, if an appeal was brought so as to be heard after 2 October 2000, would require to be decided by the application of a rule of construction, namely s 3 of the 1998 Act, which was not obligatory on the lower court. But that involves giving an undue extension to the effect of s 3. In my view s 3 only became obligatory on courts on 2 October 2000. The rule of construction which it expresses applies to all legislation whenever enacted. But there is nothing to show that it was intended by s 3 that the meaning given to a statutory provision by a court prior to 2 October 2000 should be changed in the event of an appeal against that decision being heard on or after that date. It is suggested that the 1998 Act should itself be subject to the interpretative regime contained in s 3. But I am not persuaded that there is any 'convention right' which requires appeals to be determined in that way. It is to be remembered that art 13 of the convention is not included within the 'convention rights' for the purposes of the 1998 Act. g h i j

a [143] The appellant sought to confine the scope of his argument to criminal cases only, but I am not persuaded that there is justification for making that distinction in the 1998 Act. Even if one looks only to criminal proceedings it does not seem to me likely that Parliament intended to disturb the usual understanding of the appeal process and allow matters of alleged incompatibility with the convention rights, which could always have been raised in Strasbourg, to be opened up by the taking of an appeal to a higher court on or after the date on which the 1998 Act came into effect. In general Acts of Parliament should not be read as operating so as to affect things done prior to their coming into effect. I see no reason why that principle should not apply to the 1998 Act. If a departure from the usual course was intended I would expect that to have been clearly stated.

c [144] Furthermore, if s 6(1) is to be construed as requiring courts of appeal to apply the convention to acts which occurred prior to 2 October 1998, that would not seem to me to be consistent with the careful and precise provision which Parliament did make for the extent to which acts prior to 2 October 1998 could be relied upon. Section 22(4) is expressly limited to one situation. It relates only to s 7(1)(b), it applies only to proceedings brought by or on behalf of a public authority, and it applies to acts 'whenever the act in question took place', that is to say whether before or after the coming into force of the Act. Section 22(4) then expressly states with regard to s 7(1)(b) that 'otherwise that subsection does not apply to an act taking place before the coming into force of that section'. As I have already decided, s 7(1)(b) does not allow a person to rely on a convention right allegedly breached prior to 2 October 2000 in an appeal heard on or after that date. So the argument reaches the result that under s 6(1) the appeal court is bound to take account of that convention right, although the appellant may not rely upon it. That does not seem to me to be a likely interpretation of the intention of Parliament in passing s 6(1) and it does not seem to fit comfortably with the express provision made in s 22(4).

f [145] I accept that s 6(1) imposes an obligation on a court, including, to use the language of s 6(4), this House in its judicial capacity, to act in conformity with the convention. But s 6(1) does not provide any remedy. It simply explains that, where a public authority acts in a way which is incompatible with a convention right, that act is unlawful. That word might mean that the act might be the basis for an offence. But that is obviously not the meaning to be given to it here. g Indeed s 7(8) states: 'Nothing in this Act creates a criminal offence.' Another meaning which may be ascribed to the word 'unlawful' is that it is to be unenforceable. But if one breaks off at that point one is left without any means of obtaining any remedy. It seems to me that s 6 cannot be taken in isolation but has to be read and understood along with the rest of the 1998 Act and in particular h with the sections which immediately follow it.

j [146] As I have already noted s 7(1) makes provision for the proceedings which may be used by a victim. Paragraph (a) enables him to bring proceedings against the authority in the appropriate court or tribunal. Paragraph (b) enables him to rely on the convention right in any legal proceedings, and those include (sub-s (6)) proceedings brought by or at the instigation of a public authority and an appeal. But we are here dealing with a judicial act. The 1998 Act specifically provides in s 9 that there are only three ways in which proceedings under s 7(1)(a) may be brought. These are: '(a) by exercising a right of appeal; (b) on appeal, an application for judicial review, or (c) in such other forum as may be prescribed by rules'. I have some difficulty in applying s 9 to a decision of this House but if there is a difficulty there it would not justify the construction of s 6 which is sought by

the appellant in the present case. In my view s 6 is part of the series of sections on public authorities and cannot be isolated so as to be independent of them. The better view to my mind is that the only way in which an act prior to 2 October 2000 can come within the scope of the 1998 Act is by s 22(4).

[147] The construction of the 1998 Act which I have preferred is given some support by reference to the corresponding situation which arose in New Zealand in *Minto v Police* [1990–92] 1 NZBORR 208. In that case appeals were taken against convictions for offences of breach of the peace committed by people staging a demonstration. The offences and the convictions occurred prior to the coming into force of the Bill of Rights Act 1990. The appeals were heard after that Act came into force and the appellants sought to found on the right to freedom of peaceful assembly guaranteed by s 16 of that Act. It was held that s 16 should not be given such a retrospective effect. Robertson J said (at 214) in reference to the appellant's counsel:

'He argued that the "beneficial" effect of such a retrospective interpretation should overwhelm the presumption against the retrospective effect of statutes. Certainly, it would be beneficial from his clients' point of view to have their misdemeanour undone in this fashion. But I do not accept that it would be "beneficial" for the law or society at large if a Court were to declare invalid that which was valid at the time it was done.'

Robertson J also referred to the decision of the Supreme Court of Canada in *R v Stevens* (1988) 51 DLR (4th) 394 which concerned a conviction for unlawful sexual intercourse with a girl under the age of 14 under s 146(1) of the Criminal Code. The Canadian Charter of Rights and Freedoms came into effect after the commission of the offence and it was argued that under s 7 of that charter, guaranteeing the life, liberty and security of the person, s 146(1) was invalid so far as it denied the accused a defence of honest mistake of fact. But the court held that s 7 should not have retrospective effect so as to change the substantive law at the time of the offence. So also in the present context I would hold that the appellant cannot invoke the provisions of the 1998 Act for the purposes of overturning a conviction which was not unlawful for the purposes of s 6(1) at the time it was obtained, being a time prior to the coming into effect of that section.

[148] In my view accordingly it is not open to the appellants to invoke the provisions of the 1998 Act in the present appeal. But it is nevertheless appropriate to consider for the future whether the provisions of s 28 are compatible with art 6(2) of the convention.

[149] It may be noted at the outset that cases may well occur under s 5 of the 1971 Act where no problem of compliance with art 6(2) will arise. In the case of the possession of controlled drugs Parliament has provided for the mental element of the offence in two respects. First, there is a mental element built into the offence itself in the matter of possession. An ingredient of that element, as I have already stated, is knowledge of the existence of the thing in issue. In the simplest case the only mental element which may arise is knowledge of the existence of the thing which is in fact a controlled drug. That is an essential of possession and the prosecution is required to prove that the accused had that knowledge. In some cases the inquiry may not have to go any further. Any consideration of the knowledge or ignorance of the accused about the nature of the thing which he is proved to have possessed may not arise. Indeed in some cases it may be indisputable that if there was possession the accused must have known the nature of what he possessed. In such a case no question of that kind

a of knowledge requires to be explored. If the inquiry stops at that point, the offence will have been proved. The onus of proof remained upon the prosecution and no onus has ever passed to the accused. In such circumstances there can be no contravention of art 6(2) of the convention. But the present case is one where the accused relied upon s 28(3)(b)(i) and since I am proceeding upon the basis that the burden was on him to prove his assertion of ignorance under that provision

b there is a real question whether the offence prescribed in s 5(3), subject as it is to the provisions of s 28, contravenes art 6(2) of the convention in cutting across the presumption of innocence.

[150] It is necessary first to say a word about the application of that article. It states: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' There is no doubt that it does apply to the present proceedings. Article 6(2) applies to any person charged with a criminal offence. So the appellant may invoke the benefit of the provision. But the imposition of a burden on the defendant does not necessarily involve a contravention of the convention. Some guidance on the problem can be obtained from the jurisprudence of the European Court of Human Rights. First, one must look not

c only at the form of the legislation but also at its substance and effect (*X v UK* App No 5124/71 (19 July 1972, unreported)). As regards the identification of the essentials of an offence the Privy Council have recognised that a similar approach should be taken. What is decisive is 'the substance and reality of the language creating the offence rather than its form' (*A-G of Hong Kong v Lee Kwong-kut, A-G of Hong Kong v Lo Chak-man* [1993] 3 All ER 939 at 951, [1993] AC 951 at 969).

d Secondly:

'... in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence.' (See *Salabiaku v France* (1988) 13 EHRR 379 at 387 (para 27).)

f

Thirdly, in particular, 'the Contracting States may, under certain conditions penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence': *Salabiaku's* case (at 387 (para 27)). Fourthly, presumptions of fact or of law exist in many legal systems and are not in principle

g contrary to the convention: *Salabiaku's* case (at 388 (para 28)). Fifthly, the words 'according to law' in art 6(2) do not merely refer to domestic law, but also to the rule of law, and accordingly certain limits must be observed in the extent to which presumptions of fact or law are acceptable. Those limits must be reasonable limits 'which take into account the importance of what is at stake and

h maintain the rights of the defence': *Pham Hoang v France* (1992) 16 EHRR 53, *Harây v Ireland* App No 23456/94 (29 June 1994, unreported)). Sixthly, where the persuasive burden of proof remains on the prosecution but an evidential burden is transferred to the accused in a saving or excusatory context, so that the maximum obligation on the accused is merely to raise a doubt of substance in relation to the prosecution's case, that may not involve a contravention of art 6(2)

j (*Hardy's* case).

[151] Where a rebuttable presumption is placed on the accused that may still not breach the convention right. In *AG v Malta* App No 16641/90 (10 December 1991, unreported) the statutory provision made a director of a company guilty of an offence committed by the company 'unless he proves that the offence was committed without his knowledge'. That was held by the domestic court not to

be unreasonable since otherwise it would be impossible in the majority of cases to prove its case against a company. The Commission declared the application inadmissible. They proceeded on the consideration that the presumption created by the provision was rebuttable, that the Maltese courts enjoyed a genuine freedom of assessment and that there was no indication that the provision was applied to the applicant in a manner incompatible with the presumption of innocence.

[152] But the decision may have to turn upon the particular circumstances. The focus of attention paid by the European Court of Human Rights tends to be directed at the particular circumstances of the case before them. Considerations which have weighed with the court in deciding that in particular cases that there was no infringement have included a consideration of the whole evidence and such matters as these: that while the accused was deemed liable for the offence, he had the opportunity to put extenuating circumstances before the court and was entitled to be acquitted if he succeeded in establishing a case of force majeure, unavoidable mistake, or necessity (*Salabiaku's* case and *Pham Hoang's* case), that the domestic courts had also identified in the case an element of intent, even although they were under no legal obligation to do so (*Salabiaku's* case), and that the courts had also made a careful discrimination between the two charges originally brought against the accused and acquitted him of one of them while convicting him on the other (*Salabiaku's* case). But it would be of little assistance for the future to decide the present case simply on its own particular facts. Some more general opinion ought to be possible.

[153] Reasons can readily be adduced to support the imposition of the burden of proof on the accused in the present context. Firstly, the question whether the accused was ignorant or had no reason to suspect that what he possessed was a controlled drug is a matter very much within his own knowledge. There are sound practical reasons for imposing the burden on him to prove his ignorance. Secondly, the proof may be relatively easy for him, as I have already noted. Thirdly, there is a serious consideration of the public interest in the discouragement of what is well recognised as a grave social evil, the unlawful distribution of controlled drugs. Fourthly, the knowledge of the defendant of the nature of what he possessed is brought in as a defence, not as an ingredient of the offence. In some cases it may never arise. It can be strongly argued that a transfer of a persuasive burden of proof onto the defendant under s 28 could be compatible with art 6(2).

[154] But while it might seem reasonable for such considerations to let the accused bear the burden of proof I do not consider that such a result can be justified when one weighs the considerations of what is, or at least may be, at stake for the accused and the interests of the public. As I have already noted, in order to be acceptable a presumption must fall within limits which 'take into account the importance of what is at stake and maintain the rights of the defence'. If the matter is approached as one of generality one can make no useful distinction here between the various classes of drugs which may be involved. In the most serious cases the accused may face a sentence of life imprisonment. A strict responsibility may be acceptable in the case of statutory offences which are concerned to regulate the conduct of some particular activity in the public interest. The requirement to have a licence in order to carry on certain kinds of activity is an obvious example. The promotion of health and safety and the avoidance of pollution are among the purposes to be served by such controls. These kinds of cases may properly be seen as not truly criminal. Many may be

a relatively trivial and only involve a monetary penalty. Many may carry with them no real social disgrace or infamy.

[155] In *Sweet v Parsley* [1969] 1 All ER 347 at 349, [1970] AC 132 at 148 Lord Reid observed that 'there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did'. The advent of the 1998 Act has certainly sharpened a consciousness of the human right which is embodied in the presumption of innocence and invites a closer scrutiny of what Ashworth and Blake 'The Presumption of Innocence in English Criminal Law' (1996) CLR 314 have described as a large-scale derogation from basic principle. They quote the advice of the *Eleventh Report of the Criminal Law Revision Committee: Evidence (General)* (Cmd 4991 (1972)), para 140 that 'both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only'. The 1998 Act should encourage a reconsideration of a trend which has for over a decade been exposed to powerful criticism.

[156] While it may be that offences under s 5 of the 1971 Act may be described as regulatory they can lead to the most serious of consequences for the accused. Of course trafficking in controlled drugs is a notorious social evil, but if any error is to be made in the weighing of the scales of justice it should be to the effect that the guilty should go free rather than that an innocent person should be wrongly convicted. By imposing a persuasive burden on the accused it would be possible for an accused person to be convicted where the jury believed he might well be innocent but have not been persuaded that he probably did not know the nature of what he possessed. The jury may have a reasonable doubt as to his guilt in respect of his knowledge of the nature of what he possessed but still be required to convict. Looking to the potentially serious consequences of a conviction at least in respect of class A drugs it does not seem to me that such a burden is acceptable.

[157] But I have no difficulty in finding the solution by an application of s 3 of the 1998 Act. It requires no straining of the language of s 28 to construe the references to proof as intending an evidential burden and not a persuasive one. Indeed, as I have already stated, it would be a construction to which I would in any event have inclined, even without the added compulsion of the 1998 Act. The construction seems to me to be something which is well within the scope of what is 'possible' for the purposes of s 3. In rewriting the legislation as it did in the 1971 Act, Parliament must have recognised that in fairness to the accused provision must be made for the case where he was ignorant of the nature of the thing which he possessed and that the law as laid down by the majority of this House in *Warner's* case was unduly harsh. It seems to me that the proper way by which that harshness should be alleviated is to recognise that the accused should have the opportunity to raise the issue of his knowledge but to leave the persuasive burden of proof throughout on the prosecution. Respect for the 'golden thread' of the presumption of innocence deserves no less.

[158] I am not persuaded that this approach gives rise to any practical problem. In some cases no issue may arise at all about the accused's knowledge of the nature of thing which he is alleged to possess. Section 28 then will not come into play and it would only distract a jury from the point in issue to give any direction, or certainly any detailed direction, about it. When the matter of the accused's knowledge (including in that word for convenience the matters of suspicion and reason to suspect which are detailed in s 28) does arise, such burden as there is on the defence is discharged by the defence expressly raising

knowledge as an issue. Where that occurs the judge will require to explain the substance of s 28 to the jury but will also simply remind them that the burden of proving guilt is throughout on the prosecution. If the jury are satisfied on the matter of possession but are left with a reasonable doubt on the matter of his knowledge or suspicion of the existence of a fact which the prosecution has to prove, such as, for example, the existence of the controlled drug, then they should acquit. If the jury are satisfied beyond reasonable doubt that the accused possessed the substance or product in question but are not satisfied beyond reasonable doubt that he knew that it was a controlled drug (or suspected or had reason to suspect that it was) then again they should acquit him. They can only convict if they are satisfied beyond reasonable doubt that the prosecution has proved possession of the controlled drug and, if the issue is raised, that the lines of defence set out in s 28 are without foundation.

[159] I do not consider that this understanding of the offences in question in the future should cause any serious problem for any past or current cases. Ultimately what is in issue is the fairness of the trial. No doubt in many cases an unfair trial in contravention of art 6 will constitute an unsafe conviction (see for example *R v Togher* [2001] 3 All ER 463, *R v Forbes* [2001] 1 All ER 686, [2001] 1 AC 473). But an unfairness is not always fatal to an conviction. In particular in the present context a direction that there is a persuasive burden on the accused to establish a defence under s 28 will not necessarily lead to an unsafe conviction. If there is doubt about guilt then the conviction must be held to be unsafe. But if there is no doubt about guilt it is not every case where an unfairness can be identified that will necessarily and inevitably lead to a quashing of the conviction.

[160] The present appeal has been more concerned with generalities than with the particular facts and circumstances of the particular case which has been used as a vehicle for raising them. If one turns to the facts here, which I need not repeat as they have been narrated by others of your Lordships, I am not persuaded that there is any ground for doubting that the verdict of the jury, who rejected the defence of duress, would also have rejected the defence under s 28 even had it been explained to them that the burden of proof remained throughout on the prosecution. I see no room for quashing the conviction.

[161] For the foregoing reasons I would dismiss the appeal.

LORD HUTTON.

[162] My Lords, the appellant, Steven Lambert, was convicted on 9 April 1999 in the Crown Court at Warrington after a trial before Judge Hale and a jury of the offence of possession of a controlled class A drug with intent to supply, contrary to s 5(3) of the Misuse of Drugs Act 1971 and was sentenced to seven years' imprisonment.

[163] In summing up to the jury, the trial judge succinctly summarised the facts relied on by the prosecution:

'Members of the jury, it's half past one on the afternoon of 25 November of last year when this defendant gets off the London train as it arrives in Runcorn on its way to Liverpool. He gets off holding an envelope. He crosses the bridge. In the hallway on the other side by the ticket office in Runcorn Station a man comes up to him and says, "Steve". They shake hands, they go out onto the car park. Within a couple of minutes he's back in the reception area trying first to make a phone call on his mobile phone, then

a going into the phone kiosk. He has now got in his hand a duffle bag which contains two kilos of cocaine worth over £140,000.'

The appellant's defence can be summarised as follows. In the past a man named 'John' had asked him to go to Liverpool to deliver money for him. On this occasion John again asked him to go to Liverpool to deliver something for him and gave him an envelope which he thought contained money. He took the train to Liverpool and during the journey John telephoned him and told him to get off at Runcorn. He did so and met a man who gave him a bag which the man told him contained scrap gold to go back to John and the man then said it was scrap jewellery. The appellant also advanced a defence of duress.

c [164] In the course of his summing up the trial judge directed the jury pursuant to s 28(2) and (3) of the 1971 Act that the burden of proof was on the appellant to prove on the balance of probabilities that he neither believed nor suspected nor had reason to suspect that the substance in the bag was a controlled drug.

d [165] Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) provides: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' The appellant appealed to the Court of Appeal against his conviction on the ground that the judge's direction to the jury that the burden of proof as to lack of knowledge rested on him violated the presumption of innocence given by art 6(2). The Court of Appeal ([2001] 1 All ER 1014, [2001] 2 WLR 211) dismissed his appeal on the ground that in respect of prosecutions for possession of drugs there was an objective justification for the relevant statutory provisions and they were not disproportionate, and accordingly there was no violation of art 6(2).

f [166] However, the Court of Appeal accepted (though with reservations) that, as agreed by all counsel, the Human Rights Act 1998, which, apart from four sections, came into force on 2 October 2000, more than a year after the date of the appellant's conviction at the Crown Court, did have a retrospective effect so far as art 6 was concerned. Therefore the first question which arises on this appeal is whether the 1998 Act has a retrospective effect. If it does not, the applicant cannot rely on art 6(2) in the English courts and his appeal must fail.

g *Retrospectivity*

[167] Section 6 of the 1998 Act provides:

'(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

h (2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

j (3) In this section "public authority" includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.'

Section 7 provides:

'(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act ...

(6) In subsection (1)(b) "legal proceedings" includes—(a) proceedings brought by or at the instigation of a public authority; and (b) an appeal against the decision of a court or tribunal.'

Section 22 provides:

'(2) Sections 18, 20 and 21(5) and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.'

Mr Starmer advanced two principal submissions in support of the argument that the appellant was entitled to rely on art 6(2) notwithstanding that he was convicted before the convention had been incorporated into the law of England by the 1998 Act. His first submission concentrated on the effect of s 6 viewed in isolation from ss 7 and 22. He submitted that the Appellate Committee of the House, sitting as a court, is a 'public authority' within the meaning of s 6 and that s 6(1) forbids the Appellate Committee to act in a way which is incompatible with the right given to the appellant by art 6(2). If the statutory provisions, pursuant to which the trial judge had directed the jury as to the onus of proof, were in breach of art 6(2), the Appellate Committee would be acting unlawfully under s 6(1) if it upheld the conviction obtained in breach of that article, notwithstanding that the trial and conviction had taken place before the 1998 Act came into force. Mr Starmer further submitted that the application of s 6 for which he contended did not mean that this section was given retrospective effect: the right under art 6(2) of the convention existed at the time of the appellant's trial and conviction, although he was then unable to enforce it in the domestic courts. Where there has been an infringement of the art 6(2) right to a fair trial, this will result in the conviction being held to be unsafe when an appeal is heard by the Court of Appeal (or by the House of Lords) from 2 October 2000: see *R v Togher* [2001] 3 All ER 463 at 472 (para 33) per Lord Woolf CJ, approved by this House in *R v Forbes* [2001] 1 All ER 686 at 697, [2001] 1 AC 473 at 487 (para 24). Therefore the appellant's argument does not, in truth, seek to give a retrospective effect to s 6(1), it merely seeks to give effect to s 6(1), as it binds the Appellate Committee at the present time.

[168] Mr Starmer further submitted that the Crown could not counter this argument by relying on s 6(2)(a) or (b) and contending that the House itself was bound to give effect to the provisions of s 28 of the 1971 Act, because under s 3 of the 1998 Act the House could read and give effect (as the Crown accepted) to s 28 in a way compatible with art 6(2).

a [169] The argument which Mr Starmer skilfully advanced is a powerful one, but I have come to the conclusion that it should not be accepted. It is a well established principle that no statute should be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction. In addition, save as to the proceedings described in the first part of s 22(4), I consider that that subsection supports the view that the 1998 Act is not
b to have a retrospective effect. In my opinion an Act has a retrospective effect if it operates to make unlawful or unsafe a conviction which was lawful and safe at the time it was imposed. This is the result for which the appellant contends. Before the commencement of the 1998 Act he had been lawfully convicted and his conviction was safe. But he submits that the effect of s 6 of the 1998 Act, coming into operation after his conviction, is to make the conviction unlawful
c and unsafe. In my opinion it is no answer for the appellant to maintain that he is only concerned with the lawfulness of a decision taken by the Appellate Committee on a date after 2 October 2000. I consider that this argument does not alter the reality that if the House were to quash the conviction it would be giving a retrospective effect to s 6.

d [170] Nor do I think that the appellant can derive assistance from s 3 of the 1998 Act which provides:

‘(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the convention rights.

e (2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted ...’

In my opinion if the 1998 Act, including s 3, does not (apart from the effect of s 22(4)) have a retrospective effect, s 3 cannot give s 6(1) a retrospective operation.

f [171] Mr Starmer’s second main submission relied on the combined effect of ss 6, 7 and 22. Under s 7(1)(b) a person who claims that a court has acted in a way which is made unlawful by s 6(1) may rely on the convention right concerned in any legal proceedings. Section 22(4) provides that s 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place. Therefore the submission was that the appeal before the House was
g ‘legal proceedings’ and that the appellant could rely on art 6(2) because the prosecution (‘proceedings’) was brought against the appellant by the Director of Public Prosecutions, a public authority, notwithstanding that the conviction by the Crown Court took place before the 1998 Act came into force.

[172] In my opinion this argument fails because s 7(6) provides:

h ‘In subsection (1)(b) “legal proceedings” includes—(a) proceedings brought by or at the instigation of a public authority; and (b) an appeal against the decision of a court or tribunal.’

j The subsection therefore distinguishes between ‘proceedings brought by or at the instigation of a public authority’ and ‘an appeal against the decision of a court or tribunal’. Accordingly when s 22(4) refers, in identical words to the words of s 7(6)(a), to ‘proceedings brought by or at the instigation of a public authority’, the retrospective operation permitted by that subsection does not apply to an appeal against the decision of the Crown Court in this case.

[173] Although the 1998 Act was passed on 9 November 1998, its sections, with the exception of ss 18, 20, 21(5) and 22, did not come into force until 2 October 2000, the day appointed by the Secretary of State pursuant to s 22(3). I

consider that this delayed commencement of the great majority of the sections in the 1998 Act suggests that it was the intent of Parliament that the 1998 Act (save in the limited circumstances set out in s 22(4)) should not operate retrospectively, but that the sections were only to operate in respect of acts taking place subsequent to 2 October 2000 after public authorities in the United Kingdom had had the opportunity to ensure that their actions and procedures would not violate convention rights. I think that Parliament did not intend to bring about the situation which was a cause of concern to Rose LJ, the Vice-President of the Criminal Division, in *R v Kansal* [2001] EWCA Crim 1260 at [24], and which he described in the judgment of the Court of Appeal:

‘Leaving aside colourful historical examples such as Sir Thomas More, Guy Fawkes and Charles I, all of whom would have benefited from convention rights, until the Criminal Evidence Act 1898, no defendant was permitted to give evidence on his own behalf. That is a clear breach of art 6. Many examples in the 20th century of other rules and procedures which, viewed with the wisdom of hindsight, were in breach of the convention could be given. But we resist that temptation lest, by succumbing, we exacerbate the problem to which we are drawing attention. For over 20 years, this court has adopted a pragmatic approach, confirmed by successive Lord Chief Justices, whereby a refusal to extend time to apply for leave to appeal has filtered out those seeking to take advantage of a change in the law since they were convicted. This, in our judgment, reflects the public interest that there be finality in litigation and it is an approach which has also helped this court to concentrate its limited resources on determining more meritorious appeals arising from more recent convictions.’

[174] In reaching my conclusion on this difficult issue of retrospectivity I have taken into account the opinions in favour of retrospectivity expressed in *R v DPP, ex p Kebeline* [1999] 4 All ER 801, [2000] 2 AC 326, by Lord Bingham of Cornhill CJ in the Divisional Court and by Lord Steyn in this House, and the opinions against retrospectivity expressed by Lord Hobhouse of Woodborough in *Ex p Kebilene* and by Waller LJ in *Parker v DPP* [2001] RTR 240. I have also taken into account the judgment of the Court of Appeal in *Wilson v First County Trust Ltd* [2001] EWCA Civ 633, [2001] 3 All ER 229, [2001] 3 WLR 42.

[175] Mr Starmer relied on the following passage in the judgment of Sir Andrew Morritt V-C (at [17]):

‘Section 6 must be read with that object in mind. Section 6(1)—in conjunction with s 6(3)(a)—requires a court to refrain from acting in a way which is incompatible with a convention right. If the court is to comply with that requirement it must ask itself—in any case which comes before it after 2 October 2000—whether the order which it is about to make is or is not compatible with convention rights. The relevant event, in the present case, is not the making of the agreement on 22 January 1999; the relevant event is the making of an order on this appeal.’

However, I think that the Crown can derive greater support for its argument against retrospectivity from passages in paras [20] and [21] of the Vice-Chancellor’s judgment:

‘Nor, it seems, can a person who claims that a court or tribunal has acted in a way which is incompatible with a convention right (contrary to s 6(1) of

a the 1998 Act) rely on that as a ground of appeal against the decision of that court or tribunal in a case where the decision complained of was made before 2 October 2000—see s 7(1)(b) and s 7(6)(b) of the 1998 Act ... Nor should the decisions of courts and tribunals made before those sections had come into force be impugned on the ground that the court or tribunal was said to have acted in a way which was incompatible with convention rights.'

b The House has now had the benefit of full and careful argument on the part of Mr Starmer and of Mr Perry and I have reached the conclusion, for the reasons which I have given, that the 1998 Act does not have a retrospective effect in this case.

c [176] Therefore I consider that this appeal should be dismissed on the grounds that the appellant's conviction was safe prior to 2 October 2000 and the provisions of the 1998 Act do not require an appellate court giving its decision after 2 October 2000 to declare it unsafe. However, as detailed submissions were advanced to the House on the basis that the appellant could rely on ss 6, 7 and 22(4) of the 1998 Act, I propose to state my opinion on those submissions.

d *The essential ingredients of the offence*

[177] Section 5 of the 1971 Act provides:

'(1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.

e (2) Subject to section 28 of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.

(3) Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.'

f

Section 28 provides:

'Proof of lack of knowledge etc. to be a defence in proceedings for certain offences.—(1) This section applies to offences under any of the following provisions of this Act, that is to say section 4(2) and (3), section 5(2) and (3), section 6(2) and section 9.

g

(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

h

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but (b) shall be acquitted thereof—(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or (ii) if he

j

proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.

(4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section.'

[178] The essence of the argument advanced on behalf of the appellant is contained in two propositions. The first proposition is that the decision of this House in *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428 established that mens rea was an essential element of every criminal offence unless Parliament expressly or by implication provided to the contrary. Knowledge on the part of a defendant that the article or substance which he was carrying or had under his control was a controlled drug was an essential ingredient of the offence of possession of a controlled drug with intent to supply contrary to s 5(3) of the 1971 Act. The second proposition is that s 28(2) and (3) transfer the onus of proof to a defendant by requiring him to prove that he neither knew nor suspected nor had reason to suspect that the article or substance which he was carrying was a controlled drug, and therefore the subsections were in breach of art 6(2) as they reversed the burden of proof in respect of an essential ingredient of the offence.

[179] The argument advanced on behalf of the Crown is that the essential ingredients which the prosecution has to prove to establish the offence under s 5(3) in a case such as that against the appellant is possession of the bag and its contents, which required proof that the defendant knew that he had control over the bag and whatever object or substance was inside it, and also proof that the contents of the bag were, in fact, a controlled drug. Section 28(2) and (3) provide a defence which arises only after the prosecution has proved the essential ingredients of the offence, and therefore there is no transfer of the burden of proof which infringes the presumption of innocence set out in art 6(2).

[180] Before considering these opposing submissions it is necessary to have regard to the authorities in relation to the offences of possession of controlled drugs under s 5(2) and 5(3). In *R v Boyesen* [1982] 2 All ER 161 at 163, [1982] AC 768 at 773 Lord Scarman stated:

'The statutory offence may be described as an absolute one in the sense that the prosecution establish it by proving possession without authority: see s 5(1) and (2) of the Act. Section 28 provides for certain defences which, if they are to succeed, the defendant must prove on a balance of probabilities. They do not arise for consideration in this appeal. Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature; but you do not possess it unless you know you have it.'

In *R v McNamara* (1988) 87 Cr App R 246 at 251 Lord Lane CJ, in considering an appeal against a conviction under s 5(3), stated:

'It seems to us, in order to make sense of the provisions of section 28, and also to make as clear as can be possible the decision in [*Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256], the draftsman of the Act intended that the prosecution should have the initial burden of proving that

- a the defendant had, and knew that he had, in these circumstances the box in his control and also that the box contained something. That, in our judgment, establishes the necessary possession. They must also of course prove that the box in fact contained the drug alleged, in this case cannabis resin. If any of those matters are unproved, there is no case to go to the jury ... Once the prosecution have proved that the defendant had control of the box, knew that he had control and knew that the box contained something which was in fact the drug alleged, the burden, in our judgment, is cast upon him to bring himself within those provisions.'
- b

- [181] In my respectful opinion the law in relation to ss 5(3), 28(2) and (3) was correctly stated by Lord Lane CJ, save that the illuminating analysis of s 28 by the Lord Justice General, Lord Rodger, in *Salmon v HM Advocate* 1999 JC 67 demonstrates that where a defendant advances the defence that he did not know that the bag or other container which he was carrying contained a controlled drug and believed it contained a different type of article such as a video film, this defence arises under s 28(2) and not under s 28(3).
- c

- [182] It is also relevant to observe that s 28(2) and (3) expressly impose not merely an evidential burden on the defendant but a persuasive (or legal) burden. Therefore the appellant derives no assistance from *B (a minor) v DPP* as it is clear that Parliament has expressly provided that the prosecution need not prove the mental element of knowledge. A persuasive burden is one where the matter in question must be taken as proved against the defendant unless he satisfies the jury on the balance of probabilities to the contrary. An evidential burden is one where the matter must be taken as proved against the defendant unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the burden rests on the prosecution to satisfy the jury as to the matter beyond reasonable doubt.
- d
- e

- [183] As I have observed, the submission advanced by the Crown is that (a) Parliament has chosen by s 5(3) to create an offence in which knowledge by the defendant that he has custody or control of a controlled drug is not an essential element, and that the issue of lack of knowledge by the defendant only arises as a defence under s 28(2) or (3), and (b) accordingly under European jurisprudence there is no violation of the presumption of innocence given by art 6(2). Viewed in the context of English law alone I consider that proposition (a) is correct, but I am unable to accept proposition (b) because I think that a similar submission on behalf of the government of France was not wholly accepted by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379. In that case a presumption of criminal liability was laid down in art 392(1) of the French Customs Code for every person who was found in possession of prohibited goods. Mr Salabiaku complained of a violation of art 6(2). The argument advanced on behalf of the French government was very similar to the argument advanced on behalf of the Crown in the present case. In para 27 of its judgment (at 387) the court recorded the argument on behalf of the French government as follows:
- f
- g
- h

- 'As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.'
- j

[184] The court held that this argument could not be accepted in its entirety and stated (at 388 (para 28)):

'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The Court proposes to consider whether such limits were exceeded to the detriment of Mr. Salabiaku.'

[185] Therefore, following the jurisprudence of the court, I consider that the Crown cannot rebut an argument based on a violation of art 6(2) by simply contending that the government of the United Kingdom is entitled 'to define the constituent elements of the ... offence', and that a violation of art 6(2) is avoided because the 1971 Act makes absence of knowledge of being in possession of a controlled drug a defence rather than making knowledge an ingredient of the offence which the prosecution has to prove.

Is the presumption contained within reasonable limits?

[186] Whether or not there has been a violation of art 6(2) depends, therefore, upon whether the presumption created by s 28(2) and (3) is confined within reasonable limits which take into account the importance of what is at stake and maintains the rights of the defence.

[187] In *X v UK* App No 5124/71 (19 July 1972, unreported) the applicant had been convicted of living on the immoral earnings of a prostitute. He complained of a violation of art 6(2) on the ground that the statutory provision under which he was convicted provided that 'a man who lives with or is habitually in the company of a prostitute ... shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary'. The Commission held that his complaint was manifestly ill-founded and stated in its decision:

'The statutory presumption in the present case is restrictively worded. It requires the prosecution to prove that the defendant "lives or is habitually in the company of a prostitute or ... (that he) exercises control, direction or influence over (her) movements in a way which shows he is aiding, abetting or compelling her prostitution". Only when this has been proved is it presumed that he is knowingly living on her earnings and he is then entitled to disprove the presumption. The presumption is neither irrebuttable nor

- a unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.'

In my opinion the reasoning of the Commission can be relied on by the Crown in this case. In the present case the statutory presumption is restrictively worded in that it requires the prosecution to prove that the defendant is in possession of the container containing the controlled drug and that the substance inside the container is, in fact, a controlled drug. Only when this is proved is it presumed that he knew that the substance was a controlled drug and he is then entitled to disprove the presumption. The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to prove that the defendant knew that the substance was a controlled drug in many cases would make it very difficult to obtain a conviction (a point to which I will refer in more detail in a later part of this speech).

- b
- c [188] In *AG v Malta* App No 16641/90 (10 December 1991, unreported) the applicant complained that he had been deprived of the presumption of innocence guaranteed by art 6(2) by a statutory provision which provided that a director of a company is presumed guilty of an offence committed by the company unless he
- d proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. The applicant brought an application before the Constitutional Court of Malta claiming that the provision was in conflict with the article of the Constitution of Malta which guaranteed the presumption of innocence. His application was
- e dismissed by the Constitutional Court and the European Commission also rejected his application and stated in its decision:

- f 'The Commission notes that in the present case the legislation provides that a director of a company is presumed guilty of an offence committed by the company unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. The applicant was therefore provided under the legislation with the possibility of exculpating himself. The Commission does not consider that the conditions, which required the applicant to prove that he had no actual knowledge of the offence and also was not negligent in his duties as an officer of a company, were self-contradictory or imposed an
- g irrebuttable presumption. The Commission further finds that the Maltese courts enjoyed a genuine freedom of assessment in this area and that there is no indication that art 13 of the 1975 Act was applied to the applicant in a manner incompatible with the presumption of innocence.'

- h [189] In a number of judgments the European Court has given guidance as to the extent to which a convention right may be qualified by national legislation and these judgments were considered by the Privy Council in *Brown v Stott* (*Procurator Fiscal, Dunfermline*) [2001] 2 All ER 97, [2001] 2 WLR 817. Lord Bingham of Cornhill stated:

- j 'The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within art 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the convention could have led to

the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history.' (See [2001] 2 All ER 97 at 115, [2001] 2 WLR 817 at 836.)

Lord Hope of Craighead stated:

'I would hold therefore that the jurisprudence of the European Court tells us that the questions that should be addressed when issues are raised about an alleged incompatibility with a right under art 6 of the convention are the following. (1) Is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) If it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) If so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised? The answer to the question whether the right is or is not absolute is to be found by examining the terms of the article in the light of the judgments of the court. The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual.' (See [2001] 2 All ER 97 at 130, [2001] 2 WLR 817 at 851.)

[190] Therefore in considering whether a rebuttable presumption of knowledge created by s 28(2) and (3) is compatible with art 6(2) a number of factors (which to some extent overlap) have to be considered: (1) *Is the presumption created by s 28(2) and (3) directed towards a clear and proper public objective?* In my opinion it clearly is. The taking of controlled drugs is a great social evil which causes widespread suffering and the possession of controlled drugs with intent to supply is a grave and frequently committed offence which ensures the continuation of this social evil. (2) *Is the creation of the presumption a reasonable measure for Parliament to take and is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?* In considering this matter it is necessary, as Lord Hope stated in *Brown v Stott*, to assess whether a fair balance has been struck between the general interest of the community and the personal rights of the individual. In my opinion the threat posed by drugs to the welfare of society is so grave and the difficulty in some cases of rebutting a defence that the defendant believed that he was carrying something other than drugs is so great that it was reasonable for Parliament to impose a persuasive burden as to lack of knowledge on a defendant. The question whether a fair balance has been struck depends in large measure on whether the creation of an evidential burden as opposed to a persuasive burden on a defendant would be adequate to remedy the problem with which s 28(2) and (3) were intended to deal. That problem can arise in the type of case where the Crown proves that a man was carrying a container such as a bag and that the bag contained a controlled drug, or where the Crown proves that tablets, which were a controlled drug, were on a table in the bedroom of the defendant's house and the defendant raises the defence that he believed that the object in the bag was a video film or that the tablets on the bedroom table were painkillers. In such cases it will often be very difficult to

- a prove guilt if the prosecution has to prove beyond a reasonable doubt that the defendant knew that the bag contained a controlled drug or that the tablets were a controlled drug.

[191] It is clear from the decisions of the European Commission in *X v UK* and *AG v Malta* that the difficulty of proving knowledge on the part of the defendant is one of the factors which can justify the creation of a presumption against a defendant, where the presumption is neither irrebuttable nor unreasonable.

- b [192] I am, with respect, unable to agree with the view that the problem of obtaining a conviction against a guilty person can be surmounted by imposing an evidential burden on the defendant. All that a defendant would have to do to discharge such a burden would be to adduce some evidence to raise the issue that he did not know that the article in the bag or the tablets on the table were a controlled drug, and the prosecution would then have to destroy that defence in such a manner as to leave in the jury's mind no reasonable doubt that the defendant knew that it was a controlled drug in the bag or on the table.
- c *Blackstone's Criminal Practice* (11th edn, 2001) p 1996 (para F3.7) states:

- d 'Although it is said ... that the evidential burden is on the defence, that burden will be discharged *whenever* there is sufficient evidence in relation to the defence to leave it to the jury ... it has been said that ... if there is a reasonable possibility on one interpretation of the evidence adduced that the accused may have that defence, the judge should put it to the jury (*R v Watson* [1992] Crim LR 434).'

- e In my opinion it would be easy for a defendant to raise the defence of lack of knowledge by an assertion in his police statement or by adducing evidence (which could be from a third person), and the Crown would then have to prove beyond a reasonable doubt that the defendant did have knowledge. Therefore I think that in a drugs case, in practice, there is little difference between the burden of proving knowledge resting throughout on the prosecution and requiring the defendant to raise the issue of knowledge before the burden of proof on that matter reverts to the prosecution.

- f [193] Support for the appellant's argument is to be found in the opinion of the Criminal Law Revision Committee in para 140 of its *Eleventh Report: Evidence (General)* (Cmnd 4991 (1972)) that 'both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only'. But in my opinion the threat of drugs to the well being of the community and the peculiar difficulty of proving knowledge in such cases justifies an exception to the general principle advocated by the Criminal Law Revision Committee, and this was clearly the view taken by Parliament in enacting ss 5 and 28 of the 1998 Act.
- g Moreover the transfer of the burden of proof as to knowledge in drugs cases has the powerful support of Lord Reid and Lord Pearce in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256 to which I later refer.

- h [194] The argument advanced against the imposition of a persuasive burden is that it creates the position that where a defendant fails to satisfy the jury on the balance of probabilities that he did not know he was carrying drugs, the jury will or may convict him notwithstanding that they have a reasonable doubt as to whether or not he had that knowledge. In theory there is force in this argument, but in my respectful opinion there is greater force in the commonsense view of Lord Pearce in *Sweet v Parsley* [1969] 1 All ER 347, [1970] AC 132 where the defendant was charged under s 5(b) of the Dangerous Drugs Act 1965 with being
- j

concerned in the management of premises used for the purpose of smoking cannabis resin. Lord Pearce said:

'Parliament might, of course, have taken what was conceded in argument to be a fair and sensible course. It could have said, in appropriate words, that a person is to be liable unless he proves that he had no knowledge or guilty mind. Admittedly, if the prosecution have to prove a defendant's knowledge beyond reasonable doubt, it may be easy for the guilty to escape. But it would be very much harder for the guilty to escape if the burden of disproving mens rea or knowledge is thrown on the defendant. And if that were done, innocent people could satisfy a jury of their innocence on a balance of probabilities. It has been said that a jury might be confused by the different nature of the onus of satisfying "beyond reasonable doubt" which the prosecution have to discharge and the onus "on a balance of probabilities" which lies on a defendant in proving that he had no knowledge or guilt. I do not believe that this would be so in this kind of case. Most people can easily understand rules that express in greater detail that which their own hearts and minds already feel to be fair and sensible.' (See [1969] 1 All ER 347 at 357, [1970] AC 132 at 157.)

In my opinion it is not unprincipled to have regard to practical realities where the issue relates to knowledge in a drugs case.

[195] Clayton and Tomlinson *The Law of Human Rights* (2000) vol 1, p 277 (para 6.37) state:

'Convention rights are expressed in broad and open textured language. This means that when construing the Human Rights Act, it will be both appropriate and inevitable that the English courts should put these broad concepts in context: by reflecting domestic legal and cultural values and traditions. Precisely because the Commission and the Court recognise an interpretative obligation to respect the primacy of domestic states in interpreting the scope and content of rights, the English courts will be afforded a margin of appreciation in developing a human rights jurisprudence to meet domestic conditions.'

At the heart of the present case is the concept of a fair trial which is enshrined in art 6. However the concept of a fair trial has been an integral part of the law of the United Kingdom long before it was set out in the convention. It is clear that 30 years ago members of this House considered that it was not unfair for Parliament to place a persuasive burden as to lack of knowledge on the defendant in a drugs case. In *Warner's* case the appellant was charged with an offence under s 1(1) of the Drugs (Prevention of Misuse) Act 1964 which provides:

'... it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless [being duly authorised] ...'

The prosecution proved that the appellant was driving a van in the back of which there was a case with a plastic bag containing 20,000 amphetamine sulphate tablets. His defence was that he believed that the case contained scent. The question certified by the Court of Appeal for the opinion of this House was:

'Whether for the purposes of s 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance

a when to his knowledge he is in physical possession of the substance but is unaware of its true nature.'

[196] In the course of their speeches the members of the House considered at length the issue which arises when such a defence is advanced in a drugs case. In the course of his speech Lord Pearce said:

b 'It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for their possession.'
c (See [1968] 2 All ER 356 at 390, [1969] 2 AC 256 at 307.)

Lord Reid also recognised that Parliament might think it right to transfer the onus of proof and said:

d 'In a case like this Parliament, if consulted, might think it right to transfer the onus of proof so that an accused would have to prove that he neither knew nor had any reason to suspect that he had a prohibited drug in his possession ...' (See [1968] 2 All ER 356 at 367, [1969] 2 AC 256 at 280.)

In *Sweet v Parsley* [1969] 1 All ER 347 at 350–351, [1970] AC 132 at 149 Lord Reid said:

e 'One must put oneself in the position of a legislator. It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing new legislation dealing with this class of offences, its silence as to mens rea means that the old practice is to apply. But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place, a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma. So he would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape. And equally important is the fact that, fortunately, the press in this country are vigilant to expose injustice, and every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and of its administration ... The choice would be much more difficult if there were no other way open than either mens rea in the full sense or an absolute offence; for there are many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that, on balance of probabilities, he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method; but one of the bad effects of the decision of this House in *Woolmington v Director of Public Prosecutions* ([1935] AC 462, [1935] All ER Rep 1) may have been to discourage its use.'

And in the passage of his speech which I have already cited Lord Pearce said:

‘Parliament might, of course, have taken what was conceded in argument to be a fair and sensible course. It could have said, in appropriate words, that a person is to be liable unless he proves that he had no knowledge or guilty mind.’ (See [1969] 1 All ER 347 at 357, [1970] AC 132 at 157.)

[197] My Lords, when judges of such eminence considered that transferring the burden of proof in relation to knowledge would not result in an unfair trial for the defendant, I consider that 30 years later when the problem has not changed there is no reason for this House to take a different view. Section 2 of the 1998 Act now requires the House in determining a question which has arisen in connection with a convention right to take into account judgments of the European Court and decisions of the European Commission, but in my opinion the judgments and decisions to which I have referred provide no basis for the view that under the jurisprudence of the European Court the transfer of the onus of proof as to knowledge in drugs cases would constitute a violation of art 6(2).

[198] Therefore my conclusion is that the difficulty in some cases of convicting those guilty of the crime of possession of a controlled drug with intent to supply, if the burden of proving knowledge beyond a reasonable doubt rests on the prosecution, is not resolved by placing an evidential burden on the defendant, and that it is necessary to impose a persuasive burden as s 28(2) and (3) do. I further consider that the transfer of the onus satisfies the test that it has a legitimate aim in the public interest and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Accordingly I am of the opinion that s 28(2) and (3) do not violate art 6(2) and I am in full agreement with the Court of Appeal on this issue.

Is there an infringement of art 6(2) if the appellant has suffered no injustice?

[199] However if, contrary to the view which I have taken, the imposition of the persuasive burden on the defendant in relation to knowledge constitutes an infringement of the presumption of innocence, a further issue arises for consideration. The case against the appellant was an extremely strong one and I agree with my noble and learned friend Lord Steyn that even if the judge had directed the jury on the basis that only an evidential burden rested on the appellant, the jury would have been bound to convict. Therefore the question arises whether, notwithstanding that the jury would have certainly convicted him on such a direction, it would be right for an appellate court to hold that there had been a violation of art 6(2) resulting in an unfair trial and that consequently the conviction was unsafe and must be quashed. One answer would be to hold that there would be a breach of art 6(2) if, on ordinary principles of construction, ss 5 and 28(2)(3) have the effect of imposing a persuasive burden, and that accordingly under s 3 of the 1998 Act those sections should be read and given effect in a way which is compatible with art 6(2), so that they impose only an evidential burden, and then to hold that a jury would have been bound to convict if they had been directed on the basis that only an evidential burden rested on the defendant with the result that the conviction was not unsafe.

[200] However I would take a different view and I would accept the second of the written propositions submitted by counsel for the appellant:

'Proposition 1

- a* In principle, a legal burden on the defendant to prove his defence under s 28 [of the 1971 Act] infringes art 6(2) because it is possible in such circumstances that the defendant may be convicted where there is a reasonable doubt as to his guilt.

Proposition 2

- b* If, on analysis of the facts, it is clear that a properly directed jury would inevitably have convicted, there is by definition no doubt as to guilt, notwithstanding the direction given, and therefore no actual breach of art 6(2) and, accordingly, the conviction is not unsafe under s 2 [of the Criminal Appeal Act 1995].'

- c* (My understanding is that counsel advanced this second proposition because their principal concern was to obtain a ruling of principle on the issues debated before the House.) On my reading of the European jurisprudence the European Court pays particular attention to the facts of the individual case before it and does not make a finding of a violation of art 6 if the applicant has suffered no injustice.

- d* [201] In *Hoang v France* (1992) 16 EHRR 53 at 78–80 (paras 32–34) where the court held that there was no violation of art 6, it stated (at 78–79 (para 33):

- e* 'As was pointed out in the *Salabiaku* judgment of 7 October 1988, Article 6 requires States to confine presumptions of fact or of law provided for in their criminal law within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. However, the Court is not called upon to consider in the abstract whether Articles 369(2), 373, 392(1) and 399 of the Customs Code conform to the Convention. Its task is to determine whether they were applied in the instant case in a manner compatible with the presumption of innocence and, more generally,
- f* with the concept of a fair trial.'

In *R v Togher* [2001] 3 All ER 463 at 472 (para 33) Lord Woolf CJ stated:

- g* 'The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance ... Fairness in both jurisdictions is not an abstract concept. Fairness is not concerned with technicalities. If a defendant has not had a fair trial and as a result of that injustice has occurred, it would be extremely unsatisfactory if the powers of this court were not wide enough to rectify that injustice.'

- h* In *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 115, [2001] 2 WLR 817 at 836 Lord Bingham of Cornhill stated:

- j* 'The general language of the convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur jus*.'

[202] There will be cases where a conviction cannot stand and must be quashed irrespective of the strength of the evidence against the defendant because the trial as a whole is judged to be unfair. But in my opinion in this case

where the unfairness is claimed to arise from the transfer of the onus and it was open to the appellant to seek to rebut the presumption, and where there can be no doubt that the jury would have convicted if only an evidential burden had rested on the appellant, then the imposition of a persuasive burden as to knowledge resulted in no injustice and accordingly, in my opinion, no breach of art 6(2). a

[203] For the reasons which I have given I would answer the first certified question in accordance with paras [183]–[185] of this speech, the second certified question No, and the third certified question No in relation to an alleged breach of his convention rights by the trial court and I would dismiss the appeal. b

Appeal dismissed.

Kate O'Hanlon Barrister.

a **Stirling v Leadenhall Residential 2 Ltd**
[2001] EWCA Civ 1011

COURT OF APPEAL, CIVIL DIVISION

JUDGE, LATHAM LJ AND LLOYD J

b 3 MAY, 29 JUNE 2001

Landlord and tenant – Tenancy – Creation – Assured tenancy – Tenant of premises held on assured tenancy falling into arrears of rent – Landlord obtaining order for possession together with payment of arrears and mesne profits – Tenant offering to pay off arrears in monthly instalments – Landlord accepting proposal and not enforcing order – Whether landlord's acceptance of tenant's proposal creating new assured tenancy – Housing Act 1988.

c

The defendant, S, had an assured periodic tenancy under the Housing Act 1988 at a rent equivalent to £411.66 per month. In June 1996 the landlord obtained an immediate order for possession on the mandatory ground of rent arrears. The order required S to give up possession on 19 July 1996 and to pay arrears of £2,832.63. It also provided that the landlord was at liberty to accept mesne profits at a rate of £411.66 per month until possession was given. On 8 July 1996, during an exchange of correspondence, the landlord's agent accepted an offer by S to repay the outstanding rent by monthly instalments of £100. Although the landlord did not apply to enforce the possession order on 19 July 1996, the tenancy ended on that date by virtue of the order. Nevertheless, S continued to enjoy exclusive possession of the premises, with the monthly sums of £411.66 being paid regularly by way of housing benefit and the payment of arrears continuing sporadically. In March 1998, the landlord notified S of an increase of rent from £411.66 to £433 per month. It was accepted that that increase created a new tenancy, but if no new tenancy had been created before then, it would only have been an assured shorthold tenancy. In contrast, a new tenancy in July 1996 would have been an assured tenancy. Such a tenancy gave a tenant a greater degree of protection than an assured shorthold tenancy. In October 1999 the landlord brought fresh proceedings for possession. In those proceedings, S contended that the agreement in July 1996 had created a new assured tenancy, and that accordingly possession could be obtained only by means of the procedure appropriate to such a tenancy. The deputy district judge granted an order for possession, holding that the dealings in July 1996 had not been intended to create legal relations and that the correspondence amounted to no more than an agreement for the payment of the arrears for which a money judgment already existed. Following the dismissal of his appeal by the judge, S appealed to the Court of Appeal, contending that parties had agreed in July 1996 that he should continue to have exclusive possession of the premises after 19 July in return for monthly payments, and that that had the effect of giving him a new tenancy, regardless of the parties' actual understanding or intentions.

d

e

f

g

h

j

Held – Where the landlord of premises let on an assured tenancy under the 1988 Act had obtained a judgment for arrears of rent and an order for possession permitting him to accept payments from that tenant by way of mesne profits until possession was given, no new tenancy was created merely because the landlord had accepted a proposal by the tenant to pay regular amounts towards the money

judgment and, impliedly, had agreed not to enforce the order in the meantime if the payments for occupation were also kept up. There was no real distinction between such a case and one in which the landlord did nothing but accept payments from the former tenant by way of mesne profits, at the rate set out in the order, and towards the arrears, and refrained from enforcing the order. 'Mesne profits' was no more than the name given to damages for trespass where the trespasser used to be a tenant. The receipt of such profits could not be relied on by itself to say that the former tenant was no longer a trespasser paying damages for trespass, but rather a tenant paying rent. Thus, in the instant case, without the exchange of letters in July 1996, S would clearly have continued as a trespasser, at risk of being turned out on the issue of a warrant, but in practice able to expect that, so long as payments were made, he would be allowed to stay. It was therefore necessary to determine whether, by what had passed between them in July 1996, the parties had intended to affect the legal relations which already governed the position between them by way of the order. No new or different terms had been reached as regards the terms on which S was to remain in occupation. He was to go on paying for his occupation at the same rate. The only point dealt with expressly was the rate at which he would pay off the arrears. Thus the exchange of letters in July 1996 had not been intended to affect, and had not affected, the legal relations between the parties which were at that time, and continued to be, governed by the terms of the order. That remained so until the landlord took a position inconsistent with the order, by seeking and obtaining from S an increase in the monthly payment for use and occupation. Only from that point had the legal relations between the parties been affected. Accordingly, the appeal would be dismissed (see [26], [29], [31]–[33], [35], [36], [47], [49], [54]–[56], below).

Burrows v Brent London BC [1996] 4 All ER 577 distinguished.

Street v Mountford [1985] 2 All ER 289 considered.

Notes

For mesne profits and for the recovery of possession of properties held on assured tenancies, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 258, 951.

For the Housing Act 1988, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 1053.

Cases referred to in judgments

Booker v Palmer [1942] 2 All ER 674, CA.

Burrows v Brent London BC [1996] 4 All ER 577, [1996] 1 WLR 1448, HL; *rvsg* (1995) 27 HLR 748, CA.

Capital Prime Plus plc v Wills (1998) 31 HLR 926, CA.

Errington v Errington [1952] 1 All ER 149, [1952] 1 KB 290, CA.

Greenwich London BC v Regan (1996) 28 HLR 469, CA.

Javad v Aqil [1991] 1 All ER 243, [1991] 1 WLR 1007, CA.

Longrigg, Burrough & Trounson v Smith [1979] 2 EGLR 42, CA.

Marcroft Wagons Ltd v Smith [1951] 2 All ER 271, [1951] 2 KB 496, CA.

Murray, Bull & Co Ltd v Murray [1952] 2 All ER 1079, [1953] 1 QB 211.

Street v Mountford [1985] 2 All ER 289, [1985] AC 809, [1985] 2 WLR 877, HL; *rvsg* (1985) 49 P & CR 324, CA.

Case also cited or referred to in skeleton arguments

Facchini v Bryson [1952] 1 TLR 1386, CA.

Appeal

- a The defendant, William Watson Stirling, the occupant of a residential property known as 2 Linford Court, 14 Appleton Square, Mitcham, Surrey, appealed with the permission of Sir Murray Stuart-Smith given on 1 February 2001 from the decision of Judge Coningsby QC at Croydon County Court on 26 October 2000 dismissing his appeal from the order of Deputy District Judge Turner on 18 April 2000 requiring him to give possession of the property to the claimant freeholder, Leadenhall Residential 2 Ltd. The facts are set out in the judgment of Lloyd J.

Jan Luba QC and Alison Rowley (instructed by Stanfords) for Mr Stirling.

Paul Morgan QC and Nicholas Allen (instructed by Henriques Griffiths, Bristol) for Leadenhall.

Cur adv vult

29 June 2001. The following judgments were delivered.

- d **LLOYD J** (giving the first judgment at the invitation of Judge LJ).

[1] This appeal raises a point of importance to landlords and tenants under the Housing Act 1988 in relation to circumstances which must occur very frequently. The defendant, Mr Stirling, was a tenant under an assured tenancy. He got into arrears and his landlord brought proceedings for possession. An order for possession was obtained on the basis of those arrears, the ground relied on being one of those under which the court has no discretion to refuse an order or to suspend or postpone its effect. Mr Stirling was required to give up possession on 19 July 1996. Shortly before that date he offered to pay off the arrears at £100 per month, and the landlord agreed to that proposal. It is now said, for Mr Stirling, that this agreement constituted the creation of a new assured tenancy, and that possession can only be obtained by going through the procedure appropriate to such a tenancy. The deputy district judge held otherwise, as did the circuit judge on appeal. The general importance of the point justifies this second appeal.

The facts

- g [2] Mr Stirling took a tenancy of 2 Linford Court, 14 Appleton Square, Mitcham, Surrey on 7 February 1994, for a year, at £4,940 per year, equivalent to £411.66 per month. His landlord was a different company from the present respondent, Leadenhall Residential 2 Ltd (Leadenhall), but nothing turns on the identity of the particular freeholder, and I will refer to Leadenhall as if it had been the reversioner throughout. The tenancy was an assured tenancy under Ch I of the 1988 Act. He remained in possession after the year had expired, and thus acquired a statutory assured periodic tenancy (see s 5). He was already in arrears of rent. Notice was served under s 8 of the 1988 Act that the landlord would seek possession, referring to both mandatory and discretionary grounds. In May 1996 possession proceedings were commenced, relying on both mandatory and discretionary grounds. On 21 June 1996 an immediate order for possession was made, requiring Mr Stirling to give up possession on 19 July 1996, and to pay arrears of £2,832.63. By a later amendment under the slip rule, it also provides that the claimant be 'at liberty to accept mesne profits at the rate of £411.66 per month until possession is given'. The order is in the prescribed form and does not record on which ground it was made, nor does it make that clear, for example, by

recording that the court was satisfied that it was reasonable to make the order. The order was in fact made on the mandatory ground. a

[3] Mr Stirling wrote a letter to the landlord dated 4 July 1996 which is not in evidence. On 8 July Leadenhall's agent replied as follows:

'I refer to your letter dated 4th July 1996 sent to Ross McLaren regarding your repayment plan of outstanding rent amounting to £2643.45 as at end of June 1996. I would confirm that your offer to pay £100 per month is accepted by your Landlord and by ourselves. I look forward to hearing from you and receiving your first payment of £100.'

b

[4] Leadenhall did not apply to enforce the possession order on 19 July 1996. It did so apply in August when Mr Stirling had not paid the first £100, but the warrant which had been issued was then withdrawn, and payment of the arrears began. It continued rather sporadically. The £411.66 was being paid regularly by way of housing benefit. In June 1997 when four monthly payments of £100 had been missed, the landlord's agent wrote referring to £400 as being 'rent in arrears', threatening enforcement proceedings, but again Mr Stirling managed to save the day with a payment. In March 1998 the landlord notified an increase of rent from £411.66 to £433 per month. Later, in January 1999 there was a further increase. It is accepted that the increase in March 1998 created a new tenancy, but if a new tenancy was not created until that date, then it was an assured shorthold tenancy and does not afford the same degree of protection for the tenant as does an assured tenancy. A new tenancy in July 1996 would have been an assured tenancy. In March 1999, on the grounds of further arrears, Leadenhall issued a warrant for possession. Mr Stirling applied to have the warrant set aside, and succeeded on the basis that the order for possession made in 1996 had been superseded by a new tenancy. The judge did not have to decide when the new tenancy came into being. In July 1999 Leadenhall gave a new notice that it would seek possession, and brought these proceedings in October 1999. On 18 April 2000 Deputy District Judge Turner delivered a written judgment and made an order for possession to be given on 2 May 2000. Mr Stirling appealed, and on 26 October 2000 Judge Coningsby QC heard the appeal, gave judgment dismissing the appeal, and ordered that possession be given by 15 November 2000. The effect of the possession order had been stayed until then and is still stayed pending this further appeal. c
d
e
f
g

[5] There was no dispute of fact before Deputy District Judge Turner, and so far as I can gather no oral evidence at all, the matter proceeding on the documents, and above all on the letter of 8 July 1996. He held that the dealings in July 1996 were not intended to create legal relations at all, and that the letter amounted to no more than an agreement for the payment of the arrears for which a money judgment already existed (see para 3.9 of his reserved judgment). On appeal, Judge Coningsby viewed what took place in July 1996 as amounting to an agreement that, if the tenant paid the £100 per month and the £411.66 each month as well, the landlord would not apply for a warrant of possession to enforce the order. The letter says nothing about either the £411.66 or the enforcement of the order. He analysed the position somewhat differently from the deputy district judge, and said that it was not a tenancy, but was an arrangement for Mr Stirling to stay on as a non-tenant against whom Leadenhall would not enforce the possession order if he paid off the arrears and kept up payment of the current rent in accordance with his offer. He held that this was a h
j

a relationship which could exist legally without constituting a tenancy, that it was not a licence, but was like a licence, and was a conditional right of occupation.

[6] Mr Luba QC submits that the parties agreed in July 1996 that Mr Stirling should continue to have exclusive possession of the premises after 19 July 1996 in return for monthly payments, and that this has the effect of giving Mr Stirling a new tenancy, regardless of the parties' actual understanding or intentions. If that is correct, landlords who have the benefit of a possession order on a mandatory ground act at their peril if they show any indulgence to the tenant after the date on which he is bound to give up possession. That is a conclusion to which the court would be reluctant to come, but he submits that we have no choice.

The Housing Act 1988

c [7] Assured tenancies are governed by the 1988 Act, Ch I. Under s 5 an assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the court. By s 7, the court may only make an order for possession, if the dwelling is let on an assured tenancy, on one of the grounds set out in Sch 2 to that Act; if a ground set out in Pt I of the Schedule is made out the court has no discretion not to make an order, whereas on the grounds set out in Pt II the court may make an order if it considers it reasonable to do so. Under s 7(7) a statutory periodic tenancy such as Mr Stirling had in June 1996 comes to an end on the day on which the possession order takes effect. Section 8 requires the landlord to give notice before proceedings are started. Section 9 gives the court power to adjourn possession proceedings for such period as it thinks fit and, if it makes a possession order, also gives it power, either on making the order or afterwards at any time before execution, to stay or suspend that order or to postpone the date for possession. However, s 9(6) provides that none of these discretionary relieving powers apply if the court is satisfied that the landlord is entitled to possession on any of the mandatory grounds for possession in Pt I of Sch 2, or if the tenancy is an assured shorthold tenancy under s 21. The mandatory grounds in Pt I of Sch 2 include ground 8, relating to given minimum arrears of rent. The discretionary grounds in Pt II include grounds 10 and 11 which relate to arrears of rent.

Burrows v Brent London BC

g [8] Tenancies of dwellings belonging to local authorities, and some other social landlords, are not assured tenancies but secure tenancies, under Pt IV of the Housing Act 1985. A licence to occupy a dwelling-house given by such a landlord is also a secure tenancy (see s 79(3)). Such a tenancy cannot be brought to an end by the landlord without an order for possession (see s 82(1)). If an order is made, the tenancy comes to an end on the date on which the tenant is to give up possession under the order. The grounds on which the court may make an order are set out in Sch 2 to the 1985 Act, and they include grounds which are discretionary, depending on whether the court thinks it reasonable to make the order, or on whether the court thinks it reasonable to make the order and is also satisfied that there will be reasonable alternative accommodation available for the tenant, and mandatory grounds, which depend only on the court being satisfied as to suitable alternative accommodation. Section 85 of the 1985 Act gives the court discretionary relieving powers of adjournment of the proceedings, and staying or suspending the order or postponing the date for possession, very similar to those which exist under s 9(1) and (2) of the 1988 Act. As in that case, however, these powers do not apply where the order is sought or made on the mandatory grounds requiring only that alternative accommodation be available.

[9] The London Borough of Brent entered into a tenancy agreement with a Mr Allen and his wife Miss Burrows. Mr Allen then left his wife and the property. Some years later the council obtained an order for possession on the grounds of arrears of rent, requiring Miss Burrows to give up possession on 12 February 1992. Before that date, however, she and the council made an agreement under which she was allowed to remain in possession so long as she paid a sum equivalent to the rent and an agreed regular sum towards the arrears. This agreement was recorded in writing in a document signed by Miss Burrows which acknowledged her arrears and included the following: 'I agree to pay the rent charge of £2.67 due every week and, in addition, to reduce the arrears by regular instalments of £3.00 per week.' (See *Burrows v Brent London BC* [1996] 4 All ER 577 at 579, [1996] 1 WLR 1448 at 1450.)

[10] The amounts payable and paid were documented by the council as if they were rent, and were increased successively in April 1992, 1993 and 1994 in accordance with its general rental policy. Later Miss Burrows again fell into arrears and the council issued and enforced a warrant for possession. Miss Burrows started proceedings to be let back into the property, on the basis that the agreement in February 1992 had created a new secure tenancy, and that if she was to be evicted for arrears the requisite procedure had to be gone through from the start. At trial the judge found for Miss Burrows and the council appealed. In the Court of Appeal ((1995) 27 HLR 748) it was submitted for the council that the agreement in February 1992 was not intended to give Miss Burrows exclusive possession of the property, but only amounted to a forbearance from executing the warrant as long as she complied with the terms of the agreement, giving her the status of a tolerated trespasser, merely postponing the date on which possession would be enforced. For Miss Burrows it was submitted that, after the date on which she was ordered to give possession, her occupation could only be that of a trespasser liable to pay mesne profits unless and until the council either executed the order by means of a warrant for possession, or granted her a new tenancy or licence to stay, and that the agreement in February 1992 gave her the right to remain in exclusive occupation of the property at a rent, and necessarily amounted to the grant of a new tenancy as of the date when her former tenancy came to an end.

[11] Auld LJ said that the concept of a tolerated trespasser might be possible in a holding-over case, but that it could have no possible application to the circumstances of that case, where the landlord entitled to possession under an order taking effect in a few days had expressly agreed with the tenant that she might continue to live in the property for an indefinite period provided that she paid rent and a regular payment in reduction of arrears of rent. He held ((1995) 27 HLR 748 at 755) that the effect of the agreement was to give her a new lease or licence to occupy the property, it not being necessary to decide which, because of s 79(3) of the 1985 Act. The Court of Appeal therefore dismissed the council's appeal.

[12] The council appealed to the House of Lords ([1996] 4 All ER 577, [1996] 1 WLR 1448). A new point was taken, based on s 85(2) of the 1985 Act, prompted by the decision of the Court of Appeal in *Greenwich London BC v Regan* (1996) 28 HLR 469. The House of Lords held that since the order could have been suspended or stayed, or the date for possession postponed, so as to give effect to the agreement between the parties on the basis of which Miss Burrows remained in possession, it remained possible, by such an order, to revive the original secure tenancy at any time up to the moment which possession was enforced.

- a Accordingly, it was not necessary or appropriate to infer the creation of a new tenancy or licence in order to explain the agreement reached in February 1992. The retention of possession and payment of rent remained attributable to the former tenancy which was in limbo but which might be revived, the former tenant being fairly described as a tolerated trespasser whom the landlord has agreed not to evict pending either the revival of the old tenancy or the breach of the agreed conditions. If and so long as the former tenant complied with the conditions, he or she could at any time apply back to the court and obtain a postponement of the possession date so as to reinstate the old tenancy (see [1996] 4 All ER 577 at 583–584, [1996] 1 WLR 1448 at 1455 per Lord Browne-Wilkinson). On that basis, the House of Lords allowed the council's appeal. Lord Browne-Wilkinson made clear ([1996] 4 All ER 577 at 583, [1996] 1 WLR 1448 at 1454) that
- c a factor which influenced him strongly was the desirability of enabling local authority landlords to deal humanely and reasonably with their tenants, so that they can grant an indulgence to them without being subject to adverse consequences, which would deter them from behaving sensibly and reasonably towards tenants who, having become subject to a possession order, are able to
- d make sensible and acceptable proposals for payment under which they ought to be allowed to remain in possession. Lord Browne-Wilkinson did, however, say ([1996] 4 All ER 577 at 581, [1996] 1 WLR 1448 at 1452) that, on the case as put to the Court of Appeal, the conclusion they reached in favour of Miss Burrows was inevitable.

- e [13] Mr Luba relies strongly on that proposition, namely that the only thing that enabled the court to find in favour of the London Borough of Brent was s 85(2) of the 1985 Act. He points out that, although there is an equivalent provision in the 1988 Act, it does not apply here, because of s 9(6) of that Act. Therefore, he submits, the answer in the present case must be the same as the Court of Appeal came to in *Burrows'* case, in favour of Mr Stirling. He does accept
- f that there is one other difference in the relevant legislation. Under the 1985 Act it does not matter whether the new arrangement or agreement amounts to a tenancy or a licence, because of s 79(3) of the 1985 Act. Under the 1988 Act it does matter, because only if there is a new tenancy does it amount to an assured tenancy giving Mr Stirling the protection of a new tenancy as of July 1996. He goes on to submit that, in the circumstances, the new arrangement cannot have been other
- g than a tenancy. This depends on the nature of the dealings between the parties in July 1996, but before I examine that, it is right to summarise the general law as regards the basis of arrangements under which one person has exclusive occupation of another's property and pays for that occupation.

h *Licence or tenancy: the general law*

- j [14] Mr Luba submits that there are, relevantly, only three possibilities where one person, A, is the owner of land and another, B, is in occupation of that land. If B is there without the consent of A he is a trespasser. If he is there with consent, then either that consent amounts to the creation of a tenancy, in which case he is a tenant, or it does not, in which case he is a licensee. He further submits that, if B has exclusive possession of the premises for a term or on a periodic basis and is paying money for his occupation, then he is a tenant, unless special circumstances exist, and that this is the case whether or not the parties intend that a tenancy should exist, or realise that it does, and regardless of what label the parties may put on the transaction. For this he relies principally on *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809.

[15] That case was concerned with a fully expressed written agreement, described as a licence agreement, whereby A granted to B the right to occupy two rooms at a weekly payment subject to 14 days' notice, and which gave B exclusive occupation of the rooms. Later, A sought to establish that the agreement did not create a tenancy, since if it did then B would have the protection of the Rent Acts. The Court of Appeal ((1985) 49 P & CR 324) held in favour of A but the House of Lords allowed B's appeal. Lord Templeman gave the only full speech. He reviewed both older and more recent cases on the distinction between licences and tenancies. The case establishes clearly the irrelevance of the parties' intentions, understanding or even express declaration as regards the effect of the agreement which they enter into. It takes as the most critical test whether B has exclusive possession of the premises. It recognises that there are some cases where, despite B having exclusive possession, the parties did not intend to create legal relations at all: one example is a case of pure charity, as in *Booker v Palmer* [1942] 2 All ER 674. It recognises that there are cases where the agreement involves the provision of service or attendance by A, so that B is only a lodger. That is not a term of art, but it is a convenient label for a licensee in particular circumstances. It also recognises that there are some special cases, including service occupiers, to which I will come. But subject to those points, the case states unequivocally that if residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor service, the grant is a tenancy (see [1985] 2 All ER 289 at 293, [1985] AC 809 at 818).

[16] Among the cases reviewed by Lord Templeman was *Murray, Bull & Co Ltd v Murray* [1952] 2 All ER 1079, [1953] 1 QB 211. There a company had granted a tenancy to its managing director of a flat which provided direct access to the company's business premises, but this was not by way of a service occupancy. The tenancy came to an end, as did the tenant's employment, but he was allowed to stay on for a time, paying rent but on the express basis that this was not to constitute a tenancy. It was held that this intention was effective to prevent a tenancy arising, but Lord Templeman held that the decision was wrong. He said ([1985] 2 All ER 289 at 297, [1985] AC 809 at 822) that the parties showed an intention to contract and there were 'no relevant special circumstances'.

[17] Another case considered by Lord Templeman, *Marcroft Wagons Ltd v Smith* [1951] 2 All ER 271, [1951] 2 KB 496, provides an instructive comparison with the present case. There, a house had been occupied by a Mr Aris as a statutory tenant under the Rent Acts. He died and his widow succeeded to the statutory tenancy, and lived on in the house with her daughter. The widow then died. The daughter asked that the tenancy be transferred into her name. The landlord's agent refused to do that, saying that the landlord would want the premises for an employee, but did not require the daughter to leave, and accepted from her a sum equivalent to two weeks' rent, and she remained in occupation paying thereafter the equivalent of the weekly rent. The landlord did not seek possession until six months had gone by. The county court judge held that this did not create a tenancy, but only a licence, and the Court of Appeal held that this was a finding which was open to him on the evidence. It was relevant that, when the widow died, it was not clear whether her husband had become a statutory tenant before his death: if he had not, then the daughter would have had statutory succession rights. The court held that he had, but considered that this question was a further reason why allowing the daughter to remain in possession for a while did not lead to the creation of a tenancy. Evershed MR said:

a 'There is no doubt that the intricacies of modern life, as reflected in the rent
restrictions legislation, have made, in many respects, the relationship between
landlords and tenants sometimes assume an artificial, and, indeed, unfriendly,
character which is somewhat to be deplored. In particular, landlords, who
b may have ordinary human instincts of kindness and courtesy, may often be
afraid to allow to a tenant the benefit of those natural instincts in case it may
afterwards turn out that the tenant has thereby acquired a position from
which he cannot subsequently be dislodged. In the general interest it may be
c necessary that the relationship should have to assume a much more formal
character than would otherwise be necessary. Nevertheless, I should be
extremely sorry if anything which fell from this court were to have the result
that a landlord could never grant to a person in the position of the defendant
any kind of indulgence, particularly in the circumstances which existed in
March, 1950, when the defendant lost her mother. It seems to me that it
d would be quite shocking if, because a landlord allowed a condition of affairs
to remain undisturbed for some short period of time, the law would have to
infer therefrom that a relationship had arisen which made it impossible
thereafter for the landlord to recover possession of the property when,
admittedly, by taking proper measures from the start he could have got
possession.' (See [1951] 2 All ER 271 at 274, [1951] 2 KB 496 at 501.)

[18] On the facts of the case the court was troubled as to whether it was
possible to hold that the position was and remained only a licence when the
e landlord allowed the defendant to remain in possession, paying the weekly sums,
for six months, whereas it would have had no such difficulty if she had been
allowed to stay for only a few weeks. It held, on balance and with some hesitation,
that the period of six months was consistent with the position remaining a licence,
so that the defendant had no defence to the claim for possession. In *Street v*
f *Mountford* [1985] 2 All ER 289 at 295, [1985] AC 809 at 820 Lord Templeman treats
this as a case in which the parties did not intend to contract at all.

[19] Lord Templeman recognised that there might be special circumstances
such that the arrangement between the parties could not be regarded as constituting
a tenancy. He mentioned a number of examples himself, and also referred on this
point to *Errington v Errington* [1952] 1 All ER 149, [1952] 1 KB 290 and some later
g cases. In *Errington v Errington* Denning LJ referred to a number of special cases
where a tenancy had been held not to arise despite the occupier having exclusive
possession in return for payment. These included the *Marcroft Wagons* case,
described above, and otherwise were as follows: a case of a requisitioning
authority (which had no estate in the land out of which to grant a tenancy)
h allowing people into possession in return for a weekly payment, a case where a
landlord told a tenant on his retirement that he could live in a cottage rent free
for the rest of his life, and a case where the owner of a shop allowed (but did not
require) its manager to live in a flat above the shop and took the value of the
occupation into account in fixing his wages. He summarised the position ([1952]
j 1 All ER 149 at 155, [1952] 1 KB 290 at 298) by saying that letting someone in on
the basis of exclusive possession normally shows the arrangement to be a
tenancy, but that will not be so if the circumstances negative any intention to
create a tenancy. That contrary intention cannot be an intention that something
which, on correct legal analysis, is a tenancy should be treated as if it were
something else. The intention has to relate to the substance of the transaction,
not to its label.

[20] In *Street v Mountford* Lord Templeman referred to cases of lodgers, service occupiers, and vendor and purchaser where the purchaser is allowed into the property before completion. He said: 'Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy.' (See [1985] 2 All ER 289 at 300, [1985] AC 809 at 826–827.) a

[21] Lord Templeman also said ([1985] 2 All ER 289 at 294–295, [1985] AC 809 at 819) that the statutory regime of the Rent Acts was irrelevant to the problem of determining the legal effect of the rights granted by the agreement at issue in that case. b

[22] We were shown one case decided since *Street v Mountford*, namely *Javad v Aqil* [1991] 1 All ER 243, [1991] 1 WLR 1007. That was an odd case, in which, for reasons to do with the pleadings, it was not argued that the occupation was under a licence, but the owner of the property succeeded in establishing that the occupation was under a tenancy at will. The occupant was allowed in pending negotiations for a lease, and paid three instalments of rent on a quarterly basis, but the negotiations broke down and the landlord sought possession. Thus, if the case had been argued on the basis of a licence, it may have been possible to justify such a contention by saying that the explanation for the giving of possession lay not in any existing agreement which might constitute a tenancy, but in the current negotiations. I do not find that case helpful in resolving the issue before us. c d

[23] Thus, there is no defined list of special cases in which a person who is let into, or allowed to remain in, another's property, with exclusive possession and paying for his occupation, may be a licensee rather than a tenant. There are certain recognised categories, such as service occupiers and lodgers, but otherwise it depends on finding either that there is no intention to contract at all, or that the circumstances are such as to justify attributing the possession to something quite distinct from a tenancy. The question is whether either of those findings is correct in the present circumstances. e f

Licence, tenancy or trespass: the facts

[24] Here Mr Stirling was a tenant on 8 July 1996 at the time when the landlord accepted his proposal. The arrangement undoubtedly contemplated that he would remain in exclusive possession of the premises of which he was (up to 19 July 1996) the tenant, and that he would go on paying the same amount for his occupation as had been being paid by way of rent, as well as regular sums towards the accrued arrears. To all outward appearance, the position remained the same as it had been before the possession order was made, apart from the fact of that order itself. Undoubtedly the original assured tenancy came to an end on 19 July 1996 as a result of the order, and was not capable of being revived, as it could have been if it had been made on a discretionary ground. Mr Luba submits that it is not open to the court to find anything other than that Mr Stirling remained in possession after 19 July 1996 under a new tenancy. g h

[25] Mr Morgan QC, for Leadenhall, submitted that this would be an absurd result to suppose that the parties had intended, and a highly unsatisfactory result to achieve in general. It would mean that the landlord, who could throw the tenant out on or after 20 July 1996 by obtaining a warrant of possession, and who was entitled, until possession was given, to receive £411.66 per month by way of mesne profits, lost the benefit of the possession order at once, by doing no more than agreeing to a proposal as to the payment of the arrears by instalments, for which it had a money judgment, and, by implication, agreeing not to enforce the j

a possession order while payments were kept up. If Mr Luba is right, and the tenant thereafter neglected to pay the sum due in respect of his occupation of the premises, Leadenhall would have to give a fresh notice under s 8 of the 1988 Act, and then start new proceedings, facing therefore additional cost and additional delay.

[26] Mr Morgan submitted, in my judgment rightly, that, if the exchange of letters in July 1996 had not taken place, and if Mr Stirling had continued to pay (by way of housing benefit) the £411.66 per month and had made payments towards the money judgment, either regularly or sporadically, and if Leadenhall had simply refrained from issuing a warrant to obtain possession, the present argument could not have been run. Nothing that Leadenhall had done could be said to have amounted to agreeing to any new tenancy, and the parties' rights and obligations would be governed by the order. Mesne profits is no more than the name given to damages for trespass by unlawful occupation of land where the trespasser used to be a tenant. Thus by the terms of the order, as corrected, and as quoted at [2], above, Leadenhall was free to receive from Mr Stirling £411.66 each month as damages for trespass, and the receipt of those sums month by month cannot be relied on by itself to say that Mr Stirling was no longer a trespasser paying damages for trespass but rather a tenant paying rent. Without the exchange of letters in July 1996, Mr Stirling would clearly have continued as a trespasser, at risk of being turned out on the issue of a warrant, but in practice able to expect that, so long as payments were made, he would be allowed to stay. How, then, can it be said that, merely by accepting a proposal to pay regular amounts towards the money judgment and, impliedly, agreeing not to enforce the order in the meantime, if the payments for occupation were also kept up, the landlord has altered the position fundamentally?

[27] Both counsel made submissions based on anomaly as regards the position in which the parties would be if there were no new tenancy. Mr Morgan's main submission was that referred to in the previous paragraph, as to the absurdity of the consequences for Leadenhall of having been found to have agreed a new tenancy. Mr Luba's answer to the submission that it is undesirable to put landlords in a position in which they cannot be indulgent to tenants, or not without severe risk to their own interests, was to point out that landlords have an alternative course which does not expose them to this sort of dilemma. They can seek an order on a discretionary, rather than the mandatory, ground, in which case an arrangement such as was made in the present case, or in *Burrows v Brent London BC* [1996] 4 All ER 577, [1996] 1 WLR 1448, is explicable in law without the creation of a new tenancy, on the analysis of the House of Lords in *Burrows'* case. Of course, if they do that, the court also has more flexibility as to whether, and if so when and on what terms, to make a possession order.

[28] Mr Luba's submissions as to anomaly focused on Mr Stirling's position. In particular he pointed out that Mr Stirling would have no right to compel Leadenhall to carry out any obligations, such as of repair, to which it would have been subject under the previous assured tenancy, and would have no rights against the owner of the property under the Defective Premises Act 1972, though he did accept that a contractual licensee has such rights and even a trespasser would have rights under the Occupiers' Liability Act 1984. He also submitted that, if the correct analysis were a contractual licence, Leadenhall would have no contractual right to possession except on the basis of non-payment of rent or of the periodical sum towards the arrears. He posed the questions whether, as a trespasser in possession pending execution of the order, Mr Stirling would have a

home for the purposes of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998), and who would be the occupier for council tax purposes.

[29] I see the force of Mr Luba's submissions based on *Street v Mountford*, and I see that on Mr Morgan's argument there are anomalies in Mr Stirling's position, though there are also difficulties consequent on Mr Luba's submissions. It seems to me, however, that the issue which has first to be addressed is whether, by what passed between the parties, they did indeed intend to create legal relations, or rather to affect the legal relations which already governed the position between them by way of the order. Lord Templeman's speech in *Street v Mountford* recognises that this is the first question. Usually the answer will be clear in a case where what is at issue is the arrangement under which B is let into possession of A's property in the first place. Often it will be clear in a holding-over case, but there is more scope for doubt in such cases, where the parties' relations are, or at any rate have been, governed by one set of rights and obligations, but these have come to an end. In *Burrows'* case, but for s 85(2) of the 1985 Act, the position would have been clear because of the terms of the written agreement entered into by Miss Burrows and the council providing for her to pay rent and a sum towards the arrears, not to mention the subsequent increases in the rent she had to pay. In the present case the position is a good deal less clear, because what was done was not formally documented.

[30] If no new arrangement had been come to between Mr Stirling and Leadenhall after the date of the order on 21 June 1996, then, when he was allowed to and did remain in possession after 19 July, he was a trespasser, liable to pay Leadenhall at the rate of £411.66 per month by way of mesne profits for his occupation of the property, and also liable to pay it £2,832.63 arrears. Leadenhall could have executed the order by obtaining and enforcing a warrant at any time within six years, but did not have to do so. That situation could have continued for several years, if nothing was done to alter it. Thus, in *Capital Prime Plus plc v Wills* (1998) 31 HLR 926 at 935, Simon Brown LJ said: '[A landlord] can of course obtain an immediate order under Ground 8 and then simply not follow it up, depending no doubt on whether the tenant pays the arrears outstanding.'

[31] The first question is whether what was said in July 1996 was intended to alter the relations between the parties so that they should be governed by a new agreement rather than by the order. No new or different terms were come to, as regards the terms on which Mr Stirling was to remain in occupation. He was to go on paying for his occupation at the same rate. The only point dealt with expressly was the rate at which he would pay off the arrears. I can see the force of Mr Luba's criticisms of Judge Coningsby's approach. If there was a new contractual arrangement under which, after 19 July 1996, Mr Stirling had the benefit of exclusive possession of the property for an indefinite period in return for payment, it would be hard to categorise that as anything other than a tenancy, in the light of *Street v Mountford*. However, I am impressed by Mr Morgan's submission as to the artificiality of distinguishing what happened in the present case from a case where the landlord does nothing except to accept payments from the former tenant by way of mesne profits, at the rate set out in the order, and towards the arrears, and refrains from enforcing the order. The content of the suggested new contract in the present case is very much more limited than the express agreement entered into in *Burrows'* case. In my judgment, this is a quite different case from *Burrows'* case on the facts. In agreement with the deputy

- a district judge, I consider the correct analysis of the relevant events to be that the exchange of letters of 4 July and 8 July 1996 was not intended to, and did not, affect the legal relations between the parties which were then, and continued to be, governed by the terms of the order. That remained so until Leadenhall took a position inconsistent with the order, by seeking from Mr Stirling, and obtaining, an increase in the monthly payment for use and occupation. The increased
- b payment could not be justified by reference to the order, and therefore had to be analysed on a different legal basis. It is not disputed, and could not be, that this created a new tenancy. From then on, the legal relations between the parties were affected. In my judgment, until then they were not.

[32] I would therefore dismiss this appeal.

c **LATHAM LJ.**

- [33] I agree. As is so often the case, the facts are all important. Lloyd J has set them out at [2]–[4] of his judgment. It is to be noted that there is no evidence that anything was said, either before or at the time of the order for possession, as to either parties' attitude to the consequences of the order; nor was there any
- d evidence as to what was said thereafter either orally or in writing on that subject apart from the landlord's agents' letters of July 1996 and June 1997.

- [34] It seems to me that the decisions of the House of Lords in *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809 and *Burrows v Brent London BC* [1996] 4 All ER 577, [1996] 1 WLR 1448 establish the following propositions which are
- e binding upon us. Firstly, if by contract an occupier is granted exclusive possession of premises for a fixed or periodic term certain in consideration of a premium or periodical payment, that will prima facie constitute a tenancy (see [1985] 2 All ER 289 at 294, [1985] AC 809 at 818 per Lord Templeman). Secondly, where a person is in exclusive possession of another's land for a term in return for a periodical
- f payment, the relationship may not amount to a tenancy if the parties did not intend to enter into a legal relationship, or where the relationship between the parties was that of a vendor or purchaser, master and servant occupier, or similar such exceptional circumstance (see [1985] 2 All ER 289 at 295–296, 300, [1985] AC 809 at 821, 826–827 per Lord Templeman). Thirdly, parties cannot simply by choosing to describe the relationship as a licence affect its legal nature (see [1985] 2 All ER 289 at 297, [1985] AC 809 at 822 per Lord Templeman). Fourthly, the
- g grant of exclusive possession for the payment of a periodical sum will not, however, of itself amount to the grant of a new tenancy where the agreement is between the landlord and the existing occupier where the landlord is seeking or has obtained a possession order under Pt IV of the Housing Act 1985 in circumstances in which s 85(2) of that Act could revive the previous tenancy (see
- h *Burrows'* case).

- [35] In the present case, there is no doubt that Mr Stirling remained in exclusive occupation of the premises and paid a periodic sum in respect of that occupation. Unlike, however, the occupiers in *Street v Mountford* and *Burrows'* case, he did not occupy the premises on the basis of any express agreement. The only clear
- j agreement that can be deduced from the material that we have is an agreement as to payment of the arrears of rent. As to payment for his occupation, the only express provision was that the respondent, Leadenhall Residential 2 Ltd (Leadenhall), be at liberty to accept a monthly sum by way of mesne profits until possession was given up. Those facts do not, in my judgment, justify the conclusion that there was any legally enforceable agreement in relation to Mr Stirling's continued occupation. Nor do I think that any such contract or agreement can

be inferred from the surrounding circumstances. Leadenhall had, by taking possession proceedings, evinced an intention to bring the legal relationship to an end; there is no evidence that Mr Stirling considered himself other than to be at the mercy of Leadenhall after the order for possession had been made. a

[36] I therefore agree with Lloyd J that the deputy district judge was correct in concluding that after the possession order, Mr Stirling's occupation was referable only to forbearance on the part of Leadenhall, and not the grant of any new entitlement to exclusive possession. Had there been material which suggested that the parties had so intended, I would have had great difficulty in avoiding the logic of Mr Luba QC's argument that the relationship thereby created would have been one of landlord and tenant. None of the exceptional circumstances which would exclude that relationship exists on the facts; in particular this is not a case in which the original tenancy could have been revived under the Housing Act 1985, so as to enable Leadenhall to argue that the case fell within the exceptional circumstance identified in *Burrows*' case. b
c

[37] I am glad to have been able to come to this conclusion. Although the result is that the relationship was, from July 1996 to March 1998, anomalous, as pointed out by Mr Luba, it has the advantage that it has enabled Leadenhall to extend a helping hand to Mr Stirling without a wholly unintended advantage accruing to him which could discourage Leadenhall and similar landlords from acting in a similar fashion in the future. d

JUDGE LJ.

[38] I gratefully adopt the narrative of facts set out in Lloyd J's judgment. As nothing turns on the identity of the landlord, I shall refer to it throughout as a single entity. In summary, on 21 June 1996 an order for outright possession was granted to the landlord by District Judge Palmer. Rent arrears, providing a mandatory basis for the order, were established. Possession was to be given 28 days later, on 19 July. On that date the original tenancy ended. District Judge Palmer further entered judgment for £2,832.63 arrears of rent. According to the order as drawn up, this accrued debt was to be paid at the rate of £411.66 monthly, an instalment figure plainly based on the monthly rental payments during the tenancy. As drawn, the order did not refer to mesne profits. When, however, in April 2000, the issues which now arise for consideration were before Deputy District Judge Turner, he sensibly checked the terms of the order as drawn against District Judge Palmer's note of the order he had actually made, and discovered that as drawn the order was inaccurate. It said nothing about arrears of rent, but referred simply to mesne profits. So Deputy District Judge Turner amended the order to reflect precisely the order made by District Judge Palmer: that the landlord should be 'at liberty to accept mesne profits at the rate of £411.66 per month until possession is given'. It was not argued that this amendment was impermissible or indeed open to question. e
f
g
h

[39] As Lloyd J's judgment explains, on 4 July 1996 Mr Stirling made proposals in writing for repayment of rent arrears. We do not know the precise terms of his offer, but the fact that it was made at all, when the order as drawn up initially purported to have dealt with the issue, underlined not only that the amendment made by Deputy District Judge Turner was rightly made in April 2000, but also that Mr Stirling understood that the issue of arrears had not been addressed in the order made on 21 June 1996. We also know that while the tenancy was still subsisting, that is before 19 July 1996, the landlord's response was headed 'Arrears repayment proposal'. The text of the letter is concerned exclusively with a proposal j

a of this nature, and nothing more can be read into it, in particular nothing which can be said even to hint at tenancy issues.

[40] 19 July 1996 came and went. As a matter of day-to-day reality Mr Stirling continued to enjoy unbroken and exclusive possession until after March 1998. In the meantime, £411.66 monthly continued to be paid directly to the landlord through housing benefits. In this respect there were no defaults. On the other
b hand, arrears of rent, on which the original order for possession was based, were more problematic. Again I shall not repeat the narrative set out in Lloyd J's judgment. In March 1998, Mr Stirling was given notice that the monthly payments would be increased to £433. It is accepted by the landlord that this figure represented rent paid in consideration of a tenancy. Thereafter, as before, there were continuing
c problems with payment of rent but repetition of the details does not assist in the analysis of the nature of Mr Stirling's occupation of 2 Linford Court, 14 Appleton Square, Mitcham between 19 July 1996, when the order for possession made against him on 21 June 1996 was ordered to take effect, and 1 March 1998, from when, whatever the basis of his continued occupation since July 1996, he admittedly was a tenant.

d [41] From Mr Stirling's point of view, the striking features of this period are that he remained in continuous and exclusive occupation of the premises and that the landlord was paid a monthly sum which mirrored the original rental payment, and was due to be paid monthly sums in reduction of rent arrears, some of which were undoubtedly paid. Although he enjoyed a tenancy until 19 July 1996, and again from March 1998, if the landlord's argument is correct it follows
e that, notwithstanding the continuity of his physical occupation and the monthly payments of housing benefit to the landlord, together with occasional payments off the arrears, between these dates, he did not occupy as a tenant.

[42] Deputy District Judge Turner rejected the contention that Mr Stirling's occupation during the disputed period was a tenancy. He thought that there was
f no intention to affect the legal relationship consequent on District Judge Palmer's order. Judge Coningsby QC reached the same conclusion, but on the basis that Mr Stirling enjoyed not a tenancy, but a conditional right of occupation, based on the landlord's forbearance to enforce the order for possession, similar to a licence.

[43] The essential thrust of the submission by Mr Jan Luba QC, on behalf of
g Mr Stirling, was that although the original tenancy was terminated on 19 July 1993, the effect of the correspondence before that date established that a new tenancy, taking effect immediately after the original tenancy came to an end, had been created. Mr Paul Morgan QC argued that this correspondence reflected the arrangements by which the arrears of rent were to be paid. Subsequent events simply confirmed that the landlord was determined that Mr Stirling should
h comply with the arrangement for payment of arrears. Importantly, given that Mr Stirling was bankrupt, and that he had allowed substantial arrears to accumulate, the sanction was understood to be the issue of a warrant for possession based on the order of 21 June 1996. Mr Stirling did not suggest, either in further correspondence, or in evidence, that there could have been any defence to such
j a warrant, or that he understood that the sanction based on the order for possession had been abandoned by the landlord before 1 March 1998.

[44] Our attention was drawn to a number of authorities. For my purposes, the starting point is *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809. Notwithstanding occupation in accordance with what was expressly described as a 'licence', it was held that a tenancy had been created. In an opinion with which each member of the House of Lords agreed, Lord Templeman summarised

[[1985] 2 All ER 289 at 292, [1985] AC 809 at 816) what he described as the 'traditional distinction between a tenancy and a licence', which he said 'lay in the grant of land for a term at a rent with exclusive possession'. He repeated ([1985] 2 All ER 289 at 293, [1985] AC 809 at 818) that 'If ... residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy'.

[45] This combination of exclusive possession and payment of rent providing the characteristics of a tenancy represents a recurring theme of his opinion, illustrated in the observation towards the end: '... the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent.' (See [1985] 2 All ER 289 at 300, [1985] AC 809 at 826.)

[46] Lord Templeman explained that exclusive possession on its own was not conclusive of the issue. Quite apart from the payment of rent, he identified the 'owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier' as occupiers with exclusive possession who were not tenants. His analysis went on to acknowledge that—

'Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy.' (See [1985] 2 All ER 289 at 300, [1985] AC 809 at 826–827.)

[47] Applying these principles to the present case, District Judge Palmer's order permitted the landlord to accept mesne profits until possession was granted. It was 'at liberty' to do so. No authority has been drawn to our attention which suggests that the acceptance of mesne profits from a former tenant currently enjoying exclusive possession thereby creates a new tenancy, or revives an old one. Indeed, although the point was not considered in detail in argument, it is perhaps necessary to highlight the distinction between payments of rent and payments of mesne profits. Mesne profits are emphatically not rent, and payment of mesne profits is inconsistent with the existence of a tenancy, or occupation by right. This broad view is reinforced by the language of s 85(3)(a) of the Housing Act 1985 and s 9(3) of the Housing Act 1988, both of which, unsurprisingly, identify 'payments in respect of occupation after the termination of the tenancy' as mesne profits.

[48] As there was no evidence from Mr Stirling to suggest that he believed or intended that the monthly payments from housing benefits after July 1996 represented, or were intended to represent, anything other than mesne profits, in accordance with District Judge Palmer's order, perhaps it is sufficient simply to notice, in addition, that in any event, a degree of caution is required before treating 'the payment and acceptance of a sum in the nature of rent' as sustaining the 'old common law presumption of a tenancy'. (See *Longrigg, Burrough & Trounson v Smith* [1979] 2 EGLR 42, applying *Marcroft Wagons Ltd v Smith* [1951] 2 All ER 271, [1951] 2 KB 496; and the observations of Nicholls LJ in *Javad v Aqil* [1991] 1 All ER 243 at 252, [1991] 1 WLR 1007 at 1017, and his salutary reminder that it is for the individual who asserts a tenancy to establish it.)

[49] In my judgment, in this case, Mr Stirling's exclusive possession and the payments to his landlord as mesne profits after 19 July 1996 of sums equivalent to the rent payable before that date, and the acceptance of those payments by the landlord under and in accordance with the order of the court, do not establish the creation or existence of a new tenancy.

- a [50] I must now consider whether the decision of the House of Lords in *Burrows v Brent London BC* [1996] 4 All ER 577, [1996] 1 WLR 1448 must lead, as Mr Luba suggested it did, to the conclusion that a new tenancy was created. In that case, after the council had obtained an order for possession which brought a secure tenancy to an end, Miss Burrows agreed to pay the council a weekly 'rent charge', that is, a payment to cover future occupation, and to make instalment payments to reduce existing arrears. The question for decision involved analysis of the 1985 Act, rather than the 1988 Act, with which this litigation is concerned.
- b [51] There are two significant differences. The first was referred to both in the Court of Appeal and in the House of Lords in *Burrows'* case. In the Court of Appeal Auld LJ said:

- c 'The distinction between a tenancy and the licence of a dwelling-house in the context, as here, of security of tenure under Part IV of the 1985 Act, is immaterial, for ... the provisions of that Part apply to a licence to occupy as they apply to a tenancy.' (See (1995) 27 HLR 748 at 752.)

- d In the House of Lords Lord Browne-Wilkinson emphasised:

- e 'It is important to note that ... the provisions of Part IV of the Act apply to a "licence to occupy a dwelling-house ... as they apply in relation to a tenancy". Therefore nothing in this case turns on the distinction between a licence and a tenancy; if, by making the agreement not to enforce the possession order, the local authority is to be taken to have granted a licence for the tenant to continue in occupation the position will be just the same as if they had granted a tenancy.' (See [1996] 4 All ER 577 at 580, [1996] 1 WLR 1448 at 1451.)

- f [52] This consideration does not apply to the 1988 Act, where the security of tenure provided by the 1985 Act does not extend to a licence to occupy a dwelling house under an assured tenancy. In *Burrows'* case, for the purposes of the relevant statutory protection, a licence, in effect, was deemed to be a tenancy. It is hardly surprising that when considering the argument advanced to the Court of Appeal in *Burrows'* case, Lord Browne-Wilkinson held that their conclusion was inevitable. The Court of Appeal was invited to conclude that although the termination of
- g Miss Burrows' tenancy by a court order was followed by an express agreement that she should enjoy exclusive possession of the premises, provided she paid rent charges as well as arrears of rent by instalments, she was a mere trespasser, and remained so, notwithstanding subsequent increases in the rent payable by her. The rejection of that contention does not, in my judgment, establish any principle
- h of law applicable to cases arising under a different statutory regime, where the facts are similar but not identical to those which arose in *Burrows'* case.

- j [53] In the House of Lords, in *Burrows'* case, but not the Court of Appeal, s 85 of the 1985 Act was said to produce a 'far more compelling argument' in favour of the council than it had advanced before the Court of Appeal. In this case, as the order made by District Judge Palmer was made on mandatory grounds, s 9 of the 1988 Act, the equivalent provision to s 85 of the 1985 Act, had no application. As explained in *Burrows'* case, the effect of s 85 enabled a defunct secure tenancy to be revived by a subsequent court order. Mr Luba suggested that, absent s 85, the decision of the Court of Appeal in *Burrows'* case would not have been overruled. Therefore the decision of the Court of Appeal in *Burrows'* case, that a new tenancy had been created by operation of law, applied here, and accordingly

a new tenancy had been created. I do not accept that the decision in *Burrows* has this effect.

[54] The starting point in Lord Browne-Wilkinson's analysis of the legal position when a former tenant is 'by agreement allowed to remain in possession of the demised property after the termination of the tenancy', identifies the critical question in each case as 'quo animo the parties have so acted: depending upon the circumstances, their conduct may give rise to a new tenancy, a licence or some other arrangement'. (See [1996] 4 All ER 577 at 583, [1996] 1 WLR 1448 at 1454.) In *Burrows*' case he concluded:

'... the parties plainly did not intend to create a new tenancy or licence, but only to defer the execution of the order so long as Miss Burrows complied with the agreed conditions. It cannot be right to impute to the parties an intention to create a legal relationship such as a secure tenancy or licence unless the legal structures within which they made their agreement force that conclusion.'

Accordingly, the answer to the critical question in each case depends on the terms of the agreement itself, (if any) the intentions of the parties, and the inferences to be drawn from their conduct, a question not of law but of fact. Miss Burrows was held to be a 'tolerated trespasser, a former tenant who the landlord had agreed not to evict', pending either the revival of the old tenancy or the breach of the agreed conditions, or, I would add, as happened here, the eventual creation of a new tenancy.

[55] Mr Luba used the correspondence and subsequent conduct of the parties as the basis for his submission that a new tenancy was created. His submission involved attaching little, if any, weight to the fact that Mr Stirling's proposals for the payment of arrears of rent were no more than proposals to make payments in satisfaction of an accrued debt, and were accepted as such by the landlord. The monthly payments through housing benefits represented the implementation of the order made by District Judge Palmer granting the landlord liberty to accept mesne profits. In my judgment there is no sufficient evidence that either Mr Stirling or the landlord contemplated a new tenancy taking effect after 19 July 1996, or that the landlord waived its right to apply for a warrant of possession of the premises before the arrangements for rent were renegotiated in March 1998.

[56] Accordingly, for these reasons as well as those given by Lloyd J in his judgment, I too would dismiss this appeal.

Appeal dismissed.

Dilys Tausz Barrister

a **Carlson v Townsend**
[2001] EWCA Civ 511

COURT OF APPEAL, CIVIL DIVISION

b SIMON BROWN, BROOKE AND MANCE LJJ
26 MARCH, 10 APRIL 2001

c *Practice – Personal injuries action – Damages – Experts’ reports – Disclosure to other parties – Pre-action protocol requiring party to provide other party with names of proposed experts before instructing an expert – Protocol giving other party opportunity to object to any of named experts – Claimant instructing expert to whom defendant had taken no objection but refusing to disclose his report – Whether defendant’s failure to object to expert nominated by claimant transforming expert into single joint expert whose report was available to both parties – Whether refusal to disclose report of expert to whom no objection made by other side constituting non-compliance with protocol – Pre-Action Protocol for Personal Injury Claims, paras 3.14, 3.16.*

d

The claimant, C, brought a personal injury claim in respect of a back injury which he suffered while employed by the defendant. C’s solicitors informed the defendant’s insurers that they intended to instruct one of three consultant orthopaedic consultants, T, R and O’D, to prepare a report. That information was given in accordance with para 3.14^a of the Pre-Action Protocol for Personal Injury Claims (the protocol), which provided that, before any party instructed an expert, he should give the other party a list of the names of one or more experts in the relevant speciality whom he considered were suitable to instruct. Under para 3.16^b, the other party could indicate, within 14 days, an objection to one or more of the named experts, and the first party ‘should then instruct a mutually acceptable expert’. The defendant’s insurers objected only to O’D. In the event T was instructed, and he duly reported to C’s solicitors. On the day before that report was received, the defendant’s insurers had written that they assumed that the medical instructions were to be on a joint instruction basis and that they therefore expected that the report would be delivered to both parties at the same time. C’s solicitors immediately challenged the insurers’ contention that the medical instructions had been on a joint instruction basis. Subsequently, they stated that T’s report would not be disclosed. Instead, they sent a medical report by S, an expert who had not been among the three originally named. On an application by the defendant for disclosure of T’s report, the district judge held that on a proper construction of the protocol there was no distinction between the joint selection of a medical expert and the joint instruction of a medical expert, and that T was to be regarded as jointly instructed by both parties. Accordingly, he ordered C to disclose T’s report. The judge allowed C’s appeal, concluding that C alone had instructed T and that there had been no waiver of the privilege which ordinarily attached to a medical report prepared for the purposes of litigation. He further found that the protocol imposed no requirement for the expert to be jointly instructed and that nothing in it required disclosure of a report merely because it was provided by a mutually acceptable expert. The defendant appealed.

e

f

g

h

j

a Paragraph 3.14 is set out at [1], below

b Paragraph 3.16 is set out at [1], below

Held – On a true understanding of the protocol, a failure by a defendant to object to an expert nominated by the claimant could not of itself transform that expert, once instructed, into a single joint expert whose report was accordingly available to both parties. It was one thing to provide for a practice whereby experts objectionable to one party were eliminated at the outset and, with them, an obvious barrier to the prospect of ultimately agreeing the expert evidence: quite another to hold that by giving the other side the opportunity to object to a proposed expert, a party was thereby waiving in advance the privilege which would otherwise attach to the report being obtained. Although the protocol plainly encouraged and promoted the voluntary disclosure of medical reports, it did not specifically require it. It followed that, in the instant case, the withholding of T's report did not constitute non-compliance with the protocol, although the instruction of S without first giving the defendant an opportunity to object plainly did. In cases of non-compliance, the court was provided with ample and various sanctions, in particular with regard to directions, costs and interest, by paras 2.1 and 2.3 of the Practice Direction on Protocols. One sanction not available to the court, however, was to override C's privilege in T's report. Accordingly, the appeal would be dismissed (see [18], [19], [22], [23], [36]–[39], below).

Cases referred to in judgments

Causton v Mann Egerton (Johnsons) Ltd [1974] 1 All ER 453, [1974] 1 WLR 162, CA.
Walsh v Misseldine (29 February 2000, unreported), CA.

Case also cited or referred to in skeleton arguments

Daniels v Walker (Practice Note) [2000] 1 WLR 1383, CA.

Appeal

Karen Townsend, the defendant to proceedings for personal injury brought by the claimant, Richard Thurber Carlson, appealed with permission of May LJ granted on 4 December 2000 from the decision of Judge Geddes at Worcester County Court on 21 September 2000 allowing an appeal by the claimant from the order of District Judge Dickinson on 14 July 2000 requiring him to disclose to the defendant a medical report by Mr M Trevett, a consultant orthopaedic surgeon. The facts are set out in the judgment of Simon Brown LJ.

Dermot O'Brien QC and *Christopher Taylor* (instructed by *Metcalfes*, Bristol) for the defendant.

James Corbett QC and *Amarjit Rai* (instructed by *Thursfields*, Worcester) for the claimant.

Cur adv vult

10 April 2001. The following judgments were delivered.

SIMON BROWN LJ.

[1] This is a second-tier appeal raising an important point of practice about the disclosure of medical reports under the Pre-Action Protocol for Personal Injury Claims. That Protocol, under the heading 'Experts', provides:

'3.14 Before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he considers are suitable to instruct ...

a 3.16 *Within 14 days* the other party may indicate *an objection* to one or more of the named experts. The first party should then instruct a mutually acceptable expert.'

b [2] Pursuant to those provisions the claimant gave the defendant a list of three names of consultant orthopaedic surgeons. The defendant objected to one of the three whereupon the claimant instructed one of the remaining two, Mr Trevett. Having obtained Mr Trevett's report, however, the claimant then declined to disclose it and instead instructed another expert, Dr Smith, not one of those originally named.

c [3] On 14 July 2000 District Judge Dickinson in the Worcester County Court ordered the claimant to disclose Mr Trevett's report. On 21 September 2000 Judge Geddes allowed the claimant's appeal against that order. The defendant now appeals to this court with the permission of May LJ.

d [4] As it seems to me, two central questions arise for decision on the appeal. First, does the claimant's refusal to disclose Mr Trevett's report constitute a failure to comply with the Protocol? Second, even assuming that it does, can the court properly then order the report's disclosure? These questions are ones of general application and in no way dependent upon the detailed facts of this particular case. The following brief summary will therefore suffice.

e [5] The dispute arises in the context of a personal injury claim brought by the claimant in respect of a back injury which he suffered as a care assistant whilst employed by the defendant to look after her disabled adult son, in particular through repeatedly having to lift and move him. After the letter before action but before the issue of proceedings the claimant's solicitors on 6 May 1999 wrote to the defendant's insurers stating:

f 'We will wish to shortly instruct a consultant orthopaedic surgeon to prepare a report and in this regard it is our intention to instruct a consultant from one of the following, namely Mr K. O'Dwyer or Mr M. Trevett based at Worcester Royal Infirmary or Mr I.S.R. Reynolds based at Hereford. Please let us know if you have an objection to any of these consultants. If so, please let us know who you object to when we will instruct one of the others.'

g [6] On 11 May 1999 the defendant's insurers replied:

'... we object to Mr K. O'Dwyer but have no objection to any of the others on your list. Thus we assume you will be appointing either Mr Trevett or Mr Reynolds.'

h [7] In the event Mr Trevett was instructed and, having examined the claimant, he reported to the claimant's solicitors on 17 November. Meantime, on 16 November, the defendant's insurers had written:

j '... we assume you went ahead with the medical instructions which were to be on a joint instruction basis. Thus, we would expect the report to be delivered to us at the same time as yourselves.'

[8] The claimant's solicitors immediately challenged the insurers' contention that the medical instructions had been on a 'joint instruction basis'. Later, on 8 June 2000, they stated that Mr Trevett's report would not be disclosed and enclosed instead a copy of a medical report by Dr Brendan Smith (a consultant anaesthetist and specialist in spinal pain relief) dated 23 March 2000. The

defendant's application to the district judge for Mr Trevett's report to be disclosed followed shortly afterwards. a

[9] District Judge Dickinson ruled that on a proper construction of the Protocol there is no distinction between the 'joint selection' of a medical expert and the 'joint instruction' of a medical expert and that Mr Trevett was to be regarded as jointly instructed by both parties. On that approach, of course, both parties would have an equal right to see his report. b

[10] On appeal, however, Judge Geddes took the contrary view. He concluded that the claimant alone had instructed Mr Trevett and that there had been no waiver of the privilege which ordinarily attaches to a medical report prepared for the purposes of litigation. He furthermore found that the appropriate Protocol imposed no requirement for the expert to be jointly instructed and that nothing in it required disclosure of a report merely because it was provided by 'a mutually acceptable expert'. c

[11] Let me at this point repeat for convenience paras 3.14 and 3.16 of the Protocol and set them in the context of the other paragraphs under the heading 'Experts', two of which influenced the judge below:

'3.14. Before any party instructs an expert he should give the other party a list of the *name(s)* of *one or more experts* in the relevant speciality whom he considers are suitable to instruct. d

3.15. Where a medical expert is to be instructed the claimant's solicitor will organise access to relevant medical records—see specimen letter of instruction at Annex C. e

3.16. *Within 14 days* the other party may indicate *an objection* to one or more of the named experts. The first party should then instruct a mutually acceptable expert.

3.17. If the second party objects to all the listed experts, the parties may then instruct *experts of their own choice*. It would be for the court to decide subsequently if proceedings are issued, whether either party had acted unreasonably. f

3.18. If the *second party does not object to an expert nominated*, he shall not be entitled to rely on his own expert evidence within that particular speciality unless: (a) the first party agrees, (b) the court so directs, or (c) the first party's expert report has been amended and the first party is not prepared to disclose the original report. g

3.19. *Either party may send to an agreed expert written questions* on the report, relevant to the issues, via the first party's solicitors. The expert should send answers to the questions separately and directly to each party.

3.20. The cost of a report from an agreed expert will usually be paid by the instructing first party: the costs of the expert replying to questions will usually be borne by the party which asks the questions. h

3.21. Where the defendant admits liability in whole or in part, before proceedings are issued, any medical report obtained by agreement under this protocol should be disclosed to the other party. The claimant should delay issuing proceedings for 21 days from disclosure of the report, to enable the parties to consider whether the claim is capable of settlement. The Civil Procedure Rules, Part 36 permit claimants and defendants to make offers to settle pre-proceedings.' (Emphasis in original.) j

[12] Judge Geddes found support for his conclusions in paras 3.18(c) and 3.21. Paragraph 3.18(c) in terms postulates that 'the first party is not prepared to

- a disclose the original report' ie is prepared to disclose only an amended report. If the nature and extent of an amendment need not be disclosed, why then cannot the whole report simply be withheld and another one obtained and disclosed instead?

[13] Paragraph 3.21 provides expressly for disclosure of 'a medical report obtained by agreement'—which I take to be the same as a medical report from 'a mutually acceptable expert' (para 3.16) which in turn is the same as a report from 'an agreed expert' (paras 3.19 and 3.20)—where liability is admitted. But what need would there be for this provision if disclosure of such a report is required in any event and why, indeed, is the provision confined to cases where liability is admitted? The implication can only be that in other cases disclosure is not required.

- c [14] Mr O'Brien QC for the appellant submits that reasoning of this sort is inappropriate in the case of a non-statutory protocol. The court should, he contends, determine its meaning more pragmatically and in the light of its clear objectives; the usual canons of construction do not apply.

- d [15] He places particular reliance upon the Introduction and Notes of Guidance to the Protocol. Amongst its aims set out in para 1.2 of the Introduction are:

'... more pre-action contact between the parties

better and earlier exchange of information

better pre-action investigation by both sides

- e to put the parties in a position where they may be able to settle cases fairly and early without litigation ...'

[16] Paragraph 2.4 of the Notes of Guidance refers to 'the "cards on the table" approach advocated by the protocol' and para 2.11 reads:

- f 'The protocol encourages joint selection of, and access to, experts ... The protocol promotes the practice of the claimant obtaining a medical report, disclosing it to the defendant who then asks questions and/or agrees it and does not obtain his own report ...'

- g [17] There in terms the Protocol is promoting disclosure of the claimant's report. And indeed, Mr O'Brien points out, without such disclosure there cannot be 'joint ... access to experts', which the Protocol encourages, nor questioning of the report by the defendant, which again para 2.11 envisages and which para 3.19 of the Protocol expressly provides for.

- h [18] That the Protocol contemplates the voluntary disclosure of the claimant's expert's report (certainly where it has been obtained from 'an agreed expert') in the vast majority of cases I have not the least doubt. Such a course plainly reflects the modern and highly desirable 'cards on the table' approach and best facilitates settlement of claims ideally before, but failing that after, the issue of proceedings. But that is not to say that the Protocol specifically requires disclosure in every case and still less that its effect is to override the substantive law with regard to privilege.

- j [19] It seems to me one thing to provide, as the Protocol undoubtedly does, for a practice whereby experts objectionable to one party are eliminated at the outset and with them an obvious barrier to the prospect of ultimately agreeing the expert evidence; quite another to hold that by giving the other side the opportunity to object to a proposed expert, a party is thereby waiving in advance the privilege which would otherwise attach to the report being obtained. In the

Civil Procedure Rules themselves, of course, there is express provision for the court to direct that evidence be given by a single joint expert (CPR 35.7). In this event, 'each instructing party may give instructions to the expert' (CPR 35.8). There is plainly in these circumstances joint instruction of the expert with the result that both parties have (unless the court directs otherwise) an equal liability for his fees and an equal right to see his report. That, however, is not what happens when the Protocol is followed. On the contrary, para 3.16 requires in terms that '[t]he first party should then instruct a mutually acceptable expert', and the specimen letter provided for by para 3.15 begins: 'We are acting for the above named in connection with injuries received in an accident', and repeatedly thereafter refers to him as 'our client'. Jointly selected the expert in a real sense has been; jointly instructed, however, he is not.

[20] *The Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996) states with regard to this part of the Protocol:

'Provided at least two names are acceptable to both parties, the claimant may reject a report by the expert of his first choice without letting the defendant know that he has done so.' (See para 9 of Ch 10.)

[21] Mr O'Brien was forced to concede that, had the claimant here gone to Mr Reynolds after Mr Trevett, he would not have had to disclose Mr Trevett's report (although, had the case reached the stage of discovery, its existence as a privileged document would doubtless have had to be acknowledged). I for my part cannot see why it makes any difference to the disclosability of the report that the claimant went secondly to Mr Smith, a non-nominated and therefore unagreed expert, rather than to Mr Reynolds, another 'mutually acceptable expert'.

[22] I can state my overall conclusions on the appeal really very shortly: (1) Although the Protocol plainly encourages and promotes the voluntary disclosure of medical reports, it does not specifically require this. (2) Withholding Mr Trevett's report did not constitute non-compliance with the Protocol although the instruction of Dr Smith without first giving the defendant an opportunity to object plainly did. (3) Paragraphs 2.1 and 2.3 of the Practice Direction on Protocols provide the court with ample and various sanctions—in particular with regard to directions, costs and interest—for non-compliance with a Protocol. In the present case, of course, the claimant has still to obtain the necessary permission from the court to call Dr Smith. The defendant for her part would almost certainly, if she wished, be permitted to call an expert of her choice. The court would, after all, know that one expert at least, Mr Trevett, had reported less favourably to the claimant's cause than Dr Smith. (4) One sanction not available to the court, however, would be to override the claimant's privilege in Mr Trevett's report. (5) This appeal in truth could only succeed if Mr O'Brien established his central contention that, on a true understanding of the Protocol, the defendant's non-objection to a nominated expert of itself transforms that expert, once instructed, into a single joint expert whose report is accordingly available to both parties. This is not an argument I can accept either in principle or upon the scheme or language of the Protocol.

[23] I would accordingly dismiss this appeal, and add only that I cannot recognise in the result the apocalyptic future which Mr O'Brien has sought to conjure up. In the vast majority of cases the initial selection of an unobjectionable expert will continue to increase the prospects of his evidence being agreed. Success cannot be guaranteed. But the Protocol will still serve its purpose.

BROOKE LJ.

a [24] The introduction of pre-action protocols, and of the procedures they suggest for the obtaining of expert evidence, represents a major step forward in the administration of civil justice. Any practitioner or judge with significant experience of personal injuries litigation will have been very familiar with the mischiefs they seek to remedy. Under the former regime, in many disputed cases of any substance nothing very effective seemed to happen until a writ was issued close to the expiry of the primary limitation period. So far as the use of experts were concerned, there were often complaints that they appeared to be playing too antagonistic a role on behalf of the client who was paying for their services, so that it was most unlikely that the other side would accept their report. This led to further delay and expense while the other side instructed their own expert, who might well adopt an equally antagonistic position.

c [25] In 1988 the authors of the *Report of the Review Body on Civil Justice* (Cm 394) showed that they were baffled by this problem. They wrote:

d '198. Delay before commencement of proceedings has proved to be an intractable matter. For personal injury cases Table 9 in Chapter 7 shows that proceedings had not been started within a year of the incident in 65% of cases. In 19% of cases proceedings were not started until 6 months or less before the close of the 3 year limitation period. It is a matter for the parties and their legal advisers whether or not to start proceedings at all and, if so, whether to seek to reach a settlement before formal proceedings begin. It does, nevertheless, appear that there is an element of casual or unthinking delay during the pre-writ period. In their evidence on personal injury litigation the Law Society said that some solicitors lacked expertise in this field, and this could affect their judgment as to the timescale appropriate to particular cases.

f 199. Pre-commencement delay is not a matter which lends itself to rigid regulation, in whatever form. It is not easy to see, for example, how rules of court setting out a pre-commencement timetable so as to regulate handling of cases could be satisfactorily enforced.'

g [26] The scale of public dissatisfaction with the former slow, expensive procedures for resolving disputed personal injury claims was revealed in the research report commissioned by the Law Commission under the title *Personal Injury Compensation: How much is enough?* (Law Com no 225) (1994). Section 4.12 of that report, entitled 'Satisfaction with compensation at time of settlement', spoke eloquently of the distress caused to many victims of personal injury accidents by the twin scourges of cost and delay. The summary in para 4.13 of the report begins as follows:

j 'The survey reveals that the majority of accident victims have to wait for very long periods before they receive their damages. The survey also shows that the length of time waited by respondents before their claims are settled increases with the size of the settlement. Even among the lowest settlements, one in four took more than four years to settle while among the largest claims, one-third took six years or longer to settle. Qualitative interviews provide evidence of the strain of delay, and the financial difficulties experienced during the settlement period.'

[27] In his *Interim Report on Access to Justice* (June 1995) Lord Woolf did not mince his words. I quote only three paragraphs of this report as illustrative of a more general theme:

'Many of the difficulties which we face arise because attitudes are entrenched before proceedings are begun. Before the writ is issued, it is the adversarial approach which colours behaviour and permeates negotiations. Traditionally, the courts have been reluctant to become involved with the behaviour of potential litigants. But if the court were in a position to control behaviour, then this might avoid the need for some proceedings altogether or, if proceedings did result, could make the court's task substantially less onerous.' (See Ch 19, para 3.)

Chapter 23, para 1:

'The subject of expert witnesses has figured prominently throughout the consultative process. Apart from discovery it was the subject which caused the most concern. The comments were not confined to specific classes of litigation. While the criticisms differed in detail depending on the type of proceedings which were being considered, the general thrust was the same. The need to engage experts was a source of excessive expense, delay and, in some cases, increased complexity through the excessive or inappropriate use of experts. Concern was also expressed as to their failure to maintain their independence from the party by whom they had been instructed.'

Chapter 23, para 13:

'This unhappy situation [entailing a delay of six to nine months before a single expert report is obtained] has become institutionalised. In seeking to serve their clients' best interests, lawyers have repeatedly instructed a limited class of consultants for reports. A major cause of delay is a shortage of experts, especially in the medical field, who are considered suitable to provide forensic services. The reason why solicitors have become so selective is partly because they wish to ensure that their expert will carry as much clout as possible, and a well-known name is thought to ensure this. There is also a tendency for solicitors to rely on the experts who are familiar to them. In addition, certain doctors are known to be sympathetic to particular causes, and so instructing those doctors should result in a favourable report. If a wider range of doctors were used, delays would not be so great.'

[28] The resolution of these difficulties required ingenuity and imagination. Nobody could be compelled to incur the cost of commencing legal proceedings until the very end of the primary limitation period. Until legal proceedings were started, in the absence of any express statutory power (as, for instance in matters relating to pre-action disclosure of documents), the court had no direct power to control what a party might or might not do. And the common law has always recognised a privilege in communications, such as medical reports in personal injury cases, which come into existence when litigation is contemplated, if they have been made with a view to such litigation. In *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453 at 460, [1974] 1 WLR 162 at 170 Roskill LJ said:

'I am clearly of the view that this court has no power to order production of privileged documents. Medical reports are in no different category from other experts' reports and it would be quite wrong to engraft a qualification on the doctrine of privilege according to the nature of the report or the class of professional qualification attaching to its maker ... [So] long as we have an adversary system, a party is entitled not to produce documents which are

a properly protected by privilege if it is not to his advantage to produce them, and even though their production might assist his adversary if his adversary or his solicitor were aware of their contents or might lead the court to a different conclusion from that to which the court would come in ignorance of their existence.'

b [29] Chapter 10 of Lord Woolf's *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996) contains the beginnings of the solution to this problem. After explaining how his proposed arrangements for pre-action protocols would set out codes of sensible practice which parties would be expected to follow, he said (para 6):

c 'Protocols will also be an important means of promoting economy in the use of expert evidence, in particular by encouraging the parties to use a single expert wherever possible. Unless this happens before the commencement of proceedings, it will frequently be too late because the parties will already have established an entrenched relationship with their own expert.'

d [30] Then, after the passage cited by Simon Brown LJ in para [20] of his judgment, Lord Woolf commented, in relation to the arrangements now reflected in paras 3.14 and 3.16 of the published Pre-Action Protocol for Personal Injury Claims:

e 'The advantage for defendants is that they can identify at an early stage if the claimant is intending to use an expert whom they regard as partisan and whose report they are unlikely to accept.' (See para 9 of Ch 10.)

f [31] These protocols are not agreements made for valuable consideration, on which one or other party can bring an action to compel compliance. Nor are they documents drafted with the precision of the products of a parliamentary draftsman. They are guides to good litigation and pre-litigation practice, drafted and agreed by those who know all about the difference between good and bad practice.

g [32] The claimant's claim in the present action was quite tricky to evaluate. He was employed by the defendants for about three years in the task of undertaking the full-time nursing care of their 28-year old son who had suffered from cerebral palsy from birth. The claimant began to feel pain in his thoracic spine at about the end of August 1996. This turned into an intense aching pain about seven months later. For the rest of the time he did this job he claims that he was aware of this pain almost from the time his daily shift began. He found work increasingly difficult, and he eventually stopped work altogether when the pain became intolerable.

h [33] Dr Brendan Smith's medical report discussed a number of possible causes of the thoracic facet joint and costovertebral joint arthropathy from which the claimant was suffering at the T8/9 and T9/10 level. Radiotherapy in this area as an infant, a bicycle accident in about 1989 and the excision in 1996 of a basal cell carcinoma from an area just below the left shoulder blade were all canvassed as possible causes. Dr Smith, however, said that he felt that it was inescapable that the most likely cause of the claimant's problems was founded in the repeated lifting episodes throughout 1996 and the early part of 1997.

i [34] We do not know the terms in which Mr Trevett reported in November 1999. We do not know why Mr Carlson's solicitors did not then instruct Mr Reynolds, the other identified expert acceptable to the defendants. We do not know why they then unilaterally instructed Dr Brendan Smith outside the

umbrella of the protocol. In a letter dated 8 June 2000 they said that 'of course the protocol is designed for fast track cases' as if this excused their conduct. This attitude is inconsistent with the Notes of Guidance to the Protocol. While acknowledging that the Protocol was primarily designed for fast track cases, the Notes continue:

'2.4. However, the "cards on the table" approach advocated by the protocol is equally appropriate to some higher value claims. The spirit, if not the letter of the protocol, should still be followed for multi-track type claims. In accordance with the sense of the civil justice reforms, the court will expect to see the spirit of reasonable pre-action behaviour applied in all cases, regardless of the existence of a specific protocol.'

[35] It is not difficult to understand why this should be so. In a fast-track case, the employment of a medical expert on each side, with all the ensuing disadvantages in time and cost that this entails, must be avoided wherever possible for the reasons clearly set out in para 2.3 of these Notes. But even in 'multi-track type claims' the overriding aim is still to achieve a settlement, wherever possible, in an economic and cost-effective manner. This is more likely to be attainable if a claimant's solicitor instructs an expert known to be acceptable to the other side. If he does not, the settlement of his client's claim may be unnecessarily delayed—in *Walsh v Misseldine* (29 February 2000, unreported) 18 months were taken up while each side instructed its own expert in turn—and in addition to having to wait that much longer for settlement, the solicitor's client may lose his entitlement to interest for a significant part of this period. There may also be adverse costs consequences which will reduce the net value of any sum the claimant recovers in the action.

[36] I have set out these matters at some length because it appeared to me that the submissions we received from Mr O'Brien QC revealed a number of misunderstandings about the purpose and effect of the Protocol in a case like this. It was not its aim to deprive a claimant of the opportunity to obtain confidential pre-action advice about the viability of his claim, which he would be at liberty to discard undisclosed if he did not agree with it. There is no hint in the Protocol that its authors intended the parties' solicitors to instruct the acceptable expert on a joint basis. Indeed, para 3.16 makes it clear that the first party will instruct the expert, and para 3.20 provides that he will usually pay the expert's fees: no doubt, the parties could make some different agreement about the fees. If the expert advises his client that he has no claim, and the client accepts this advice, not even Mr O'Brien suggested that the advice should be disclosed to the other side, as would inevitably follow if the expert was jointly instructed.

[37] In these circumstances I agree completely with the judgments of Simon Brown LJ, and of Judge Geddes in the court below, about the proper interpretation of what happened in the present case.

[38] I, too, would dismiss this appeal.

MANCE LJ.

[39] I agree with both judgments.

Appeal dismissed.

a **British Waterways Board v Severn Trent
Water Ltd**

[2001] EWCA Civ 276

b COURT OF APPEAL, CIVIL DIVISION
PETER GIBSON, CHADWICK AND KEENE LJJ
22, 23 JANUARY, 2 MARCH 2001

*Public health – Sewerage – Drainage – Surface water – Whether sewerage undertakers
c* *having implied power to discharge water onto another's land or watercourse – Water
Industry Act 1991, ss 94, 155, 159, 165.*

The defendant company, STW, was a sewerage undertaker within the meaning of the Water Industry Act 1991, one of a number of statutes enacted following the decision to privatise the water industry. As such, it had duties, under s 94^a of the Act, to provide a system of public sewers and to make provision for the emptying of those sewers. Under s 155^b, it had powers, subject to the authorisation of the Secretary of State, to purchase compulsorily any land which it required for the purposes of, or in connection with, the carrying out of its functions. It also had an express power, under s 159^c, to lay pipes in any land which was not in, under **e** or over a street. That section, which applied to both water and sewerage undertakers, also granted such undertakers various ancillary powers, including the right to inspect, maintain, adjust, repair or alter a laid pipe. Section 165^d conferred on water undertakers an express power of discharge into any available watercourse, but sewerage undertakers had no such express power. In 1976 the claimant, BWB, a statutory navigation authority, granted STW's statutory **f** predecessor a licence to discharge surface water from a housing estate via a discharge pipe into a canal vested in BWB. The licence was subject to an annual charge of £29, and was terminable on six months' notice. By one of its clauses, the licensee covenanted with BWB that, immediately on the termination of the licence, it would remove the pipe and reinstate BWB's property. In 1996 BWB **g** gave STW six months' notice of the termination of the licence. STW claimed that it did not need BWB's consent to discharge water into the canal, contending that s 159 contained an implied power of discharge onto another's property. BWB did not agree, and wanted a higher charge. It therefore brought proceedings, seeking a declaration that STW, as sewerage authority, had no power or right **h** under s 159 to discharge the contents of any sewer or disposal main into any canal or waterway vested in BWB. Although the Water Industry Act was a consolidating statute, the judge concluded that it was necessary to examine the predecessor legislation since the existence of an implied power of discharge under s 159 was cast into doubt by, inter alia, the express discharge power in s 165. After conducting that examination, however, she concluded that there was such an implied power. **j** Accordingly, she declined to make the declaration sought by BWB, and instead granted a declaration in STW's favour. BWB appealed.

a Section 94, so far as material, is set out at [8], below
b Section 155, so far as material, is set out at [66], below
c Section 159, so far as material, is set out at [14], below
d Section 165, so far as material, is set out at [57], below

Held – On its true construction, s 159 of the Water Industry Act did not confer on a sewerage undertaker an implied power to discharge water onto another person's land or watercourse without obtaining the owner's consent. Such a power was inconsistent with the provisions of the Act, examined as a whole, and there was no cause to look at the predecessor legislation. Although the elaboration of the ancillary powers in s 159 did not eliminate all possibility of the implication of further powers, it rendered more difficult the implication of a discharge power. That difficulty was considerably increased by the fact that express provision for discharge was made in the same Part of the Act but limited to water undertakers. Moreover, the lack of an implied power for sewerage undertakers to discharge the contents of their sewers would not defeat the intention of Parliament. The s 94 duty could be fulfilled by discharge into rivers or the sea, by discharge into its own land or by procuring the consent of the owner. The imprecise limits on the suggested power was a further indication that no implication should be made. It was also to be noted that in the Water Resources Act 1991, which was enacted at the same time and as part of the same group of Acts relating to water as the Water Industry Act, express powers were conferred on the National Rivers Authority (now the Environment Agency) as to pipe-laying and discharge, and that provision was made for compensation. Similarly, the Highways Act 1980 conferred on highway authorities the power to lay pipes for draining surface water and an express power of discharge, and made provision for compensation. All that was consistent with the absence of any implied power of discharge under the Water Industry Act for sewerage undertakers. The judge's conclusion to the contrary was based on the false premise that Parliament had to have intended that sewerage undertakers should have facilities to discharge without paying for those facilities. Whether or not that premise could have been supported in the context of a public authority charged with functions imposed in the interests of public health, it could not be supported in the context of legislation enacted following a decision to privatise the water industry. The power to discharge, where required, could be acquired compulsorily under s 155 of the Water Industry Act, upon payment of compensation. Accordingly, the appeal would be allowed (see [39]–[45], [57], [70], [71], [75]–[78], [83], below).

Durrant v Branksome UDC [1897] 2 Ch 291 distinguished.

Decision of Arden J [2000] 1 All ER 347 reversed.

Notes

For the powers of relevant undertakers to lay pipes in other land, see 49(2) *Halsbury's Laws* (4th edn reissue) para 258.

For the Highways Act 1980, see 20 *Halsbury's Statutes* (4th edn) (1999 reissue) 64.

For the Water Industry Act 1991, ss 94, 155, 159, 165, see 49 *Halsbury's Statutes* (4th edn) (1999 reissue) 481, 555, 561, 568.

For the Water Resources Act 1991, see 49 *Halsbury's Statutes* (4th edn) (1999 reissue) 673.

Cases referred to in judgments

Allen v Gulf Oil Refining Ltd [1981] 1 All ER 353, [1981] AC 1001, [1981] 2 WLR 188, HL.

Durrant v Branksome UDC [1897] 2 Ch 291, Ch D and CA.

Hesketh v Birmingham Corp [1924] 1 KB 260, [1922] All ER Rep 243, CA.

Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd [1953] 1 All ER 179, [1953] Ch 149, [1953] 2 WLR 58, CA.

- a *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 WLR 15, HL.

Cases also cited or referred to in skeleton arguments

A-G v Great Eastern Railway Co (1880) 5 App Cas 473, HL.

Dell v Chesham UDC [1921] 3 KB 427.

- b *Farrell v Alexander* [1976] 2 All ER 721, [1977] AC 59, HL.
Jones v Llanrwst UDC [1911] 1 Ch 393, [1908–10] All ER Rep 922.

Appeal

- The claimant, the British Waterways Board (BWB), appealed with permission of Arden J from her order on 13 October 1999 ([2000] 1 All ER 347, [2001] Ch 32) whereby she declared that the defendant, Severn Trent Water Ltd (STW), as a sewerage undertaker had an implied power under s 159 of the Water Industry Act 1991 to discharge surface water from the Poplars Estate at Brierley Hill into the Stourbridge Canal via a nine-inch surface water pipe which was the subject of a licence dated 22 April 1976, and that accordingly STW was not obliged by virtue of cl 2(G) of the licence to remove the pipe from BWB's property or to reinstate that property. The facts are set out in the judgment of Peter Gibson LJ.

Charles Flint QC and *Michael Fordham* (instructed by *Eversheds*, Leeds) for BWB.

Michael Beloff QC and *Richard Macrory* (instructed by *Herbert Smith*) for STW.

- e *Cur adv vult*

2 March 2001. The following judgments were delivered.

PETER GIBSON LJ.

- f [1] The issue raised by this appeal is of some importance both to the sewage industry and also to owners of canals and other watercourses and, if the sewerage undertaker is right, the owners of other land in which a sewer has been laid. It is whether a sewerage undertaker has the right to discharge water from its sewers into such canals and watercourses and onto such land or whether it needs the consent of the owners to do so. Arden J ([2000] 1 All ER 347, [2001] Ch 32) held that the sewerage undertaker has the right to discharge such water into canals and watercourses as being implicit in the undertaker's express statutory power to lay and maintain pipes. In this test case the sewerage undertaker is Severn Trent Water Ltd (STW) which discharged water from its sewers into the Stourbridge Canal. The owner of that canal is the British Waterways Board (BWB) which g appeals to this court with the leave of the judge.

[2] The factual background to this case can be stated very shortly. The Stourbridge Canal was built between 1776 and 1779 pursuant to a private Act of Parliament, the Stourbridge Canal Act 1776 (16 Geo III c 28). Rights over the canal have been transferred over time to the BWB, latterly under the Transport Act 1962.

- j The BWB was created under s 1 of that Act. It is a navigation authority.

[3] In 1972 planning provision was granted for the construction of an extension to an existing housing estate known as the Poplars at Brierley Hill in the West Midlands. As part of that development, the developers sought permission from the BWB for the discharge of surface water from the estate via a nine-inch discharge pipe into the canal. On 22 April 1976 a licence was granted by BWB to STW's statutory predecessor as sewerage undertaker subject to an

annual charge of £29. The licence was terminable on six months' notice. By cl 2(G) the licensee covenanted with BWB that immediately on the termination of the licence it would remove the pipe and reinstate BWB's property. a

[4] On 26 September 1996 BWB gave notice of the termination of the licence on 31 March 1997. STW claimed that it did not need BWB's consent to discharge water into the canal. BWB claimed that STW did need that consent and wanted a higher charge from STW. The parties were unable to reach agreement. b

[5] On 21 January 1997 BWB commenced these proceedings. By its originating summons BWB sought a number of declarations of which in the event the material declaration was that upon the true construction of s 159 of the Water Industry Act 1991 STW as a sewerage authority had no power or right thereunder to discharge the contents of any sewer or disposal main into any canal or waterway vested in BWB. Before the judge argument was confined to the single issue whether that declaration should be granted. The judge, finding in favour of STW, did not grant BWB the declaration which it sought but declared that STW as a sewerage undertaker had an implied power under s 159 to discharge surface water from the Poplars Estate into the canal via the pipe, the subject of the licence, and that accordingly STW was not then and was not on 31 March 1997, when the licence was terminated, obliged to remove its pipe or reinstate BWB's property. c
d

[6] The Water Industry Act is a consolidation Act (with amendments, not material to this case, to give effect to recommendations of the Law Commission). As has recently been reaffirmed by the House of Lords in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 WLR 15, the court when construing a consolidation Act will normally seek to ascertain the intention of Parliament by looking only to the way that intention was expressed in the words used in that Act and will not construe that Act by reference to the repealed statutes which the enactment has consolidated. The good sense of that rule is obvious: there would be little benefit in consolidation if the ascertainment of the intention of Parliament required recourse to the antecedent legislation in the hope that that would provide a sufficiently clear indication of the meaning of the statutory language in the consolidating Act. But that rule is subject to exceptions. If there is an ambiguity in the consolidation Act or if the court finds itself unable to interpret a provision in that Act in the social and factual context which originally led to its enactment, then it will be permissible to look at the superseded legislation for such help as it may give (see [2001] 1 All ER 195 at 208, [2001] 2 WLR 15 at 28 per Lord Bingham of Cornhill, with whom on this point Lord Nicholls of Birkenhead and Lord Cooke of Thorndon agreed). The starting point is the consolidation Act itself. e
f
g
h

[7] The Water Industry Act recognises two relevant types of undertakers: a water undertaker and a sewerage undertaker. Such undertakers are companies which are appointed for any specified area (s 6(1) of that Act). A company may be both a water undertaker and a sewerage undertaker, and STW is such a company, but its functions in relation to each capacity are spelled out in the Water Industry Act in elaborate detail. i

[8] The general duties of water undertakers are set out in s 37 and other provisions of Pt III of the Water Industry Act. The general duties of sewerage undertakers are set out in s 94 and other provisions of Pt IV of that Act. Section 94(1) reads:

- a* 'It shall be the duty of every sewerage undertaker—(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers as to ensure that that area is and continues to be effectually drained; and (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.'

[9] Section 94(2) imposes a duty on the sewerage undertaker to have regard to its existing and future obligations to allow for the discharge of trade effluent into public sewers and to the need to provide for the disposal of that effluent.

- c* [10] Section 98 imposes a duty on a sewerage undertaker to provide a public sewer to be used for the drainage for domestic purposes of premises in a particular locality in its area if so required by, amongst others, the owner or occupier of any premises in that locality.

[11] Section 117(5) and (6) is in this form:

- d* '(5) Nothing in sections 102 to 109 above or in sections 111 to 116 above shall be construed as authorising a sewerage undertaker to construct or use any public or other sewer, or any drain or outfall ... (b) for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal, pond or lake, without the water having been so treated as not to affect prejudicially the purity or quality of the water in the stream, watercourse, canal, pond or lake.'

- e* (6) A sewerage undertaker shall so carry out its functions under sections 102 to 105, 112, 115 and 116 above as not to create a nuisance.'

- f* Sections 102 to 109 and 111 to 116 deal with the adoption of sewers and sewage disposal works, the communication of drains and private sewers with public sewers, other connections with public sewers and restrictions on the use of public sewers.

- [12] Part VI of the Water Industry Act relates to powers and works of undertakers. Section 155 provides that a relevant undertaker (which means a water or sewerage undertaker) may be authorised by the Secretary of State to purchase compulsorily any land which is required by the undertaker for the purposes of or in connection with the carrying out of its functions. This includes the acquisition of interests in and rights over land by the creation of new interests and rights.

- g* [13] Section 158 of that Act confers on any relevant undertaker for the purpose of carrying out its functions power to lay a relevant pipe in, under or over any street and to keep that pipe there and certain ancillary powers. References to a relevant pipe are to be construed in this way (s 158(7)):

- h* '... (a) in relation to a water undertaker, as references to a water main (including a trunk main), resource main, discharge pipe or service pipe; and (b) in relation to a sewerage undertaker, as references to any sewer or disposal main ...'

- j* [14] Section 159 of the Water Industry Act confers similar powers in relation to pipes in other land:

'(1) ... every relevant undertaker shall, for the purpose of carrying out its functions, have power—(a) to lay a relevant pipe (whether above or below the surface) in any land which is not in, under or over a street and to keep that pipe there; (b) to inspect, maintain, adjust, repair or alter any relevant

pipe which is in any such land; (c) to carry out any works requisite for, or incidental to, the purposes of any works falling within paragraph (a) or (b) above.’ a

References to maintaining or altering a pipe are further elaborated on in s 192(2) of the Water Industry Act, and to laying a pipe in s 219(2). By s 159(4) reasonable notice must be given to the owner and occupier of the land where the power is to be exercised. b

[15] Section 165 of the Water Industry Act confers powers on water undertakers (but not sewerage undertakers) to discharge water. By s 165(1) where any water undertaker is exercising or about to exercise any power conferred by certain specified sections including ss 158 and 159 or is carrying out certain other activities in relation to certain specified works belonging to or used by the undertaker, it may cause the water in any relevant pipe or in such work to be discharged into any available watercourse. But s 165(2) denies authority for any discharge which damages or injuriously affects the works or property of (inter alios) any navigation authority. c

[16] Section 166 of that Act prohibits (except in an emergency) the discharge through any pipe the diameter of which exceeds 229 mm save with the consent of the National Rivers Authority (NRA), now the Environment Agency, and of any navigation authority which carries out functions in relation to the part of the watercourse where the discharge is made or any part of that watercourse which is less than 3 miles downstream from the place of the discharge. There is no reference to a canal in the non-exhaustive definition in s 219(1) of the Water Industry Act of ‘watercourse’, but I shall assume that a canal is an artificial watercourse. Section 167(1)(b) allows a water undertaker, proposing to discharge water into any inland waters or underground strata, to apply to the Secretary of State for a compulsory works order. d

[17] Section 168 provides for a relevant undertaker to enter premises for the purposes of carrying out any survey or tests to determine whether and how certain powers (including those in ss 158 and 159) should be exercised or for the exercise of any such power. e

[18] By s 180 and Sch 12 to the Water Industry Act provision is made for a relevant undertaker to pay compensation to specified persons in specified circumstances. By para 2(1) of Sch 12 if the value of any interest in any relevant land is depreciated by virtue of the exercise by any relevant undertaker of the power in s 159 to carry out pipe-laying works on private land, the person entitled to that interest is to be entitled to compensation from the undertaker of an amount equal to the amount of the depreciation. Paragraph 2(2) and (3) of Sch 12 confers further rights to compensation on persons entitled to an interest in that land for other loss or damage or injurious affection attributable to the exercise by the undertaker of that power. Paragraph 4 requires a sewerage undertaker to make full compensation to any person who has sustained damage by reason of the exercise by the undertaker of any of its powers under ‘the relevant sewerage provisions’. This term, as defined in s 219(1), excludes ss 94, 158 and 159 of the Water Industry Act. Paragraph 6 of Sch 12 imposes a duty on every water undertaker to cause as little loss and damage as possible in the exercise of the powers under s 165 and to pay compensation for any loss caused or damage done in the exercise of those powers. f

[19] Section 181 of the Water Industry Act requires the Director General of Water Services to investigate complaints with respect to the exercise by a g

- a relevant undertaker of any powers conferred on that undertaker 'by or by virtue of sections 159 or 161(2)'. If the Director General is satisfied that the undertaker has failed adequately to consult the complainant or by acting unreasonably in the manner of its exercise of that power has caused the complainant to sustain loss or damage or to be subjected to inconvenience, he may direct the undertaker to pay to the complainant an amount up to £5,000 in respect of that failure, loss, damage or inconvenience.

- b [20] Section 184 of that Act confers power on the NRA (now the Environment Agency) or the Civil Aviation Authority or any internal drainage board, dock undertakers, railway undertakers or airport operator to take up, divert or alter the level of any sewers, drains, culverts or other pipes which are vested in a sewerage undertaker and pass under or interfere with, or interfere with the
- c alteration or improvement of, any watercourse vested in or under the control of the NRA or that internal drainage board, any property of the Civil Aviation Authority, any river or works forming part of the undertaking, the railway of the railway undertakers or the airport in question.

[21] By s 186(3) of the Water Industry Act:

- d 'Nothing in the relevant sewerage provisions shall authorise a sewerage undertaker injuriously to affect—(a) any reservoir, canal, watercourse, river or stream, or any feeder thereof; or (b) the supply, quality or fall of water contained in, or in any feeder of, any reservoir, canal, watercourse, river or stream, without the consent of any person who would, apart from this Act,
- e have been entitled by law to prevent, or be relieved against, the injurious affection of, or of the supply, quality or fall of water contained in, that reservoir, canal, watercourse, river, stream or feeder.'

Again by reason of the definition in s 219(1) of the term 'the relevant sewerage provisions' no reference is made to ss 94, 158 or 159 of the Water Industry Act.

- f [22] The judge in her full and careful judgment ([2000] 1 All ER 347 at 351, [2001] Ch 32 at 38–39) thought it helpful to keep in mind the distinction that is drawn in the legislation between a pipe-laying power and a discharge power. She referred to ss 158, 159 and 160 of the Water Industry Act and said:

- g 'One might have thought that the power to lay a pipe automatically carried with it the power to discharge the contents of the pipe at an appropriate place, perhaps a stream or a river, if the water is pure. Here, a sewerage undertaker is given the pipe-laying power on its own, that is without any discharge power. Hence the question which arises here, namely whether the discharge power is conferred by implication.'

- h [23] Under the heading 'An implied power?' the judge said:

- j 'Can a discharge power be implied into s 159 in the case of a sewerage undertaker? If one of the primary functions of a sewerage authority is to drain land, it would seem to follow that it should have an implied power to discharge the water so drained, and it would, at first sight, be odd if water undertakers had that power in right of the pipe-laying power, but sewerage undertakers did not. If, however, there is an implied power in this case, consideration would have to be given to its extent. Does it enable STW to discharge surface water into any watercourse? Does that include a dock or harbour or tidal waters or other water area not covered by the definition of "watercourse", which applies for the purposes of s 165? Is there any

restriction on the volume of water or its frequency? What happens if the power causes loss or damage to the owner of the watercourse? Is there any remedy if the discharge causes flooding or if foul water is discharged? Is there any restriction on the size of pipe that the sewerage undertaker can use (cf s 166)? Is the implied power exercisable without any person's consent? Does the sewerage undertaker have to give notice before it exercises the power? Can it exercise its power of discharge (if any) on to land as well as into water? The more questions of this nature that there are, and the greater the difficulty in providing satisfactory answers to these questions, the more persuasive will appear to be the argument that it is contrary to the true meaning of s 159 to hold that it confers an implied power of discharge.' (See [2000] 1 All ER 347 at 355, [2001] Ch 32 at 42.)

[24] The judge then turned to consider the rival arguments and the authorities and looked in detail at *Durrant v Branksome UDC* [1897] 2 Ch 291, a decision of this court under the Public Health Act 1875. This was said to be the main plank in the argument of Mr Beloff QC for STW. She described the case as compelling. She noted that the Water Industry Act is a consolidation Act but said:

'However, in this case, doubt is thrown on the existence of the implied power by the existence of the express discharge power in s 165, and the provisions of Sch 12. Therefore, it is in my judgment necessary to trace the statutory history. In any event, it is necessary to look at the statutory history in order to see whether the decision in *Durrant's* case (*Durrant v Branksome UDC* [1897] 2 Ch 291) is still good authority notwithstanding the changes in the relevant legislation.' (See [2000] 1 All ER 347 at 359, [2001] Ch 32 at 46.)

Thus the reasoning by which the judge justified looking at the legislative history of the Water Industry Act appears to proceed from the premiss that the power of discharge should, if possible, be implied; but she regards s 165 and Sch 12 as throwing doubt on that. She further finds justification for this historical research in order to see whether *Durrant's* case is still good authority.

[25] The judge then considered the statutory history, drawing conclusions that ss 159 and 165 had entirely different origins and that if there was an implied power of discharge, as from 1989 (when the Water Act 1989 changed the law) it ceased to be subject to any duty to compensate any persons suffering loss and damage; another system for compensation and enforcement was then introduced, being compensation at the discretion of the Director General on a much reduced scale and in more limited circumstances.

[26] The judge expressed her conclusions:

'First, in my judgment, there is an implied power by virtue of s 159 to discharge surface water from pipes vested in a sewerage authority. It is part of the duty of a sewerage undertaker under s 94(1) of the WI Act to make provision for "emptying" sewers (which as stated, includes drains for removing surface water). Section 94(2) reinforces this to some extent (though not in the context of surface water), that it is the duty of a sewerage undertaker, in performing its duty under s 94(1), to have regard to the need to provide for the "disposal" of trade effluent. As a matter of first impression, it is difficult to see how a sewerage undertaker can altogether avoid emptying surface water from drains into a watercourse. The position of a water undertaker is different. Section 37 refers to the supply of water. It is

- a* arguably not incidental to the normal performance of this duty that the water undertaker should discharge water into a watercourse. Hence, if a sewerage undertaker has a discharge power by implication, it does not follow that a water undertaker has such a power. On this basis, the existence of an implied power in s 159 in favour of sewerage undertakers alone would not duplicate any provision in s 165.' (See [2000] 1 All ER 347 at 366–367, [2001] Ch 32 at 55; Arden J's emphasis.)
- b*

[27] The judge then referred to *Durrant's* case as 'highly persuasive as to the result of this case'. She continued:

- c* 'The fact that there is only a limited right to receive compensation makes it clear that Parliament intended to authorise the acts of the sewerage undertaker under s 159 without a right of full compensation, such as there had been in the 1875 Act. This is therefore a case where the presumption that Parliament did not intend to interfere with private rights must yield.'

- d* [28] The judge found support in the words of s 181 of the Water Industry Act, 'any powers conferred on that undertaker by or by virtue of section 159', for the implication of a power of discharge and possible support from s 184. She found as limits on the implied power those appertaining to statutory powers in general. Thus the power had to be exercised in good faith, could only be to do what might fairly be regarded as incidental to or consequential upon those things which Parliament had authorised, the manner of its exercise was subject to a degree of control under s 181, and, because of the limited right to compensation, it had to be exercised with all reasonable regard and care for the interests of other persons.
- e*

[29] The judge therefore found in favour of STW.

- f* [30] Mr Beloff for STW supports the reasoning and conclusion of the judge. He starts from the judge's proposition to which I have referred at [22] above, suggestive as it is that a statutory pipe-laying power automatically carries with it by implication a power to discharge the contents of the pipe. As he put it, a duty to drain without power to discharge is unimaginable. He relies on the principle that statutory powers will be construed as impliedly authorising everything which can fairly or reasonably be regarded as incidental to or consequential on the power itself.

- g* [31] For my part I have difficulty with the judge's proposition as a starting point for an examination of whether a power to discharge is to be implied into a pipe-laying power in a modern statute: that must depend on whether the statutory language justifies such implication. Still more do I question the reasoning by which the judge justified looking at the predecessor legislation before the
- h* Water Industry Act. As I pointed out at [24] above, the judge appears to have started from the premiss that the power to discharge should be implied, and she found support in *Durrant's* case for that implication.

- j* [32] *Durrant's* case seems to me to have little relevance to the present case. It was a case decided by reference to four sections of the 1875 Act: ss 15, 16, 17 and 308. By s 15 every local authority was to keep in repair all sewers belonging to them and to cause to be made such sewers as might be necessary for effectually draining their district. By s 16 a local authority was given power to carry any sewer through, across or under any turnpike road or any street or place laid out as or intended for a street, or under any cellar or vault under a street and, after giving reasonable notice to the owner or occupier, into through or under any lands whatsoever within their district, and also to exercise all or any of the powers

given by s 16 without their district for the purpose of outfall or distribution of sewage. Section 17 provided:

'Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake ...'

Section 308 provided that when any person sustained any damage by reason of the exercise of any of the powers of that Act in relation to any matter as to which he was not himself in default, full compensation should be made to such person by the local authority exercising such powers.

[33] The plaintiffs in *Durrant's* case owned part of the bed of a river. The defendant local authority built drains to carry rainwater falling on roads into the river, but such water was loaded with sand and silt. The plaintiffs claimed an injunction to restrain the defendants from causing or permitting any water with sand or silt to flow into the river. North J held that the local authority had a right to discharge the water from the surface drains into the river if they observed the provisions of s 17 of the 1875 Act, and this court dismissed the appeal from him. Lindley LJ thought it very important to bear in mind that the plaintiffs, if damnified, could obtain compensation under s 308 of that Act. He thought that the inevitable inference from ss 16 and 17 was that but for s 17 water could be poured under s 16 into any natural or artificial stream or watercourse, canal, pond or lake. Lopes LJ agreed, pointing out that s 308 met any objection of injustice to the landowner. Chitty LJ also agreed, saying that the question turned on the four sections. He said that s 17 might be read partly as a proviso and partly as an enabling clause, but that the better reading was that the power was conferred by s 16. To my mind it is far from clear that this court would have reached the same conclusion in the absence of ss 17 and 308.

[34] The decision in *Durrant's* case was applied in a number of subsequent cases including *Hesketh v Birmingham Corp* [1924] 1 KB 260, [1922] All ER Rep 2 and *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] 1 All ER 179, [1953] Ch 149. But in those cases as in *Durrant's* case the relevant applicable legislation contained the same essential elements of ss 15, 16, 17 and 308 of the 1875 Act. Under the Water Industry Act, whilst to some extent s 94 might be seen to be the successor to s 15 of the 1875 Act and s 159 of the Water Industry Act to be the successor to s 16 of the 1875 Act, in relation to sewerage undertakers performing functions under ss 94 or 159 there is no equivalent to s 17 of the 1875 Act. Section 117(5)(b) of the Water Industry Act, which is the equivalent of s 17, has no application to ss 94 and 159. Further, it is hard to see that there is any modern equivalent of a provision for full compensation such as was found in s 308 of the 1875 Act. The provisions of Sch 12 to the Water Industry Act are very limited and appear only to relate to compensation for owners of the land the subject of the express pipe-laying power in s 159 of that Act. Although the judge thought that s 181 of the Water Industry Act could be taken to be the modern substitute for s 308 of the 1875 Act, it seems to me to perform a quite different function, viz to award a modest sum on public law grounds when there is maladministration in the limited ways specified in the section. That is a far cry from the full compensation for loss provided by s 308. In any event I question the applicability of s 181 at all to the suggested implied power of discharge. The judge

a thought the words 'by or by virtue of [s] 159' significant of the existence of an implied power. But when one finds in s 159 itself two references in sub-s (3) to a 'power conferred by virtue of' a paragraph of sub-s (1), it does not seem to me possible to give to the words 'by or by virtue of [s] 159' in s 181(1) the weight which the judge would have them bear as indicating a reference to an implied power in relation to s 159.

b [35] I have even more difficulty with what we were told by Mr Beloff was the judge's own point on s 184 of the Water Industry Act, which she thought might provide some confirmation that an implied power of discharge exists in favour of sewerage undertakers. I do not see that it follows from the power in that section for certain undertakers to alter sewers or drains interfering with certain watercourses or certain rivers that an implied right of discharge from sewers or drains into those watercourses or rivers was recognised. Mr Beloff did not press this point and I say no more about it.

c [36] It was common ground between the parties at the hearing before this court that STW needed the implied statutory authority for which it contended, because to discharge water onto another's land would be an interference with private rights, even if the discharge caused no damage. As the judge rightly recognised, there is a presumption that a statute does not give the right so to interfere. However, this presumption will yield to a sufficiently clear intention in a statute, as the House of Lords held in *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353, [1981] AC 1001. In that case statutory authority for the construction and operation of a refinery was held to confer immunity against actions in nuisance because the refinery could not be operated without causing a nuisance. Mr Beloff accepted that the Water Industry Act did not authorise a sewerage undertaker to commit a nuisance. That is plainly right: it is not inevitable that nuisance will be caused by a sewerage undertaker performing its statutory functions.

d [37] Mr Beloff at the hearing did not challenge BWB's submission that the discharge of water into BWB's canal without BWB's consent would be a trespass unless statutory authority for that discharge could be implied. At the end of the hearing we asked counsel to investigate this point further. As a result of their helpful further researches, it remains common ground, subject to one qualification, that discharging water onto another's land constitutes a trespass. That is because (a) such a discharge is a direct entry onto land, and (b) the cause of action in trespass does not require damage (see, for example, *Clerk and Lindsell on Torts* (18th edn, 2000) pp 926–927, 974 (paras 18-08, 18-09 and 19-02) and 45(2) *Halsbury's Laws* (4th edn reissue) para 505). It is for the defendant to justify the legality of the entry, whether by the landowner's consent or by legal right (e.g. by prescription, by easement or by statutory authority).

e [38] Mr Beloff suggested a qualification in the case of a direct discharge into flowing water. In such a case, he submitted, there would be no trespass, though he accepted that where there is a discharge through the air onto water or onto land a trespass occurs. Mr Beloff's qualification is not based on any direct authority on the point, but on inferences from cases where it has been held that there has been an interference with incorporeal rights over flowing water, such as fishing and navigation rights. I do not accept those inferences. I cannot see why in principle it should matter whether or not the discharge is directly into the water, given that the land covered by the water is owned by another. In any event, as Mr Flint QC for BWB pointed out, it is apparent that many discharges by sewerage undertakers will not be directly into flowing water (in the present case the discharge is not made directly into the water of the canal, but into a basin

area beside the canal, and at times the basin may be full and at times empty), so that it cannot be assumed that Parliament legislated on the footing that discharges would always take place directly into water so that no statutory authority was required for an interference with private rights.

[39] I accept Mr Flint's submission that the proper place to start consideration of the question whether a power to discharge is to be implied is the actual words of the section into which the power is sought to be implied. The first point of note in s 159 of the Water Industry Act is that it expressly confers detailed powers on both water undertakers and sewerage undertakers alike. Such powers are not merely to lay a pipe, but also ancillary powers such as to keep the pipe there, to inspect, maintain, adjust, repair or alter a laid pipe and to carry out any works requisite for or incidental to the purposes of works so empowered. The elaboration of the ancillary powers does not eliminate all possibility of the implication of further powers. Thus Mr Flint accepted that there must be implied power to use the pipe for the performance of the undertakers' functions by causing water to flow through the pipe. But that is a straightforward self-sufficient power easily implied without qualification. The implication of a discharge power, which gives rise to questions such as the judge herself raised, as I have noted at [23] above, is by such elaboration rendered more difficult.

[40] That difficulty is considerably increased by the fact that express provision for discharge is made in the same Part of the Water Industry Act but limited to water undertakers. Even allowing for the fact that the functions of a water undertaker differ from those of a sewerage undertaker, I regard it as significant that s 165 of the Water Industry Act expressly gives water undertakers alone the power to discharge water into any available watercourse (and nowhere else) in exercising the power conferred by s 159 on water and sewerage undertakers alike and that by s 165(2) and (3) and s 166 strict conditions are imposed on that discharge. Why should Parliament dispense with the need for the prior consent of the NRA (or the Environment Agency) or a navigation authority or the removal of mud and silt or a limit on the diameter of a pipe for a sewerage undertaker discharging through its pipes when it insists on those conditions for a water undertaker? Why should there be an express reference to compensation for expenditure attributable to a discharge under s 165 (and therefore limited to a water undertaker's discharge) in para 6 of Sch 12 to the Water Industry Act, but not to a discharge by a sewerage undertaker unless an implied power of discharge for a sewerage undertaker was not contemplated?

[41] Would it defeat the intention of Parliament if a sewerage undertaker did not have an implied power to discharge the contents of its sewers? In my judgment it is impossible so to conclude. Section 94(1)(b) of the Water Industry Act directly addresses the question of discharge. So far from suggesting that a power should be implied, it expressly imposes on every sewerage undertaker a duty to make provision for the emptying of its sewers and for effectively dealing, by means of sewage disposal works or otherwise, with the contents of those sewers. It can do this by discharge into rivers or the sea (provided that it does not cause pollution or offend environmental controls), by discharge onto its own land (and I have already noted the compulsory purchase power conferred by s 155 of that Act subject to the authority of the Secretary of State), including via its own sewage works, or by procuring the consent of the landowner, such as occurred in the present case until the licence was terminated. There is nothing in the evidence to suggest that the sewerage undertaker is inevitably left at the mercy of an over-greedy landowner. Even in the present case the water now discharged

a into the canal of the BWB could, albeit at some expense, be rerouted to be discharged elsewhere. It is entirely consistent with the presumption against Parliament interfering with private rights that no right to commit a trespass should be implied.

[42] There is a further difficulty in the way of the implication of a power to discharge. I find it impossible to see what are the precise limits of such power.

b This is not a case such as *Durrant's* case where it was possible to discern from s 17 of the 1875 Act the limits of what was impliedly permitted but for the prohibition in s 17 of the 1875 Act. Here the prohibitory provisions of ss 117(5)(b) and 186(3) of the Water Industry Act do not extend to the functions in ss 94 or 159 and so offer no guidance on the power sought to be implied into s 159, read together, as Mr Beloff submits, with s 94. Logically, one would have thought, if a power to

c discharge is to be implied merely because of the power to lay a pipe or because of the drainage or sewerage functions of the sewerage undertaker, the discharge of everything in any such pipe would be impliedly authorised. Yet Mr Beloff understandably shrinks from putting his case so high, though he has, when pressed as to where the discharge is impliedly authorised to occur, extended the

d place of discharge to any land where a pipe is laid. The limits which the judge suggested should apply to the implied power, as I have noted at [28] above, are surprisingly vague given the detailed conditions enacted for discharge by water undertakers. The imprecise limits of the suggested power of discharge seem to me to be a further indication that no implication should be made.

e [43] I therefore conclude from an examination of the Water Industry Act as a whole that the implication of a power to discharge is inconsistent with the provisions of that Act and cannot be justified. There is no cause to look at the predecessor legislation to this consolidation Act. I note that in the Water Resources Act 1991, which was enacted at the same time and as part of the same group of Acts relating to water as the Water Industry Act, express powers are conferred on the NRA

f (now the Environment Agency) as on water undertakers as to pipe-laying and discharge and that there is provision for compensation. I also note that the Highways Act 1980 conferred on highway authorities the power to lay pipes for draining surface water and an express power of discharge and provision for compensation. All this is consistent with the absence of any implied power of

g discharge in the Water Industry Act for sewerage undertakers.

[44] Since writing the first draft of this judgment I have had the benefit of seeing Chadwick LJ's judgment. I agree with the further reasons which he gives for allowing this appeal.

[45] For all these reasons, I would respectfully disagree with the decision of

h the judge, allow the appeal, set aside the judge's order, and grant declarations that upon the true construction of the Water Industry Act 1991 STW has no implied power to discharge surface water from the Poplars Estate into the Stourbridge Canal, and that STW is obliged by reason of cl 2(G) of the 1976 Licence to remove the nine-inch surface water pipe, the subject of the 1976 licence, from BWB's

j property and to reinstate its property to its satisfaction.

CHADWICK LJ.

[46] From its junction with the Birmingham Canal at Black Delph to its junction with the Staffordshire and Worcestershire Canal at Stourton, the Stourbridge Canal is a cruising waterway for the purposes of Pt VII of the Transport Act 1968. The canal is comprised in the undertaking of the British Waterways Board

(BWB); having been transferred to BWB when that board was established by the Transport Act 1962. a

[47] On 22 April 1976 BWB entered into a licence agreement with the Severn-Trent Water Authority, the purpose of which (as appears from the recital) was to enable the water authority to discharge into the canal surface water from a residential development at Brierley Hill. For that purpose BWB granted the water authority a licence, on payment of the annual sum of £29, to discharge clean surface water through a nine-inch surface water drain pipe (together with silt trap and outfall). The position of the pipe and ancillary works was defined by a plan. The licence was terminable on notice; and the water authority agreed that, on termination, it would remove the pipe and ancillary works. b

[48] The Severn-Trent Water Authority was a regional water authority established under s 2 of the Water Act 1973. Its functions included sewerage and sewage disposal. Section 14(1) of the 1973 Act was in these terms, so far as material: c

‘It shall be the duty of every water authority to provide, either inside or outside their area, such public sewers as may be necessary for effectually draining their area and to make such provision, whether inside or outside their area, by means of sewage disposal works or otherwise, as may be necessary for effectually dealing with the contents of their sewers ...’ d

In that context ‘sewer’ included a sewer or drain of every description (other than a drain used for the drainage of one building only) (see s 4 of the Public Health Act 1875, s 343(1) of the Public Health Act 1936 and s 38(1) of the 1973 Act). It is not, I think, open to doubt—nor is it in dispute—that the water authority entered into the licence of 22 April 1976 for the purpose of enabling them to perform the duty imposed by s 14(1) of the 1973 Act. e

[49] The Water Act 1989 was enacted on 6 July 1989. It provided, at s 4, for the functions of regional water authorities to be transferred to other bodies with effect from an appointed transfer date. The date appointed was 1 September 1989. The functions, including the sewerage functions, of the Severn-Trent Water Authority were transferred to Severn Trent Water Ltd (STW) as the successor company—see s 4(2) of the 1989 Act, Sch 2 to that Act and the Water Authorities (Successor Companies) Order 1989, SI 1989/1465. In relation to the sewerage functions transferred to it STW became a sewerage undertaker for the purposes of Ch III in Pt II of the 1989 Act (see s 11(4)(b) of that Act). The duties formerly imposed on its predecessor water authority by s 14(1) of the 1973 Act were imposed on STW (in substantially the same form) by s 67(1) of the 1989 Act. f

[50] The 1989 Act (so far as material) was repealed, on consolidation, by the Water Consolidation (Consequential Provisions) Act 1991 (see s 3 of that Act, and Pt I in Sch 3). The relevant provisions in relation to sewerage are now found in Ch I of Pt IV of the Water Industry Act 1991. In particular, the duties formerly imposed by s 14(1) of the 1973 Act and by s 67(1) of the 1989 Act are now imposed by s 94(1) of the Water Industry Act. The subsection is in these terms: g

‘It shall be the duty of every sewerage undertaker—(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers as to ensure that that area is and continues to be effectually drained; and (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, h

j

a by means of sewage disposal works or otherwise, with the contents of those sewers.'

[51] The benefit of the licence of 22 April 1976 was transferred to STW (together with other rights comprised in the undertaking formerly carried on by the Severn-Trent Water Authority) by the scheme made and approved under Sch 2 of the 1989 Act. On 26 September 1996 BWB, as it was entitled to do under cl 4(2) of the licence, gave notice of termination, to take effect on 31 March 1997.

b [52] STW accepted that the notice of 26 September 1996 was effective to determine the licence of 22 April 1976. It did not accept, however, that it was obliged to cease discharging surface water through the pipe and ancillary works which were the subject of that licence; nor that it could be required to remove that pipe and the ancillary works. In support of its contention that it was entitled to continue to discharge surface water STW relied upon the provisions of the Stourbridge Canal Act 1776 (16 Geo III c 28) under which the canal was originally constructed; and, in the alternative, on the provisions in s 159 of the Water Industry Act 1991. It was in those circumstances that BWB sought declaratory relief, by originating summons issued on 21 January 1997. Paragraphs 4 and 5 of that summons, which are the only paragraphs relevant on this appeal, were in these terms:

e 'A Declaration (4) that upon the true construction of Section 159 of the Water Industry Act 1991 (c.56) the Defendant as a sewerage authority has no power or right thereunder to discharge the contents of any sewer or disposal main into any Canal or other waterway vested in the Plaintiff.

A Declaration (5) that the Defendant is obliged by reason of clause 2(G) of the 1976 Licence to remove the 9 inch surface water pipe the subject of the 1976 Licence from the Plaintiff's property on the 31 March 1997 and thereupon to reinstate its property to its satisfaction.'

f [53] The summons came before Arden J for determination. By an order which she made on 13 October 1999 ([2000] 1 All ER 347 at 368, [2001] Ch 32 at 56) it was declared—

g 'that: upon the true construction of s 159 of the Water Industry Act 1991, the defendant as a sewerage undertaker has an implied power thereunder to discharge surface water from the Poplars Estate at Brierley Hill into the Stourbridge Canal via the nine-inch surface water pipe the subject of the Licence dated 22 April 1976 ... and that accordingly, the defendant is not now and was not on 31 March 1997, obliged by virtue of cl 2(G) of such licence to remove such pipe from the claimant's property or to reinstate the claimant's property.'

The judge gave permission to appeal from that part of her order. It is that appeal which is now before us.

[54] Section 159 of the Water Industry Act is in these terms, so far as material to a sewerage undertaker:

j '(1) Subject to the following provisions of this section, to section 162(9) below and to the provisions of Chapter III of this Part, every relevant undertaker shall, for the purpose of carrying out its functions, have power—(a) to lay a relevant pipe (whether above or below the surface) in any land which is not in, under or over a street and to keep that pipe there; (b) to inspect, maintain, adjust, repair or alter any relevant pipe which is in

any such land; (c) to carry out any works requisite for, or incidental to, the purposes of any works falling within paragraph (a) or (b) above ...

(4) The powers conferred by this section shall be exercisable only after reasonable notice of the proposed exercise of the power has been given to the owner and to the occupier of the land where the power is to be exercised.

(5) Subject to subsection (6) below, in relation to any exercise of the powers conferred by this section for the purpose of laying or altering a relevant pipe, the minimum period that is capable of constituting reasonable notice for the purposes of subsection (4) above shall be deemed—(a) where the power is exercised for the purpose of laying a relevant pipe otherwise than in substitution for an existing pipe of the same description, to be three months; and (b) where the power is exercised for the purpose of altering an existing pipe, to be forty-two days.

(6) Subsection (5) above shall not apply in the case of any notice given with respect to the exercise of any power in an emergency or for the purpose of—(a) laying or altering a service pipe; or (b) complying with a duty imposed under section 41 or 98 above.

(7) Subject to subsection (2) above [which excludes from sub-s (1) the laying of a service pipe by a water undertaker save in certain defined circumstances], in this section “relevant pipe” has the same meaning as in section 158 above.’

[55] Section 159, as appears from sub-s (1)(a), confers pipe-laying powers in or over land which is not, itself, in, under or over a street. Section 158 confers corresponding powers in relation to streets. Section 158(7) of the Water Industry Act defines ‘relevant pipe’ for the purposes of both ss 158 and 159. It is in these terms:

‘Subject to section 161(7) below, in this section references to a relevant pipe shall be construed—(a) in relation to a water undertaker, as references to a water main (including a trunk main), resource main, discharge pipe or service pipe; and (b) in relation to a sewerage undertaker, as references to any sewer or disposal main.’

In that context, ‘sewer’ has the inclusive meaning given to the word by s 219(1) of the Water Industry Act:

‘... “sewer” includes (without prejudice to subsection (2) below) all sewers and drains (not being drains within the meaning given by this subsection) which are used for the drainage of buildings and yards appurtenant to buildings ...’

And ‘drain’ means a drain used for the drainage of one building. In effect, therefore, the meaning established by the 1875 Act has survived.

[56] I have described ss 158 and 159 of the Water Industry Act as provisions which confer pipe-laying powers. The powers are conferred on ‘every relevant undertaker’. ‘Relevant undertaker’ means a water undertaker or a sewerage undertaker (see s 219(1) of the Water Industry Act). There is nothing in ss 158 or 159 of the Water Industry Act which suggests (on a first reading) that those sections are intended to confer powers to discharge onto land not owned by the relevant undertaker whatever it is that is to pass through the ‘relevant pipe’.

[57] The view that ss 158 and 159 are not concerned with powers to discharge the contents of the pipe which they authorise and enable the relevant undertaker

a to lay and maintain in or over the land of another is strengthened by a consideration of s 165(1) of the Water Industry Act, which gives an express power of discharge (in the circumstances there defined) to a water undertaker. The section is in these terms:

b 'Subject to the following provisions of this section and to section 166 below, where any water undertaker—(a) is exercising or about to exercise any power conferred by section 158, 159, 161 or 163 above (other than the power conferred by section 161(3) above); or (b) is carrying out, or is about to carry out, the construction, alteration, repair, cleaning, or examination of any reservoir, well, borehole, or other work belonging to or used by that undertaker for the purposes of, or in connection with, the carrying out of any of its functions, the undertaker may cause the water in any relevant pipe or c in any such reservoir, well, borehole or other work to be discharged into any available watercourse.'

Section 161 confers powers on relevant undertakers (that is to say, on both water undertakers and sewerage undertakers) to carry out works needed to secure that d water in a relevant water works (that is to say, water mains, resource mains, service pipes, etc which contain water which may be used by a water undertaker for providing a supply of water) is not polluted or otherwise contaminated. Section 163 of the Water Industry Act confers powers on a water undertaker to fit a stopcock to any service pipe used to supply water to any premises. It is of e significance that the power to discharge when a water undertaker is exercising powers under ss 158, 159 and 161 is conferred expressly by s 165(1); but there is no comparable express power conferred on a sewerage undertaker in the same circumstances. Further, the power to discharge conferred on a water undertaker by s 165(1) is subject to safeguards or limitations (see ss 165(2), (3) and 166(1)).

f [58] Before turning to the judgment below, it is convenient to refer to the scheme of the Water Industry Act; and to set s 159 in its context within that scheme.

g [59] The Water Industry Act 1991 is a consolidating Act (as its long title makes clear). It re-enacts much of the 1989 Act (which was an amending Act, having as one of its main objects the 'privatisation' of the water industry). The Water Industry Act is one of a number of enactments relating to the water industry which received the royal assent on the same day (25 July 1991). The others were the Water Resources Act 1991, the Statutory Water Companies Act 1991, and the Water Consolidation (Consequential Provisions) Act 1991. Together they comprise a formidable bulk of detailed and complex legislation. The Water Industry Act h itself contains 223 sections and 15 schedules; the Water Resources Act, 225 sections and 26 schedules. The legislation is replete with express powers to cover activities which water and sewerage undertakers might need or wish to undertake. It is, at the least, unlikely that Parliament would have left anything as fundamental as a power to discharge sewage onto another's land to be inferred.

j [60] The Water Industry Act is divided into Parts. In the context of this appeal, the relevant parts are Pt II (Appointment and Regulation of Undertakers), Pt III (Water Supply), Pt IV (Sewerage Services), Pt V (Financial Provisions) and Pt VI (Undertakers' Powers and Works).

[61] Section 6, in Pt II of the Water Industry Act, provides for the appointment of companies to be water undertakers or sewerage undertakers. A company cannot be appointed to be a sewerage undertaker unless it is a company within the meaning of the Companies Act 1985 which is limited by shares (see ss 6(5) and

219(1) of the Water Industry Act). The significance of that is that a sewerage undertaker will derive its general corporate powers from its memorandum of association; unlike a statutory undertaking, its powers do not have to found within the enactment by which it is established. There is, for example, no need to seek, within the Water Industry Act, powers for sewerage undertakers to acquire rights over land by purchase or prescription. It may be expected that those powers will be contained in the memorandum of association of the company which is appointed to be a sewerage undertaker. It is necessary, however, to look to the Water Industry Act for powers of compulsory purchase, or for powers to override the rights of others (with or without the payment of compensation).

[62] Section 37, in Pt III of the Water Industry Act, imposes a duty on every water undertaker to develop and maintain an efficient and economical system of water supply within its area. Specific obligations are imposed in relation to the supply and maintenance of water mains, trunk mains, resource mains and supply pipes (to which reference is made in the definition of 'relevant pipe' in s 158(7) of the Water Industry Act). Those are all conduits through which water is supplied; they have no function in relation to drainage or sewage. It may be noted in passing that a 'discharge pipe' to which reference is also made in s 158(7) is also a pipe used by a water undertaker (see ss 165 and 192); it has no assigned meaning in relation to sewerage undertakers.

[63] Section 94 of the Water Industry Act (to which I have referred earlier in this judgment) is the first section in Pt IV of the Water Industry Act. It imposes on every sewerage undertaker a general duty to provide a system of public sewers so as to ensure that the area for which it is responsible is effectually drained. It imposes, also, a duty to make provision for emptying those sewers and for dealing with their contents. Sections 102 to 105 of the Water Industry Act provide for the adoption by a sewerage undertaker of existing sewers or sewage disposal works within, or serving, its area. Sections 106 to 109 provide for the connection of drains and private sewers into public sewers. In particular, s 106 gives to the owner or occupier of any premises (or the owner of any private sewer which drains premises) the right to connect to, and to discharge both foul water and surface water into, the public sewer of a sewerage undertaker; save that where separate public sewers are provided for foul water and for surface water, a person may not discharge foul water into a sewer provided for surface water nor (save with the consent of the undertaker) surface water into a sewer provided for foul water. Sections 111 to 114 provide for the sewerage authority to take steps to protect its sewerage system from use which is likely to damage it or to cause a nuisance. Section 115 provides for co-operation between sewerage undertakers and a local authority (in its capacity as highway authority) in relation to the draining of surface water from roads or streets. Section 116 gives the sewerage undertaker power to close or restrict the use of a public sewer.

[64] Section 117(5) and (6) of the Water Industry Act are in these terms, so far as material:

'(5) Nothing in sections 102 to 109 above or in sections 111 to 116 above shall be construed as authorising a sewerage undertaker to construct or use any public or other sewer, or any drain or outfall ... (b) for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal, pond or lake, without the water having been so treated as not to affect

a prejudicially the purity and quality of the water in the stream, watercourse, canal, pond or lake.

(6) A sewerage undertaker shall so carry out its functions under sections 102 to 105, 112, 115 and 116 above as not to create a nuisance.'

It is important to note that s 117(5) does not confer a power to construct or use a sewer, drain or outfall for the purpose of discharging surface water or foul water into a stream, watercourse, canal, pond or lake. Rather, it imposes a restriction on doing that in the case of foul water which has not been treated. But there is nothing in ss 102 to 109, or in ss 111 to 116, which could have the effect of permitting or authorising the discharge of surface water or foul water onto the land of another, or into a stream, watercourse, canal, pond or lake. If a power to do that is conferred by the Water Industry Act, it must be found elsewhere. Further, s 117(6) gives no encouragement to the view that any power that may be conferred elsewhere is likely to authorise the commission of a nuisance.

[65] Section 142, in Pt V of the Water Industry Act, confers powers on relevant undertakers (that is to say, both sewerage undertakers and water undertakers) to fix, demand and recover charges for any services provided in the course of carrying out their functions. Section 142(4) enables a relevant undertaker, 'Except in so far as this Chapter otherwise provides', to fix charges 'by reference to such matters ... as appear to the undertaker to be appropriate'. It is plain, therefore, that (absent of some restriction imposed under Ch I in Pt V) a sewerage undertaker may, when fixing charges in connection with the provision of drainage and sewerage services, include provision for the costs associated with discharge or disposal. There is no restriction elsewhere in Ch I upon making provision for the costs of discharge or disposal. For example, it could not be said that STW would not have been entitled to take into account the licence fee payable under the licence agreement of 22 April 1976 when fixing the charges to be paid by customers. It cannot be assumed, therefore, that Parliament must have intended that sewerage undertakings would have power to discharge onto the land (or into the watercourse) of another without payment. The Water Industry Act confers power on relevant undertakings to recover the costs associated with carrying out their functions; and those costs will include the costs of acquiring any necessary rights by purchase.

[66] Chapter I in Pt VI of the Water Industry Act contains provisions as to 'Undertakers' Powers'. Sections 155 to 157 are grouped under the cross-heading 'Powers in relation to land'. Section 155(1) confers power on the Secretary of State to authorise a relevant undertaker to purchase compulsorily any land anywhere in England or Wales 'which is required by the undertaker for the purposes of, or in connection with, the carrying out of its functions'. Section 155(2)(a) provides that the power conferred on the Secretary of State by s 155(1) includes power to authorise 'the acquisition of interests in and rights over land by the creation of new interests and rights'. So, if a sewerage undertaker needs to acquire the right to discharge onto the land (or into the watercourse) of another in order to carry out the duties imposed on it by s 94 of the Water Industry Act, it can do so compulsorily under the authority of the Secretary of State. But, of course, the exercise of the right of compulsory acquisition will give rise to an obligation to pay compensation under the relevant provisions of the Compulsory Purchase Act 1965 as modified by the provisions contained in Sch 9 to the Water Industry Act (see s 155(5) of that Act). It is, I think, not without significance that para 2 of Sch 9 to the Water Industry Act makes express

provision for the compulsory acquisition of a right by the creation of a new right (for example, under a licence to discharge); and para 3 of that Schedule provides that, in the case of a compulsory acquisition under s 155 of the Water Industry Act, there shall be substituted for s 7 of the 1965 Act, the following section (so far as material):

‘In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only *to the extent (if any) to which the value of the land over which the right is to be acquired is depreciated by the acquisition of the right* but also to the damage (if any) to be sustained by the owner of the land ...’ (My emphasis.)

The words which I have emphasised replace the words of the section as enacted in the 1965 Act.

[67] It is clear, therefore, that Parliament has provided, in Pt VI of the Water Industry Act, for the compulsory acquisition of rights over land (including the right to discharge the contents of sewers onto land or into a watercourse) where those rights are required by a sewerage undertaker for the purposes of, or in connection with, the carrying out of its functions; and has provided, in Pt V of that Act, for the recovery by the sewerage undertaker, through charges, of the cost of acquiring such rights. Against that background it is, at the least, unlikely that Parliament intended to confer an implied right to discharge (with or without causing a nuisance) without any obligation to pay compensation.

[68] It is said that that implied power is to be found in s 159 of the Water Industry Act. Sections 158 and 159 form a group under the cross-heading ‘Pipe-laying’. They are to be read in conjunction with Sch 12, which makes provision ‘for imposing obligations for the purpose of minimising the damage caused in the exercise of certain powers conferred on undertakers and for imposing obligations as to the payment of compensation’ (see s 180 of the Water Industry Act). Paragraph 2 of Sch 12 is headed ‘Compensation in respect of pipe-laying works in private land’. The paragraph is in these terms, so far as material:

‘(1) If the value of any interest in any relevant land is depreciated by virtue of the exercise, by any relevant undertaker, of any power to carry out pipe-laying works on private land, the person entitled to that interest shall be entitled to compensation from the undertaker of an amount equal to the amount of the depreciation.

(2) Where the person entitled to an interest in any relevant land sustains loss or damage which—(a) is attributable to the exercise by any relevant undertaker of any power to carry out pipe-laying works on private land; (b) does not consist in depreciation of the value of that interest; and (c) is loss or damage for which he would have been entitled to compensation by way of compensation for disturbance, if his interest in that land had been compulsorily acquired under section 155 of this Act, he shall be entitled to compensation from the undertaker in respect of that loss or damage, in addition to compensation under sub-paragraph (1) above.

(3) Where any damage to, or injurious affection of, any land which is not relevant land is attributable to the exercise by any relevant undertaker, of any power to carry out pipe-laying works on private land, the undertaker shall pay compensation in respect of the damage or injurious affection to every person entitled to an interest in that land ...

a (5) In this paragraph "relevant land", in relation to any exercise of a power to carry out pipe-laying works on private land, means the land where the power is exercised or land held with that land.

(6) In this paragraph the references to a power to carry out pipe-laying works on private land are references to any of the powers conferred by virtue of sections 159, 161(2) and 163 of this Act.'

b [69] Compensation is payable under para 2 of Sch 12 in three distinct situations: (i) where the value of any interest in land, on or in which pipes are laid in the exercise of the pipe-laying power, is depreciated; (ii) where loss or damage (not being the depreciation of the value of an interest in land) attributable to the exercise of the pipe-laying power is suffered by a person entitled to an interest in
c land on or in which pipes are laid; and (iii) where damage to, or injurious affection of, land (not being land on or in which pipes are laid in the exercise of the pipe-laying power) is attributable to the exercise of the pipe-laying power. It might, perhaps, be possible to argue that the owner of the bed of a river or watercourse (not being land in or over which any pipes are laid in the exercise of the
d pipe-laying power or at all) is entitled to claim compensation for damage or injurious affection caused by the discharge of surface water or sewage from pipes laid in or over the land of a riparian owner, on the ground that that is attributable to the exercise of the pipe-laying power in relation to the riparian land; but that, to my mind, would be to give to the phrase 'attributable to the exercise of [the pipe-laying power]' a meaning which it was not intended to bear. I do not think
e that Parliament intended, when enacting para 2 of Sch 12 to the Water Industry Act, that the phrase 'attributable to the exercise of [the pipe-laying power]' was apt to cover the discharge of surface water and sewage from pipes which had been laid pursuant to the pipe-laying power. But, even if Parliament did intend that, it plainly did not intend the phrase to cover the discharge of surface water and sewage from pipes which were not laid pursuant to any statutory power but
f under the terms of a contractual licence; or, say, to existing sewers which had been taken over or adopted under ss 102 or 104 of the Water Industry Act.

[70] The importance of s 180 of, and Sch 12 to, the Water Industry Act, as it seems to me, is that they make clear that damage or injurious affection resulting from or attributable to the exercise of the pipe-laying power is to attract
g compensation. To imply into s 159 of the Water Industry Act a power to discharge onto the land (or into the watercourse) of another without giving to the person interested in that land (or watercourse) any right to compensation would be inconsistent with the statutory scheme of which s 159 forms a part. It is impossible to hold that a power to discharge onto the land of another through pipes which
h have not been laid in the exercise of the pipe-laying power could attract compensation under Sch 12. And it is unnecessary to strive to do so; the power to discharge (where required) can be acquired compulsorily under s 155 of the Water Industry Act, upon payment of compensation.

[71] But for the fact that the judge reached a different conclusion, I should
j have regarded the contention that a power to discharge the contents of sewers (whether surface water or sewage) onto the land (or into the watercourse) of another was to be implied by virtue of the provisions of s 159 of the Water Industry Act as unarguable. For the reasons which I have sought to give, I cannot see how, as a matter of construction, it can be said that the express powers which are conferred by s 159 of the Water Industry Act lead to the conclusion that a power to discharge must be implied. Nor can I see how it can be said that such a

power must be implied in order to enable a sewerage undertaker to carry out the functions imposed by s 94 of that Act. The fallacy, as it seems to me, lies in the underlying (but unspoken) premise that Parliament must have intended that sewerage undertakers should have facilities to discharge (which, plainly, they do require in order to carry out their functions) without paying for those facilities. Whether or not that premise could have been supported in the context of a public authority charged with functions imposed in the interests of public health, it cannot be supported, as it seems to me, in the context of legislation enacted following a decision to privatise the water industry.

[72] The judge, in a judgment which is now reported at [2000] 1 All ER 347, [2001] Ch 32, addressed the question whether a discharge power could be implied into s 159 of the Water Industry Act in the case of a sewerage undertaker. She observed:

‘If one of the primary functions of a sewerage authority is to drain land, it would seem to follow that it should have an implied power to discharge the water so drained, and it would, at first sight, be odd if water undertakers had that power in right of the pipe laying power, but sewerage undertakers did not.’ (See [2000] 1 All ER 347 at 355, [2001] Ch 32 at 42.)

[73] The reference, there, to the water undertaker’s power to discharge ‘in right of the pipe laying power’ is a reference to the express power conferred by s 165 of the Water Industry Act. But it must be kept in mind that the express power conferred by s 165 is conferred only where a water undertaker ‘is exercising or about to exercise’ the pipe-laying power conferred by s 159; there is no power for a water undertaker to discharge from pipes which are not the subject of a current (or immediately prospective) exercise of the pipe-laying power. The need for a power to discharge from supply pipes into an available watercourse is unlikely to arise unless something is being done (or is about to be done) to those pipes. To state the obvious, the purpose of supply pipes is to supply water to the place where it is wanted. A water undertaker is not in the business of disposing of surplus water. The position of a sewerage undertaker is quite different. It is in the business of disposing of surplus water (in particular, surface water). In the case of a water undertaker, its principal function is to supply water; the laying of pipes is incidental to that principal function; and the power to discharge water from those pipes is incidental to the pipe-laying function. In the case of a sewerage undertaker, its principal function (or one of its principal functions) is to dispose of water; the laying of pipes is incidental to that function; and it would be surprising if it were given power to discharge as an incident of its pipe-laying function. That would be to put the cart before the horse. What might, at first sight, seem an odd distinction is not, on further consideration, in the least odd. What would be odd, would be for a water undertaker to be given an express power to discharge which was not incidental to work which was being done (or about to be done) on supply pipes; or for a sewerage undertaker to be given power to discharge which was incidental to (and only exercisable in connection with) work being done (or about to be done) on sewage pipes. The power to discharge which a sewerage undertaker requires is not a power incidental to the pipe-laying power; it is a power which is exercisable after pipes have been laid. For my part, I would not expect to find the power which a sewerage undertaker requires conferred in the same statutory context as the express power to discharge which is conferred on water undertakers.

- a [74] Nor do I share the judge's view that:
- '... it would seem to follow [from the fact that one of the primary functions of a sewerage *authority* is to drain land] that it [a sewerage *undertaker*] should have an *implied* power to discharge the water so drained ...' (See [2000] 1 All ER 347 at 355, [2001] Ch 32 at 42; my emphasis.)
- b It seems to me that the judge may have overlooked the fact that one of the important changes made in the 1989 Act (and perpetuated in the Water Industry Act) is that sewerage functions were transferred from public authorities (which derived their corporate powers from the statute by which they were established) to limited companies (which derive their corporate powers from their memoranda of association). The judge referred ([2000] 1 All ER 347 at 361, [2001] Ch 32 at 49)
- c to there being no objection in principle to a statutory body having a power by reasonable implication to do that which it needs to do to achieve its object. I agree. It would be easy to find that a power to discharge was included (by implication) in the powers conferred on a statutory undertaking. But a sewerage undertaker is not a statutory undertaking. What STW seeks to assert has been conferred by
- d implication is not a corporate power to discharge (for which it can rely, no doubt, on its own memorandum of association) but a power to discharge without payment of compensation onto the land (or into the watercourse) of another. Again, for my part, I would not expect an implied power of that nature to follow from the fact that a company limited by shares (which, it may be assumed, are
- e to pass out of public ownership in due course, if the objective of privatisation is to be achieved) has been appointed as a sewerage undertaker to carry out the duties imposed by s 94 of the Water Industry Act. What I would expect to find (and do find) in the legislation is a power to acquire by compulsory purchase, with the authority of the Secretary of State and upon payment of compensation, the rights which the undertaker needs to carry out its functions.
- f [75] Faced with the obvious difficulties of construction posed by the provisions of the Water Industry Act, the judge found support for her view in the decision of this court in *Durrant v Branksome UDC* [1897] 2 Ch 291. That was a decision on the 1875 Act. I agree with Peter Gibson LJ, for the reasons which he gives, that *Durrant's* case is of little relevance to the position as it now is under the Water Industry Act. It seems to me that the judge fell into the error of reasoning, from
- g the decision in *Durrant's* case and the subsequent legislative history (i) that there must be an implied power for a sewerage undertaker to discharge onto the land of another, (ii) that, because the provisions of the Water Industry Act did not appear to support that conclusion, those provisions must be ambiguous, and (iii) that the ambiguity so identified could be resolved by recourse to *Durrant's*
- h case and the legislative history. That is the wrong approach. The Water Industry Act is a consolidating Act. The correct approach is to begin with the provisions of that Act. If they are clear (as I think that they are in the present case) there is no need to ask what the position was under previous legislation. Indeed, where the provisions of that earlier legislation differ from those in the consolidating Act,
- j there is not only no need; it is dangerous to do so.
- [76] The present case provides an illustration of the danger. There can be no doubt that the law was changed by the 1989 Act. The judge herself recognised that ([2000] 1 All ER 347 at 362, [2001] Ch 32 at 50). The trap, into which, as it seems to me, the judge was led, was to assume that the pre-1989 law remained unchanged save to the extent that changes could be identified in the 1989 Act; and to ask what those changes were. That was the wrong question. The right

question is to ask what the law has been since the statutory consolidation in 1991. The answer to that question is to be found in the Water Industry Act. It is only if that Act does not provide an answer in which the court can feel confidence that there is any reason to look at earlier legislation (see *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 WLR 15, to which Peter Gibson LJ has already referred).

[77] For those reasons, as well as for the reasons given by Peter Gibson LJ with which I concur, I would allow this appeal.

KEENE LJ.

[78] I agree, with some hesitation, that this appeal should be allowed. I can see the force of the arguments advanced on behalf of the respondent, particularly the point that it would be remarkable if Parliament had imposed the duty on sewerage authorities under s 94 of the Water Industry Act 1991 'to make provision for the emptying of ... sewers and such further provision ... as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers', without conferring on them the power to discharge the contents. Yet there is no express power to discharge given anywhere in the Water Industry Act to sewerage undertakers.

[79] Clearly as a matter of corporate capacity such a power to discharge is implicit in s 94. But it does not follow from that that there is to be implied a power to discharge onto the property of others without consent, thereby overriding private rights. One would expect to see such a power provided in express terms.

[80] Moreover, there is a considerable difficulty in implying such a power into s 159 of the Water Industry Act as the defendant contends. It is not confined to the fact that both water and sewerage undertakers are given by s 159 an express pipe-laying power with ancillary powers and that only water undertakers are given an express power to discharge by s 165(1) of the Water Industry Act. It is also the extent of any implied power so created. The express power conferred on water undertakers to discharge is confined to discharges into watercourses. But the pipe-laying power possessed by both types of undertaker by virtue of s 159 is a power to lay a pipe 'in any land which is not in, under or over a street'. There is no reference to watercourses, canals, lakes or any other specific water feature. That being so, any implied power of discharge to be derived from s 159 would seem to be a power to discharge without the consent of the landowner onto any land over which a pipe could be laid by virtue of that provision. Discharge would not be confined to watercourses or similar features. That, however, would be an even more far-reaching power and one yet more difficult to imply. It would presumably give the sewerage undertaker the power to discharge at any point along the line of the pipe.

[81] One recognises that various provisions in the Water Industry Act seem to imply that in certain circumstances a discharge may be made so long as no nuisance is caused. Section 117(5) provides:

'Nothing in sections 102 to 109 above or in sections 111 to 116 above shall be construed as authorising a sewerage undertaker to construct or use any public or other sewer, or any drain or outfall ... (b) for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal, pond or lake, without the water having been so treated as not to affect

a prejudicially the purity and quality of the water in the stream, watercourse, canal, pond or lake.'

[82] The sections there referred to do not include s 159 but comprise such statutory powers as that to adopt an existing sewer (see s 102(1) of the Water Industry Act). It might be asked why a sewerage authority should implicitly have the power to discharge foul water from an adopted sewer, so long as it does not have the prejudicial effects referred to in s 117(5)(b), and yet not have such a power when dealing with surface water drainage.

b [83] Likewise, s 186(3) of the Water Industry Act states:

c 'Nothing in the relevant sewerage provisions shall authorise a sewerage undertaker injuriously to affect—(a) any reservoir, canal, watercourse, river or stream, or any feeder thereof; or (b) the supply, quality or fall of water contained in, or in any feeder of, any reservoir, canal, watercourse, river or stream, without the consent of any person who would, apart from this Act, have been entitled by law to prevent, or be relieved against, the injurious affection of, or of the supply, quality or fall of water contained in, that

d reservoir, canal, watercourse, river, stream or feeder.'

The 'relevant sewerage provisions' do not include s 159.

e [82] The answer in respect of both s 117(5) and s 186(3) of the Water Industry Act seems to be that those provisions do not imply that the consent of the owner or occupier of the land on which the watercourse flows is not required. The purpose of those provisions is much wider. They are designed to ensure that those who may be affected by a discharge, but whose consent to the discharge itself is not required in terms of property rights, are none the less clearly protected against damage. Into such a category would come those downstream of a discharge who have a right to abstract water of a certain quality or who as riparian owners may be at risk of flooding or of other harm. The provisions in question are there to make it clear that their common law remedies, particularly in nuisance, are not affected by the exercise of the statutory powers referred to. On such a construction, there is no necessary implication that the undertaker can discharge without the consent of the owner or occupier of the watercourse.

f [83] For these reasons, as well as for those set out in the judgments of Peter Gibson and Chadwick LJ, I would allow this appeal.

Appeal allowed.

Kate O'Hanlon Barrister.

Marcic v Thames Water Utilities Ltd

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)

JUDGE RICHARD HAVERY QC

26–29 MARCH, 4, 5 APRIL, 14 MAY 2001

Nuisance – Sewer – Overflow – Flooding of neighbouring premises – Overloading of sewer during heavy rain resulting in repeated flooding of claimant's property – Statutory sewerage undertaker failing to take steps to prevent flooding – Whether sewerage undertaker liable at common law for failure to prevent flooding – Whether failure infringing claimant's right to respect for private life and right to peaceful enjoyment of possessions under human rights convention – Water Industry Act 1991, s 94 – Human Rights Act 1998, s 6, Sch 1, Pt I, art 8, Pt II, art 1.

The claimant, M, was a customer of TWUL, a statutory water and sewerage undertaker. It was accepted that TWUL was a public authority for the purposes of s 6^a of the Human Rights Act 1998. Under s 94^b of the Water Industry Act 1991, TWUL was responsible for the operation and maintenance of its sewers and had a duty effectually to drain the area for which it was responsible. Since 1992 M's home had been seriously affected by persistent external flooding and back flow of foul water from TWUL's sewer system during heavy rain. The sewers themselves had been properly constructed and maintained, but major surface drainage works were required to alleviate significantly the risk of flooding. It was practicable for TWUL to carry out those works if the necessary finance were available, but there was no prospect of such funds being made available under its system for working out priorities. In proceedings brought by M against TWUL, he contended that the flooding constituted a nuisance for which TWUL was liable, both at common law and under the 1998 Act. As regards the latter, he relied, inter alia, on s 6(1), which made it unlawful for a public authority to act in a way which was incompatible with a convention right, and s 6(6), which provided that an act included a failure to act. He contended that TWUL's failure to provide a proper drainage system infringed two rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), namely the right to respect for private and family life under art 8(1)^c and the right to peaceful enjoyment of possessions under art 1^d of the First Protocol to the convention. Under art 8(2), a public authority could not interfere with the art 8(1) right unless the interference was 'necessary in a democratic society in the interests of ... the economic well-being of the country ... or for the protection of the rights and freedoms of others'. Article 1 of the First Protocol was subject to a public interest qualification. TWUL relied on the qualifications to both rights, contending that it was necessary to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, and that in striking that balance the court should defer to TWUL's specialist expertise. TWUL further contended that there was no fresh

a Section 6, so far as material, is set at [54], below

b Section 94, so far as material, is set out at [42], below

c Article 8 is set out at [55], below

d Article 1 is set out at [55], below

a act or omission on or after 2 October 2000, the date of the implementation of the 1998 Act, such as to give rise to liability on its part under that Act.

Held – Although, at common law, a statutory sewerage undertaker was not liable to a person in its area for failing, negligently or otherwise, to fulfil its statutory duty of drainage by carrying out works necessary to prevent repetition of a nuisance which it had not caused or created, it could be subject to such a liability under the 1998 Act. In the instant case, M had no remedy under the law as it existed before the passing of that Act. However, TWUL's failure to carry out works to bring an end to the repeated flooding of M's property was incompatible with his convention rights. That failure constituted an interference with M's right under art 8(1) of the convention, notwithstanding that the complaint concerned inactivity. As to art 1 of the First Protocol, M had been deprived, at any rate in part, of the peaceful enjoyment of his possessions. The value of his property must have been seriously and adversely affected by the nuisance, and that constituted a partial expropriation. Such interference with M's human rights would be justified if a system leading to that result and protecting the rights of others were necessary in order to strike a fair balance between the competing interests of M and TWUL's other customers, allowing TWUL a margin of discretion. The burden lay on TWUL to provide that justification. It had failed to do so, and it was insufficient that the current system did not obviously fail to strike the fair balance. Moreover, although M had no remedy under the 1998 Act in respect of any act taking place before 2 October 2000, the nuisance giving rise to the cause of action for infringement of his right under art 8 was a continuing nuisance. The 'act' rendered unlawful by s 6(1) of the 1998 Act was a failure to prevent or put an end to the infringement of M's human rights. The concept of failure to prevent or put an end to an infringement implied the proposition that TWUL could reasonably act to prevent or put an end to the infringement. It could so act. Its inactivity had become unlawful, and thus the cause of action under the 1998 Act arose, when the Act came into force on 2 October 2000. That cause of action was a continuing cause of action. Moreover, the state of deprivation of his possessions had continued, and he also had a cause of action for infringement of his right under art 1 of the First Protocol since 2 October 2000 (see [26], [29], [37], [40], [41], [47], [50], [68], [69], [103], [107], [108], [110], below).

g *Guerra v Italy* (1998) 4 BHRC 63 applied.

Notes

For the right to respect for private life and the right to property, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 150, 165, and for non-feasance by a sewerage undertaker, see 49(2) *Halsbury's Laws* (4th edn reissue) para 619.

For the Water Industry Act 1991, s 94, see 49 *Halsbury's Statutes* (4th edn) (1999 reissue) 481.

For the Human Rights Act 1998, s 6, Sch 1, Pt I, art 8, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 504, 524, 525.

Cases referred to in judgment

Allen v Gulf Oil Refining Ltd [1981] 1 All ER 353, [1981] AC 1001, [1981] 2 WLR 188, HL.

Baggs v UK (1987) 9 EHRR 235, E Com HR.

Barker v Herbert [1911] 2 KB 633, [1911–13] All ER Rep 509, CA.

- British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276, [2001] 3 All ER 673. a
- Bybrook Barn Centre Ltd v Kent CC* [2001] BLR 55, CA.
- Cowley v Newmarket Local Board* [1892] AC 345, HL.
- Dunne v North Western Gas Board* [1963] 3 All ER 916, [1964] 2 QB 806, [1964] 2 WLR 164, CA.
- Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102, [1874–80] All ER Rep 836, CA. b
- Goldman v Hargrave* [1966] 2 All ER 989, [1967] 1 AC 645, [1966] 3 WLR 513, PC.
- Guerra v Italy* (1998) 4 BHRC 63, ECt HR.
- Hague v Deputy Governor of Parkhurst Prison, Weldon v Home Office* [1991] 3 All ER 733, [1992] 1 AC 58, [1991] 3 WLR 340, HL. c
- Hesketh v Birmingham Corp* [1924] 1 KB 260, [1922] All ER Rep 243, CA.
- James v UK* (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.
- Job Edwards Ltd v Birmingham Navigations* [1924] 1 KB 341, CA.
- Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 All ER 17, [1980] QB 485, [1980] 2 WLR 65, CA.
- López Ostra v Spain* (1995) 20 EHRR 277, [1994] ECHR 16798/90, ECt HR. d
- Powell v UK* (1990) 12 EHRR 355, [1990] ECHR 9310/81, ECt HR.
- Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] 1 All ER 179, [1953] Ch 149, [1953] 2 WLR 58, CA.
- R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129, [1995] 1 WLR 898, CA.
- R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL. e
- R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.
- R v Secretary of State for the Home Dept, ex p Turgut* [2001] 1 All ER 719, CA.
- Robinson v Mayor and Corp of the Borough of Workington* [1897] 1 QB 619, CA. f
- Rylands v Fletcher* (1868) LR 3 HL 330, [1861–73] All ER Rep 1, HL.
- S v France* (1990) 65 DR 250, E Com HR.
- Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] 3 All ER 349, [1940] AC 880, HL.
- Smeaton v Ilford Corp* [1954] 1 All ER 923, [1954] Ch 450, [1954] 2 WLR 668.
- Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801, [1996] AC 923, [1996] 3 WLR 388, HL. g
- X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Cases also cited or referred to in skeleton arguments h

- A-G v Guardians of Poor of Union of Dorking* (1882) 20 Ch D 595, CA.
- Baron v Portslade UDC* [1900] 2 QB 588, CA.
- Barrett v Enfield London BC* [1999] 3 All ER 193, [1999] 3 WLR 79, HL.
- Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, HL.
- Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772, [1914–15] All ER Rep 85, CA. j
- Dear v Thames Water* (1992) 33 Con LR 43.
- Foster v Warblington UDC* [1906] 1 KB 648, [1904–7] All ER Rep 366, CA.
- Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, HL.
- Green v Chelsea Waterworks Co* (1894) 70 LT 547, [1891–4] All ER Rep 543, CA.

- a* *Hammersmith and City Rly Co v Brand* (1869) LR 4 HL 171, [1861–73] All ER Rep 60, HL.
Hammond v Vestry of St Pancras (1874) LR 9 CP 316.
Hobart v Southend-on-Sea Corp (1906) 75 LJKB 305.
Holbeck Hall Hotel Ltd v Scarborough BC [2000] 2 All ER 705, [2000] QB 836, CA.
Jones v Llanrwst UDC [1911] 1 Ch 393, [1908–10] All ER Rep 922.
- b* *Managers of the Metropolitan Asylum District v Hill* (1881) 6 App Cas 193, [1881–5] All ER Rep 536, HL.
Mersey Docks and Harbour Board Trustees v Gibbs, Mersey Docks and Harbour Board Trustees v Penhallow (1864) LR 1 HL 93, [1861–73] All ER Rep 397, HL.
Newcastle-under-Lyme Corp v Wolstanton Ltd [1947] 1 All ER 218, [1947] Ch 427, CA.
Osman v UK (1998) 5 BHRC 293, ECt HR.
- c* *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997, HL.
Queally v London Borough of Brent (6 December 1996, unreported), QBD.
R v Bell (1822) 1 LJOSKB 42.
Radstock Co-op and Industrial Society Ltd v Norton-Radstock UDC [1968] 2 All ER 59, [1968] Ch 605, CA.
Rowling v Takaro Properties Ltd [1988] 1 All ER 163, [1988] AC 473, PC.
Slater v Worthington's Cash Stores (1930) Ltd [1941] 3 All ER 28, [1941] 1 KB 488, CA.
Stretton's Derby Brewery Co v Mayor of Derby [1894] 1 Ch 431, [1891–4] All ER Rep 731.
- e* *Taylor v Corp of Oldham* (1876) 4 Ch D 395.
Tithe Redemption Commission v Runcorn UDC [1954] 1 All ER 653, [1954] 1 Ch 383, CA.
Ystradyfodwg and Pontypridd Main Sewerage Board v Bensted (Surveyor of Taxes) [1906] 1 KB 490, CA; *aff'd* [1907] AC 264, HL.

f **Action**

The claimant, Peter Marcic, the owner of a property known as 92 Old Church Lane, Stanmore, Middlesex, sought (i) an injunction requiring the defendant sewerage undertaker, Thames Water Utilities Ltd, to carry out works to prevent his property being flooded by the overflow of water from the defendant's sewers, and (ii) damages for damage caused to his property by such flooding. The facts are set out in the judgment.

- g* *Peter Harrison* (instructed by *South & Co*) for Mr Marcic.
Michael Daiches (instructed by *Graham Johnson*, Head of Legal Services for Thames Water Utilities, Reading) for the defendant.

h *Cur adv vult*

14 May 2001. The following judgment was delivered.

j **JUDGE RICHARD HAVERY QC.**

[1] This is a claim against a statutory water and sewerage undertaker by one of its customers for an injunction and damages. The claim arises out of flooding to the claimant's home. Shortly before the hearing, the parties' joint valuation expert expressed his incompetence to give an opinion on the matter. Rather than vacate the date of the trial, I decided to hear all the other issues. Although I made no order for the trial of specific preliminary issues, counsel helpfully drew up an

informal list of issues to be determined at this hearing. That list appears in the appendix to this judgment. a

[2] The claimant, Mr Peter Marcic, now aged 62, lives at number 92, Old Church Lane, Stanmore, Middlesex. That property is a substantial family house with a front garden and a large rear garden. It lies within a residential area in a street of individually built houses. It dates from the inter-war period. Mr Marcic bought the property in the mid-1970s. He began to live in the property in 1980 and has lived there ever since. The property is frequently flooded. It lies at or near the lowest point in Old Church Lane. It was first significantly affected by flooding on 9 June 1992. Since then it has been regularly and seriously affected by flooding and back flow of foul water from the defendant's sewer system. b

[3] Under the road there are a foul water sewer and a surface water sewer. Mr Marcic's property has a dual, or combined, drainage system. That is to say, the surface water from the roof and the ground flows into the same drain as the sewage. The combined effluent flows into the foul water sewer under the road. c

[4] At times of heavy rain, the footpath between the road and Mr Marcic's property becomes flooded with surface water, sometimes emerging from the overcharged surface water sewer. The foul water sewer can also become overcharged by reason of widespread local use of combined drainage systems. The parties' drainage experts agreed that it is also possible that householders, concerned about surface water flooding at times of heavy rainfall, lift the covers of the inspection chambers within their properties, thereby allowing accumulated surface water to enter the foul sewer. In view of my finding, based on unchallenged evidence, that the flooding is caused by both sewers, I treat references in the list of issues to surface water sewers as including references to foul water sewers. d

[5] Water on the ground in Mr Marcic's front garden is collected from the patio through metal grilles overlying gullies which run beside the house and debouch into his foul drainage. When the foul water sewer is overcharged, the foul water backs up and can force open the manhole cover in Mr Marcic's front garden, thereby escaping into the garden. If the flood water in his front garden is sufficiently deep, however, the manhole does not open. In that case the foul water backs up through the grilles into the overlying surface water. e

[6] Mr Marcic has made some boards to put at the front of his property as a defence against flooding. They are not entirely satisfactory since water can pass both underneath and over the top. He cannot keep them in position permanently since they impede access to the premises. It takes him about 15 minutes to set them up in the evening or when he considers a flood to be imminent, and five minutes to take them down in the morning or after a flood has subsided. f

[7] In 1992, it took half an hour of heavy rainfall to cause flooding incidents at Mr Marcic's property. The problem remained roughly the same until 1996. Since 1996 the position has progressively deteriorated. Only 15 minutes of heavy rainfall or some hours of steady drizzle are now sufficient to cause flooding. g

[8] When the front garden is flooded, the water reaches the brickwork of the walls of the house both below and above the level of the damp course. The water often rises to about three quarters of an inch below the level of the front door threshold. Before carrying out some works on his property, Mr Marcic had to open his side gate and garage doors to let the water run through to the back garden, bypassing the house. That caused the back garden to be immersed. Water lay there for a few days. When it subsided it left deposits of sludge and debris. Mr Marcic has had built a manhole connected to pipes so that some flood h

- a water is carried back from his front garden underneath the garage and to the bottom of his back garden. That has to some extent alleviated the damage to the back garden. He considers that it is only by having carried out those works that he has prevented flood water from entering his house. He has spent some £16,000 on that system.

- b [9] The principal incidents of flooding were two in number in 1992; one in each of the years 1993, 1994, 1995 and 1996; two in 1997; none in 1998; four in 1999 and four or five in 2000.

[10] The above account of the flooding represents my conclusions based principally on the evidence of Mr Marcic, which was unchallenged. In his witness statement Mr Marcic said this about the effect of flooding on his property:

- c 'My house has been badly affected. Damp and a musty smell are present in my front dining room for months after each flooding. Cracks are visible all over the walls and ceiling, some quite large, showing signs of subsidence. My house is a detached property where I have spent a good part of my life trying to do it up and make it into a home. I now cannot so easily part with it, yet I find it very difficult to live with the mess. Any measures to remove the damp and its effects such as the subsidence are pointless until the regular flooding is prevented. The garden is also affected. On most occasions the floodwater contains levels of organic (oily) contaminants that run off streets and tarmac which poison the plants. At one time after heavy flooding I tried to use a garden hose to wash off the oily sheen from the surface but I only managed to disperse it. Some fully-grown conifers and shrubs have died. The soil has become contaminated and consolidated through persistent flooding, resulting in poor drainage. The vegetation has become poorly as water-logging deprives the roots of oxygen and drowns them. Those plants that do thrive are moss and weeds which are in abundance. I understand that the history of flooding has made my property unsaleable.'
- d
- e
- f

None of that evidence was challenged. The references to subsidence and the unsaleability of the property are, of course, the opinions of a layman.

[11] A structural engineer, Mr Alan Myers, was jointly instructed by the parties. In his report he concluded:

- g 'There has been no subsidence or heave of the external walls of the house ... There has been subsidence of parts of the concrete ground floor slab resulting in cracking in the internal partition walls supported on the slab and in internal walls and ceilings in the first floor storey. This has been caused, or at least greatly contributed to ... by floodwater entering already formed voids beneath the ground floor slab and softening the clay subsoil still in contact with the slab. It is probable that had the floodwater not been present the slab would have continued to support the internal walls without subsidence movement leading to cracking. It is also probable that had the voids not been present the floodwater would not have caused subsidence of the slab ... Cracking in the second floor storey walls has been caused by spread of the roof, most likely as a result of the slight dropping of internal vertical support to the roof structure because of the subsidence of the ground floor slab ... A full remedial work scheme could be carried out using grout injection below the ground floor slab. This would probably require detailed prior investigation beneath the slab, for example using radar survey equipment to trace the voids and help to plan grout injection positions.'
- h
- j

I accept that evidence.

[12] Mr Marcic notified his local authority, the London Borough of Harrow, of the flood that occurred on 9 June 1992. Their representative, Mr Bruce Regnier, who gave evidence before me, visited Mr Marcic at the property on 10 June. He confirmed the backflow of foul sewer water. He visited again on 22 September, when further heavy flooding occurred. A memorandum of Mr Regnier refers to backflow of the foul water sewer through Mr Marcic's interceptor. Mr Regnier arranged jetting of Mr Marcic's drains. The London Borough of Harrow were at that time sewerage management contractors for the defendant in relation to drainage works in their area.

[13] Correspondence in the court bundle shows that in August 1992 Mr Marcic approached his local councillor, who wrote to the head of engineering services of the council about the flooding of Mr Marcic's property. In February 1995 Mr Marcic again approached his local councillor, who wrote to the group environmental health officer about the pollution of Mr Marcic's back garden. In March 1995 Mr Marcic himself wrote to the London Borough of Harrow complaining that his property had been persistently flooded over a number of years, and asking for a grant to decontaminate and repair his back garden. The reply, which came from Mr Regnier, was in the following terms:

'Further to your letter dated 24th March 1995 and the subsequent telephone conversation and visit to your home by my assistant Mr. V. Jenkins. As I believe Mr. Jenkins explained, as the source of the flooding is the main sewerage system it comes within the remit of Thames Water Utilities Ltd. and therefore the Council does not bear responsibility for either the cause of the flooding or its effects. Under these circumstances I must also advise you that the Council does not have a mechanism for providing grants. I am aware of the flooding problem which exists in your area and I sympathise with difficulties and inconvenience it must cause but any investigations and solution must be funded by TWUL. The surface water sewers within this area are considered for upgrading as part of the Old Church Lane Surface Water Sewer Scheme. However, as you may be aware the work on this project is in abeyance until the National Rivers Authority have decided on the extent of the flood protection works for the upper reaches of the Edgware Brook. These works prospectively affect sections of the brook which are the effective outfall for your local surface water sewers. It is not possible to properly resolve the hydraulic problems of these sewers until the likely conditions at the outfall are resolved. As requested, I have passed your letter on to TWUL for consideration but I must stress that it is unusual for TWUL to make such payments. I will advise you of their response as soon as it is received and I would ask that you report any occurrences of flooding as these are recorded and are used in gauging the severity of the problem and are thus invaluable.'

On 12 April 1995 Mr Regnier sent a copy of Mr Marcic's letter to Mr T Harrington, a client manager of the defendant. In his covering letter Mr Regnier himself briefly described the flooding and the contamination of Mr Marcic's property, and mentioned that Mr Marcic had incurred expense by installing intercepting channels and barriers. I am satisfied on the evidence of Mr Christopher Douch, asset planning manager within the technical services department of the water and

a waste operations division of the defendant, that Mr Harrington was the appropriate person to write to. There is no evidence of any reply to Mr Regnier's letter.

[14] In May 1995 Mr Marcic himself wrote to the defendant enclosing a copy of his letter of March to the London Borough of Harrow and asking the defendant to do something about his 'serious flooding problem' which was connected with sewer water. The defendant promptly acknowledged his letter and promised to
b write again. Mr Marcic pressed the defendant by a further letter in July again referring to persistent sewer flooding over a period of time. That letter was acknowledged. In March 1996, having heard no more, Mr Marcic wrote to the managing director of the defendant. He offered £40 to Mr Marcic, and a cheque was sent a few days later. Mr Marcic returned the cheque.

[15] In October 1997 Mr Marcic's solicitors wrote to the Secretary of State for
c the Environment about the problem. Three months later they received a reply from the Department of the Environment referring them to the Customer Services Committee of the Office of Water Services. In the letter it was explained that sewerage undertakers' duties under s 94 of the Water Industry Act 1991 were enforceable under s 18 of that Act by the Director General of Water Services,
d who was the independent economic regulator for the water industry. The letter went on to explain that customer service committees had been set up by the Director General to assist him in his role of protecting customers' interests and investigating complaints. No approach was made to the Office of Water Services by or on behalf of Mr Marcic.

[16] On 6 March 1998 Mr Marcic telephoned the defendant in Swindon asking
e to speak to someone who had a good knowledge of sewer systems and flooding problems. After some further telephone calls and a visit from a Mr Ellis representing the defendant, Mr Arumainayagam Sitaranjan, senior operations co-ordinator, waste water in the defendant's customer network services division, visited
f Mr Marcic at his home. Mr Sitaranjan gave evidence before me. Mr Sitaranjan arranged for the jetting of the surface water sewer and of the foul water sewer over the whole length of Old Church Lane and halfway down an adjacent road. That work was done on 9 March 1998. He visited Mr Marcic again in the company of his area service manager on or about 19 May 1998. He noticed that
g the highway gullies needed clearing. He subsequently asked the London Borough of Harrow to clear them. He also checked the records held on the defendant's database. The only record of flooding at Mr Marcic's property related to external (ie out of doors only) flooding by foul sewage following a heavy rainfall event in 1992. The database showed three other properties in Old Church Lane with single flooding events on separate dates between 1987 and 1998. After these
h proceedings started, and the defendant became aware of all the incidents of flooding, those incidents were added to the database.

[17] Mr Regnier gave expert engineering evidence on behalf of the defendant. Mr Richard Lawman gave expert engineering evidence on behalf of Mr Marcic. Those gentlemen made an agreed statement as to the works necessary to
j alleviate the flooding. They described four schemes, which by reference to their paragraph numbers in the joint statement I shall call schemes 2.2, 2.3, 2.4 and 2.5. Those schemes related only to surface water drainage. No doubt the implementation of any of them would alleviate the surface water flooding, but it is not apparent that it would cure the backing up of the foul sewers. I have not heard any evidence about curing that. Mr Regnier and Mr Lawman were agreed that only major surface water drainage works would significantly alleviate the risk of

flooding. Minor works, either within the vicinity of, or in the grounds of, no 92 Old Church Lane would not be capable of removing or storing the extensive accumulation of surface water at times of heavy rainfall. The schemes they described were briefly as follows:

‘2.2. Major Scheme submitted to TWUL by London Borough of Harrow in August 1988.

Construction of twin 600 mm. diameter pipes laid along Abercorn Road to provide an overflow from the existing surface water sewer in Old Church Lane to discharge into the Edgware Brook. Estimated cost at the time, £100,000, not including utility company diversions or other related costs. Figure revised to £140,000 in 1995. Likely present cost, about £200,000.

2.3. Silk Stream and Edgware Brook Flood Alleviation Scheme.

Major flood alleviation works within the Edgware Brook and Silk Stream catchments, including construction of large storage facility within Whitchurch playing fields and of new culvert along Abercorn Road from its junction with Old Church Lane. Total cost unknown. Cost of overflow connection from Old Church Lane to culvert in Abercorn Road, about £25,000.

2.4. Alternative Scheme proposed by Alexander Associates in May 2000.

Construction of 450 mm. diameter pipe from Old Church Lane along Abercorn Lane to open section of Edgware Brook within Whitchurch playing fields, with overflow on to Whitchurch playing fields acting as a flood plain. To reduce the risk of overland flooding it would be necessary to instal a number of large gullies or grids to intercept the surface water run off at strategic locations in Lansdowne Road and Old Church Lane. Cost, about £60,000.

2.5. Further Alternative Scheme proposed by Alexander Associates in May 2000.

Construction of 450 mm. diameter pipe from Old Church Lane along Abercorn Lane as far as north-west corner of Whitchurch playing fields, discharging into balancing pond to be constructed in that corner, from which there would be a low-flow discharge to existing surface water sewer. This scheme would also require the gullies or grids mentioned in 2.4. Cost about £70,000 not including acquisition of land and other related costs.’

The references to Alexander Associates are references to a firm in which Mr Lawman is senior partner.

[18] Mr Regnier gave evidence in relation to the schemes. He is an engineer and the director of his own engineering consultancy. Between 1968 and 1997, apart from a period of six months in 1970, Mr Regnier was employed by the London Borough of Harrow in various positions, mostly within the drainage section. He had been sectional engineer and principal engineer in the section. For the last five years of his employment with the London Borough of Harrow, he was contract manager for the sewerage management contract between that borough and the defendant. The findings set out in the next few paragraphs are based largely on Mr Regnier’s evidence, but also on the joint report of Mr Regnier and Mr Lawman.

[19] Scheme 2.2 was proposed in August 1988. It requires the consent of the Environment Agency (formerly of the National Rivers Authority) to the necessary additional discharge to the Edgware Brook. It was proposed by the London

- a* Borough of Harrow, at the instigation of Mr Regnier, who had designed it. He believed that the works were necessary and justifiable to alleviate the flooding problem in Old Church Lane. There were no obstacles to implementing the plan at that stage, but the National Rivers Authority did not agree to the additional discharge into the Edgware Brook, since they were concerned about the possibility of increasing the risk of flooding downstream. That authority
- b* commissioned a study of the problem. The Thames Water Authority, predecessor of the defendant, considered the cost effectiveness of the scheme to be marginal and deferred the scheme. There was an alternative solution, not requiring any increase in the rate of discharge into Edgware Brook, involving larger diameter sewer pipes to increase storage capacity. That, according to Mr Regnier, would have been technically difficult owing to lack of available cover, and would have
- c* considerably escalated the cost of the scheme. That was unacceptable to the Thames Water Authority. But because of the uncertainty as to what further works might be proposed by the National Rivers Authority, scheme 2.2 was retained in the capital programme of the Thames Water Authority, to be reviewed later. It was transferred to the defendant's capital program after the
- d* transfer of sewerage responsibilities to the defendant in 1989, with an assigned provisional start date in 1994–1995.

[20] Mr Regnier referred to measures taken by the owner of no 90, Old Church Lane after flooding which occurred on 8 May 1988. That property, situated next door to Mr Marcic's property, had been flooded inside the building on at least

e two previously recorded occasions. It was that internal flooding that was the principal reason for including scheme 2.2 in the Thames Water capital programme. Number 90 was removed from the defendant's 'At risk' register. Mr Regnier considered that the reason was that no 90 was no longer a high-risk property since the works had been carried out there. Thus the works carried out at no 90 may have had the effect of reducing the priority of scheme 2.2.

- f* [21] In 1995 the relevant responsibilities of the National Rivers Authority were taken over by the Environment Agency. Mr Regnier thought that there had been no discussions between the defendant and the Environment Agency relating to scheme 2.2 since 1995. There would have been no point, he said, until the study mentioned above undertaken by the National Rivers Authority had been
- g* completed. That study was adopted by the Environment Agency following the demise of the National Rivers Authority. The study was enlarged by the Environment Agency to include the Silk Stream catchment following severe storms which occurred in 1992. The study is nearing completion and a draft report has been produced. That report contains provisional proposals for the
- h* construction of major flood alleviation works within the Edgware Brook and Silk Stream catchments. Those works would be in the hands of the Environment Agency. They include a proposal for the construction of the storage facility in Whitchurch playing fields mentioned under scheme 2.3 above. If the major works were carried out by the Environment Agency, the defendant would then be able to construct the overflow proposed in scheme 2.2 and connect it into the
- j* new culvert which would be laid along Abercorn Road from its junction with Old Church Lane. Restrictions on the rate of discharge into the Edgware Brook would not then prevent scheme 2.3 with modifications being implemented if the requisite finance were available.

[22] Scheme 2.4 would probably not be permitted by the Environment Agency, since it would involve the diversion of flood water into the Edgware Brook,

which is already overloaded. Scheme 2.5 was proposed as an alternative. Mr Regnier said in relation to scheme 2.5 that the relevant land was owned by the London Borough of Harrow. Unless that borough had other proposals for the land, he considered that there would be no difficulty in implementing the scheme apart from the provision of the necessary finance.

[23] Mr Regnier said that a major flood alleviation scheme known as the Marsh Lane foul sewer was designed and constructed by the London Borough of Harrow on behalf of Thames Water. It was completed during the early 1980s. It was designed to relieve persistent and severe foul flooding to properties in Marsh Lane and Green Verges. The scheme comprised the construction of a low-level 1200 mm diameter tunnel connected into the Thames Water trunk sewer. The existing 381 mm diameter foul sewer in Marsh Lane and the foul sewer in Old Church Lane were diverted into the relief sewer through a new 525 mm diameter connection. The cost appears to have been £260,000.

[24] I conclude that it would be practicable for the defendant to carry out works to remove the risk of flooding from Mr Marcic's property if the necessary finance were available. Indeed, no point has been taken to the contrary.

[25] Mr Peter Harrison, counsel for the claimant, submitted that the flooding of Mr Marcic's property constituted a nuisance for which the defendant was liable. The sewers are the property of the defendant, which is the statutory undertaker responsible for their operation and maintenance. It is not suggested that the sewers were not built in accordance with the standards that prevailed at the time they were built, or have not been properly maintained. Mr Harrison submitted that the defendant was liable both at common law and under the Human Rights Act 1998. I shall consider first the position at common law, ignoring the effect of the 1998 Act.

[26] As to the common law, I was referred to *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102, [1874–80] All ER Rep 836, *Robinson v Mayor and Corp of the Borough of Workington* [1897] 1 QB 619 and *Hesketh v Birmingham Corp* [1924] 1 KB 260, [1922] All ER Rep 243. Those were all cases of non-feasance, where the defendant statutory undertakers were held not liable for nuisances caused by the escape or discharge of sewage by reason of increases in the flow of sewage in drainage systems. The non-feasance in question consisted of neglect to perform a statutory duty to make an effectual system of drainage. James LJ said in *Glossop's* case (1879) 12 Ch D 102 at 116:

'I think myself the Court ought to hesitate a great deal before it interferes with respect to a wrong done to a whole district, when the remedy provided by the Legislature would be quite sufficient for the purpose. These provisions of course do not oust the jurisdiction of any Court ... in the case of any legal wrong done; I use that word as distinct from neglect to perform the new duties imposed by this Act.'

With reference to an injunction having the effect of a mandatory injunction, he said (at 115): 'That would be a proper injunction to restrain them from doing that which would be wrong if the thing itself were legally wrong, independently of the neglect to make an effectual system of drainage.' The headnote in the report of *Glossop's* case accurately summarises the decision as follows:

'... if a local board do not act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an

- a injunction, but the remedy is by prerogative writ of mandamus ... assuming that an actionable nuisance existed, as the Defendants had themselves done no act to create or increase it, the Plaintiff had no cause of action.' (See (1879) 12 Ch D 102.)

In *Hesketh's case* [1924] 1 KB 260 at 271, Scrutton LJ said:

- b '... if the system of drainage, originally sufficient, became insufficient by reason of the growth of houses, the neglect of the defendants to improve that system so as to meet the altered requirements cannot be made the subject of an action. The general rule is that a local authority is liable for misfeasance but not for non-feasance.'

- c In my judgment, the same applies to a statutory undertaker that is not a local authority.

[27] In *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] 1 All ER 179, [1953] Ch 149 Denning LJ said that when Scrutton LJ said the last sentence that I have quoted above, for once Homer nodded. But we are here concerned with non-feasance as neglect to perform a statutory duty to make an effectual system of drainage. I do not think that Denning LJ differed, at any rate in his conclusion, from Scrutton LJ in that context. He said:

- e 'But, although the plaintiffs may not be able to rely on the doctrine of *Rylands v. Fletcher* ((1868) LR 3 HL 330, [1861–73] All ER Rep 1) as such, they have a perfectly good cause of action for nuisance if they can show that the defendants created or continued the cause of the trouble, and it must be remembered that a person may "continue" a nuisance by adopting it, or in some circumstances by omitting to remedy it: see (*Sedleigh-Denfield v O'Callagan* (*Trustees for St Joseph's Society for Foreign Missions*) [1940] 3 All ER 349, [1940] AC 880). This liability for nuisance has been applied in the past to sewage and drainage cases in this way. When a local authority take over or construct a sewage and drainage system which is adequate at the time to dispose of the sewage and surface water for their district, but which subsequently becomes inadequate owing to increased building which they cannot control, and for which they have no responsibility, they are not guilty of the ensuing nuisance. They obviously do not create it, nor do they continue it merely by *doing nothing to enlarge or improve the system*. The only remedy of the injured party is to complain to the Minister ... It is very different, however, when the local authority themselves do the increased building, or permit it to be done, because they are then themselves guilty of the nuisance.' (See [1953] 1 All ER 179 at 203, [1953] Ch 149 at 189–190; my emphasis.)

- h [28] Another case in point to which I was referred is *Smeaton v Ilford Corp* [1954] 1 All ER 923, [1954] Ch 450. In that case, Upjohn J found as a fact that eruption or flooding from a manhole in time of heavy rain caused the plaintiff and his family grave inconvenience, and it constituted a serious deprivation of the ordinary and reasonable enjoyment of his property and its amenities which he was entitled to expect. The claim was made first under the principle of *Rylands v Fletcher* (1868) LR 3 HL 330, [1861–73] All ER Rep 1 and, secondly, that the defendant had wrongfully caused or wrongfully failed to prevent a nuisance to the plaintiff as occupier of his premises by causing or permitting the sewage matter to erupt from the manhole into his premises. Negligence was not alleged.

Distinguishing, for the purposes of his judgment, liability in nuisance from liability under the principle of *Rylands v Fletcher*, Upjohn J said, in relation to the question of liability in nuisance:

‘Paragraph 6 alleges that the said soil sewer was constructed by the defendants. That is admitted, but it is no longer alleged that it was constructed in a defective manner or that it was originally inadequate for the needs of the neighbourhood. No doubt, the defendants’ whole sewage system has now become totally inadequate to deal with the increased volume of sewage which it now has to carry, but that cannot give rise to a claim for nuisance; the only remedy of the injured party is to complain to the Minister ...’ (See [1954] 1 All ER 923 at 927–928, [1954] Ch 450 at 463.)

That is another instance of a statutory undertaker not being liable in nuisance for non-feasance of its statutory duty.

[29] The effect of the above authorities is that a statutory drainage undertaker is not liable to a person in its area who suffers damage by flooding where the claim is based on failure on the part of the undertaker to undertake works to fulfil its statutory duty of drainage of the area. That is so whether the cause of action is nuisance, the principle in *Rylands v Fletcher* or breach of statutory duty. It is clear that those authorities also cover the case of negligent non-feasance. In *Hesketh’s* case [1924] 1 KB 260 at 271–272 Scrutton LJ said:

‘The plaintiff here eventually rested his case on two alternative claims, (1.) for negligence, and (2.) for nuisance. I cannot see any evidence of negligence when the sewer and outlets were constructed, and I am bound by the authority which I have cited to hold that the failure to bring the system up to date is non-feasance and gives no cause of action.’

The authority to which Scrutton LJ referred was *Robinson v The Mayor and Corp of the Borough of Workington* [1897] 1 QB 619.

[30] Mr Harrison submitted that it had been made clear by a recent decision of the Court of Appeal that it was not a defence to show that a system might have been adequate when first installed. That decision was *Bybrook Barn Centre Ltd v Kent CC* [2001] BLR 55. In that case (at 65), Waller LJ, with whom Peter Gibson and Jonathan Parker LJ agreed, specifically distinguished the case of an inadequate sewage system where a ratepayer was seeking to get the local authority to do its public duty. It is clear that *Robinson’s* case, *Hesketh’s* case and the other cases remain binding upon me.

[31] The question of liability under the principle in *Rylands v Fletcher* was considered by Upjohn J in *Smeaton’s* case. Referring to the cases of *Glossop*, *Robinson* and *Hesketh* among others, he observed ([1954] 1 All ER 923 at 933, [1954] Ch 450 at 472) that in not one of them was it suggested that the principle had any application. In *Dunne v North Western Gas Board* [1963] 3 All ER 916 at 923, [1964] 2 QB 806 at 835, Sellers LJ, delivering the judgment of the Court of Appeal, said:

‘Where there is a mandatory obligation ... there would be, in our opinion, no liability if what had been done was that which was expressly required by statute to be done or was reasonably incidental to that requirement and was done without negligence.’

a Here there was a mandatory obligation on the defendant, imposed by s 106 of the 1991 Act, to accept discharge of foul and surface water into its sewers. Sellers LJ went on to say:

b 'The Corporation did not intentionally discharge the water ... it was an escape. It is clear that water may escape without negligence and as an incident of its provision in pipes ... In our opinion the cases establish that in such circumstances a water authority is not liable under the strict rule in *Rylands v. Fletcher* (1868) LR 3 HL 330, [1861–73] All ER Rep 1 or in nuisance.' (See [1963] 3 All ER 916 at 924, [1964] 2 QB 806 at 837.)

c [32] Mr Harrison submitted that those authorities were affected by recent developments in the law of nuisance.

d [33] Mr Harrison submitted that under what he called the principle in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 All ER 17, [1980] QB 485 the defendant is liable as occupier of the sewers for the escapes of water arising from them. The principle was that an occupier owed a general duty to a neighbouring occupier in relation to a hazard arising on the land to take steps that were reasonable in all the circumstances to deal with the hazard. *Leakey's* case was a unanimous decision of the Court of Appeal (albeit with Shaw LJ assenting reluctantly) in which Megaw LJ exhaustively analysed the authorities, especially the decision of the Privy Council in *Goldman v Hargrave* [1966] 2 All ER 989, [1967] 1 AC 645. The headnote in *Leakey's* case ([1980] QB 485 at 486) fairly summarises the decision:

e '... that an occupier of land owed a general duty of care to a neighbouring occupier in relation to a hazard occurring on his land, whether such a hazard was natural or man-made; that the duty was to take such steps as were reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour or his property of which the occupier knew or ought to have known; that the circumstances included his knowledge of the hazard, the extent of the risk, the practicability of preventing or minimising the foreseeable injury or damage, the time available for doing so, the probable cost of the work involved and the relative financial and other resources, taken on a broad basis, of the parties ...'

g Mr Michael Daiches, counsel for the defendant, submitted that for greater accuracy the words 'and not created by the occupier or his agents' ought to be inserted between the words 'land' and 'whether'. No doubt such an amendment would avoid any risk that the reader would conclude that where the hazard was created by the occupier or his agents, the duty was limited to a duty of care.

h [34] Mr Daiches submitted that the duty on an occupier of land under the *Leakey* principle was a measured duty to take reasonable steps to remove physical hazards from his own land provided that he was able to do so, and that the duty did not extend to executing works on adjacent land or to moving or eliminating the occupier's own land if that was the only way of removing the hazard. As to moving or eliminating the occupier's own land, to wit the sewers, that is not a question in issue. But it is clear that the only way the nuisance can be stopped is by the execution of works on neighbouring land. Mr Daiches relied on the view expressed by Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations* [1924] 1 KB 341 at 360: '... surely a landowner cannot be required to execute permanent works on another person's land, if he could not then stop the fire on his own land.'

Mr Daiches also relied on the following passage from the judgment of Megaw LJ in *Leakey's* case [1980] 1 All ER 17 at 37, [1980] QB 485 at 526:

'... to avert an immediate danger ... where the expenditure of money is required, the defendant's capacity to find the money is relevant. But this can only be in the way of a broad, and not a detailed, assessment; and, in arriving at a judgment on reasonableness, a similar broad assessment may be relevant in some cases as to the neighbour's capacity to protect himself from damage, whether by way of some form of barrier on his own land or by way of providing funds for expenditure on agreed works on the land of the defendant.'

Mr Daiches submitted that that passage suggested that if it were not reasonably practicable for the occupier to remove the hazard from his own land, the options (by implication, the only options) were (a) to permit a neighbour to execute works on the occupier's own land, and (b) to invite neighbours to erect barriers on their land. There was no suggestion that the occupier was under a duty to do works on the neighbour's land. Whilst I accept that there was no such suggestion, I am not persuaded that the duty of care is incapable of extending to the execution of works on neighbouring land. In the *Bybrook Barn* case, the Court of Appeal (Peter Gibson, Waller and Jonathan Parker LJJ) appears to have granted an injunction (possibly, however, in agreed terms) requiring the defendant highway authority to enlarge a culvert. Mr Daiches told me that he understood from counsel for the highway authority in that case that the enlargement works would have had to be constructed on adjacent land owned by the claimant, but the claimant had indicated that it had no objection to allowing the works to be executed on its land.

[35] Whether the *Leakey* principle is termed negligence or nuisance, the gist of the principle is negligence. The only negligence alleged in this connection is negligent failure to fulfil the statutory duty of drainage. If the defendant is liable under the *Leakey* principle, that can only be on the basis that that principle has overturned the pre-existing law on non-feasance.

[36] The *Leakey* principle is based on the Privy Council decision in *Goldman v Hargrave* [1966] 2 All ER 989, [1967] 1 AC 645. The pre-existing law on non-feasance has House of Lords authority. In *Cowley v Newmarket Local Board* [1892] AC 345, Lord Herschell cited *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102, [1874–80] All ER Rep 836 with approval. In *Robinson v Mayor and Corp of the Borough of Workington* [1897] 1 QB 619, both Lord Esher MR and Lopes LJ relied on *Cowley's* case. Mr Daiches submitted that the *Leakey* principle went back at least to the end of the nineteenth century. He relied on a decision of 1911, *Barker v Herbert* [1911] 2 KB 633, [1911–13] All ER Rep 509. In that case Vaughan Williams LJ, referring to the liability of a landowner whose property was adjacent to the highway, said:

'In my judgment there can be no liability upon the part of the possessor of land in such a case, unless it is shewn either that he himself, or some person for whose action he is responsible, created that danger which constitutes a nuisance to the highway, or that he has neglected for an undue time after he became, or, if he had used reasonable care, ought to have become, aware of it, to abate or prevent the danger or nuisance.' (See [1911] 2 KB 633 at 636–637.)

a He said (at 638) that the law which defined the liability of the possessor of land in cases of that kind had been settled for many years. Farwell LJ said (at 645):

‘In my opinion a landowner is not liable for a nuisance caused, not by his own action, but by something done by another person against his will, subject to the qualification that he may become liable if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge.’

b [37] Thus I accept Mr Daiches’ submission that the *Leakey* principle was not a new principle. It merely provided further elaboration of the scope of an occupier’s duty in relation to hazards arising on his land which he did not himself create. I conclude that *Leakey*’s case does not affect the existing law relating to the liability of drainage undertakers in cases of non-feasance of their statutory duties of drainage.

c [38] Mr Harrison submitted that the continued use of the sewers by the defendant to carry out its functions constituted adoption of the nuisance. Viscount Maugham in *Sedleigh-Denfield v O’Callagan (Trustees for St Joseph’s Society for Foreign Missions)* [1940] 3 All ER 349 at 358, [1940] AC 880 at 894 explained that someone adopted a nuisance if he made any use of the erection, building, bank or artificial contrivance which constituted the nuisance. Here, the nuisance is the backing up and overflowing of foul water from the foul water sewer and the overflowing of surface water from the surface water sewer. The nuisance is caused by the overcharging of those sewers. I shall assume that it can be said that the sewers cause (or ‘constitute’) the nuisance. Mr Daiches submitted that the concept of adopting a nuisance does not apply to the present situation, where the occupier does not actively use the actual or potential nuisance but merely permits it to continue. The way I would put it is to say that the defendant passively uses the sewers in order to carry out its statutory duty of draining its area. It passively permits the nuisance to continue. On the assumption that I have made above, the defendant has adopted the nuisance.

f [39] Mr Daiches relied on the defence of statutory authority. He submitted that the general principle of law is that when the legislature imposes a statutory duty on a body, that carries with it an implied immunity from action in nuisance, provided that the body has not been ‘negligent’ in the sense used by Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353, [1981] AC 1001. That sense was such as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons. The statutory authority upon which Mr Daiches relied was s 106(1) of the 1991 Act. That subsection reads as follows:

g ‘106. *Right to communicate with public sewers.*—(1) Subject to the provisions of this section—(a) the owner or occupier of any premises in the area of a sewerage undertaker; or (b) the owner of any private sewer draining premises in the area of any such undertaker, shall be entitled to have his drains or sewer communicate with the public sewers of that undertaker and thereby to discharge foul water and surface water from those premises or that private sewer.’

j A statutory sewerage undertaker, he submitted, has no power to refuse such a connection with the public sewers on the ground that the existing public sewer

system is inadequate to cope with any new connections. Mr Daiches submitted that it was a necessary implication from s 106 and its statutory predecessors that Parliament intended that the defendant should be absolved from any liability for nuisance attributable to having 'adopted' a public sewer which had become inadequate as a consequence of the performance by the defendant and its predecessors in title of the statutory duty imposed by s 106 and its statutory predecessors. He submitted that there was no suggestion that the defendant had been 'negligent' in the sense used by Lord Wilberforce in the conduct of its operations in relation to the existing public sewer system.

[40] I reject that argument. Lord Wilberforce said:

'[The statutory authority] confers immunity against proceedings for any nuisance which can be shown (the burden of so showing being on the [defendant]) to be the inevitable result of erecting a refinery on the site, not, I repeat, the existing refinery, but any refinery, however carefully and with however great a regard for the interest of adjoining occupiers it is sited, constructed and operated.' (See [1981] 1 All ER 353 at 358, [1981] AC 1001 at 1014.)

In the instant case, the nuisance is by no means inevitable. On the evidence, I am satisfied that the defendant has the resources and the powers necessary to remedy the nuisance. But although the defendant may have adopted the nuisance, it has not caused or 'created' it by any action on its part. The facts of this case are not significantly distinguishable from those of *Robinson v Mayor and Corp of the Borough of Workington* [1897] 1 QB 619 or of *Smeaton v Ilford Corp* [1954] 1 All ER 923, [1954] Ch 450. Thus the defendant has non-feasance immunity.

[41] However the argument is put, it reduces to the question whether the defendant is liable for failing, negligently or otherwise, to fulfil its statutory duty by carrying out the works necessary to prevent repetition of the nuisance. In *Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801 at 827–828, [1996] AC 923 at 952–953 Lord Hoffmann, with whom Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed (Lord Slynn of Hadley and Lord Nicholls of Birkenhead dissenting) said:

'Whether a statutory duty gives rise to a private cause of action is a question of construction (see *Hague v Deputy Governor of Parkhurst Prison*, *Weldon v Home Office* [1991] 3 All ER 733, [1992] 1 AC 58). It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision. As Lord Browne-Wilkinson said in *(X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 371, [1995] 2 AC 633 at 739) in relation to the duty of care owed by a public authority performing statutory functions: "... the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done." The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss

a caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.'

b In my judgment, the same applies to a statutory undertaker, such as the defendant, whether or not it is a public authority as that expression was used by Lord Hoffmann.

[42] The relevant statutory duty appears in s 94 of the 1991 Act. That section reads, so far as material, as follows:

c '(1) It shall be the duty of every sewerage undertaker—(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers as to ensure that that area is and continues to be effectually drained; and (b) to make provision for the emptying of those sewers and such further provision (whether inside
d its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers ...

e (3) The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above—(a) by the Secretary of State; or (b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Director.'

[43] Section 18 of the 1991 Act provides, so far as material, as follows:

f '(1) Subject to subsection (2) and sections 19 and 20 below, where in the case of any company holding an appointment under Chapter I of this Part the Secretary of State or the Director is satisfied—(a) that that company is contravening—(i) any condition of the company's appointment in relation to which he is the enforcement authority; or (ii) any statutory or other requirement which is enforceable under this section and in relation to which he is the enforcement authority; or (b) that that company has contravened
g any such condition or requirement and is likely to do so again, he shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.

h (2) Subject to section 19 below, where in the case of any company holding an appointment under Chapter I of this Part—(a) it appears to the Secretary of State or the Director as mentioned in paragraph (a) or (b) of subsection (1) above; and (b) it appears to him that it is requisite that a provisional enforcement order be made, he may (instead of taking steps towards the making of a final order) by a provisional enforcement order make such provision as appears to him requisite for the purpose of securing compliance with the condition or requirement in question.

j (3) In determining for the purposes of subsection (2)(b) above whether it is requisite that a provisional enforcement order be made, the Secretary of State or, as the case may be, the Director shall have regard, in particular, to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of any condition or of any statutory or other requirement enforceable under this section, is likely to

be done, or omitted to be done, before a final enforcement order may be made ... a

(8) Where any act or omission constitutes a contravention of a condition of an appointment under Chapter I of this Part or of a statutory or other requirement enforceable under this section, the only remedies for that contravention, apart from those available by virtue of this section, shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting such a contravention.' b

[44] Section 22(1) and (2) provide as follows:

(1) The obligation to comply with an enforcement order shall be a duty owed to any person who may be affected by a contravention of the order. c

(2) Where a duty is owed by virtue of subsection (1) above to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit of that person.'

[45] Thus an action for breach of statutory duty to enforce the defendant's duty under s 94 effectually to drain the area does not lie at the suit of an injured person unless an enforcement order has been made. No such order has been made in this case. d

[46] I heard argument on the effect of s 18(8). Mr Daiches conveniently described the omission to carry out the works necessary to prevent the nuisance as a 'contravention omission'. That is an apt expression, since the omission is an omission on the part of the defendant to do its duty under s 94 to ensure that the area is effectually drained. So far as the *Leakey* principle is concerned, the cause of action is negligence, or nuisance by negligence. The argument on adoption of the nuisance bases the cause of action in nuisance simpliciter. There is also the *Rylands v Fletcher* argument, which may be said to be a variety of nuisance. In all those cases the omission relied on is failure on the part of the defendant to exercise its statutory powers. But it is, indeed, a contravention omission. It appears that the expression 'the only remedies for that contravention' must mean 'the only remedies for that act or omission', given the last few words of the subsection 'available in respect of that act or omission otherwise than by virtue of its constituting such a contravention'. The remedies for negligence and nuisance are claimed in respect of the omission 'otherwise than by virtue of its constituting such a contravention'. But are they 'available'? They are of course generally available; but the statutory undertaker has an immunity. In my judgment, such remedies do fall within the expression: 'those that are available in respect of that ... omission otherwise than by virtue of its constituting such a contravention.' Thus I conclude that s 18(8) does not in itself preclude an action for nuisance or negligence. e
f
g
h

[47] Nevertheless, the policy of the Act is clear: there is no statutory liability to pay compensation. I conclude that that policy excludes the existence of a common law duty of care to fulfil the duty.

[48] A further particular of negligence that Mr Harrison relied on was this: the defendants instructed their agents the London Borough of Harrow to ensure that all further built developments included measures to ensure that rainfall run-off was minimised or held back so as to prevent flooding. The defendants never monitored whether or not this was occurring or took any other measures to ensure that the remedial system that they had implemented was carried out. j

- a The defendants did not institute any further measures when it became apparent that development was being permitted without the imposition of conditions designed to minimise or hold back water run-off.

[49] On Mr Regnier's evidence I find that the London Borough of Harrow did impose relevant conditions in relation to large developments, but that it was not worth while to do so in relation to small developments. There may have been

b some increase in run-off by reason of new developments, but it was not significant. This allegation fails on the facts.

[50] I conclude that Mr Marcic has no remedy under the law as it existed before the passing of the 1998 Act.

[51] In reaching the above conclusion, I have not overlooked the following arguments of Mr Harrison.

- c [52] Mr Harrison submitted that the older cases, concerned as they were with local authorities, which were prevented from making any profit on their activities, did not apply to the defendant, a private company. The defendant chose to become a sewerage undertaker and to make a profit out of it. The necessary change of approach had been recognised in *British Waterways Board v Severn Trent*
- d *Water Ltd* [2001] EWCA Civ 276, [2001] 3 All ER 673. Mr Harrison relied in particular on the following passage in para [74] of the judgment of Chadwick LJ:

'... one of the important changes made in the [Water Act 1989] (and perpetuated in the [1991 Act]) is that sewerage functions were transferred from public authorities (which derived their corporate powers from the statute by which they were established) to limited companies (which derive their corporate powers from their memoranda of association) ... I would not expect an implied power [to discharge without payment of compensation onto the land (or into the watercourse) of another] to follow from the fact that a company limited by shares ... has been appointed as a sewerage

e undertaker to carry out the duties imposed by s 94 of the [1991 Act]. What I would expect to find (and do find) in the legislation is a power to acquire by compulsory purchase, with the authority of the Secretary of State and upon payment of compensation, the rights which the undertaker needs to carry out its functions.'

f

- g Mr Harrison submitted that that passage showed that the defendant was not a public authority in the sense in which that expression was used by Lord Hoffmann in *Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801, [1996] AC 923, and was not to be treated as one. Whilst in that passage Chadwick LJ recognised a distinction between the sources of the powers of local authorities and of private
- h companies, the case does not in my judgment support those submissions of Mr Harrison.

[53] Further, Mr Douch (the most senior policy witness of the defendant) accepted that there was no prospect of relief for Mr Marcic for decades in the absence of exceptional circumstances: the situation would continue until the defendant chose to pay for any works. Mr Harrison submitted that the defendant was thereby asserting a right to discharge water from the surface water sewer onto Mr Marcic's property. If the defendant had put an overflow pipe from the sewer onto the edge of Mr Marcic's property, there was no dispute that it would be liable for the consequences of the flooding. On the facts of this case, submitted Mr Harrison, there was no valid distinction between overflow and deliberate discharge. In support of that submission, Mr Harrison cited various passages

j

from the judgments in the *British Waterways* case of which I quote two from the judgment of Peter Gibson LJ:

'It was common ground between the parties ... that STW [the defendant] needed the implied statutory authority for which it contended, because to discharge water onto another's land would be an interference with private rights ... there is a presumption that a statute does not give the right so to interfere. However, this presumption will yield to a sufficiently clear intention in a statute, as the House of Lords held in *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353, [1981] AC 1001. In that case statutory authority for the construction and operation of a refinery was held to confer immunity against actions in nuisance because the refinery could not be operated without causing a nuisance. Mr Beloff [for STW] accepted that the [1991 Act] did not authorise a sewerage undertaker to commit a nuisance. That is plainly right: it is not inevitable that nuisance will be caused by a sewerage undertaker performing its statutory functions ...

It is entirely consistent with the presumption against Parliament interfering with private rights that no right to commit a trespass should be implied.' (See [2001] 3 All ER 673 at [36], [41].)

I reject Mr Harrison's submission that the evidence supports the proposition that the flooding should be treated as deliberate discharges by the defendant. In my judgment, there is nothing in the *British Waterways* case inconsistent with the conclusion that I have reached.

[54] Mr Marcic claims that the failure of the defendant to provide a proper drainage system infringes his human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the 1998 Act) and constitutes a breach of the duty owed to him by the defendant under the 1998 Act. Section 6 of the 1998 Act provides, so far as material, as follows:

'(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently ...

(3) In this section "public authority" includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament ...

(6) "An act" includes a failure to act ...'

[55] The convention rights upon which Mr Marcic relies are those contained in art 8 (right to respect for private and family life) and in art 1 of the First Protocol (protection of property). Those articles read as follows:

'Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a

- a* democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ...

THE FIRST PROTOCOL

Article 1

Protection of property

- b* Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

- c* The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

- d* [56] In the absence of authority, I would have thought that those articles had nothing to do with the case. But I would have been wrong. There is clear authority that matters of this kind do fall within those articles. In *Baggs v UK* (1987) 9 EHRR 235, a case of nuisance by noise from Heathrow airport affecting the applicant's enjoyment of his home, the European Commission of Human Rights (the commission) deemed his complaints under both articles admissible.
- e* In *S v France* (1990) 65 DR 250 the applicant complained under both articles of the effect of a nuclear power station near her home. It was said to cause noise, light during the hours of darkness, and, by reason of repeated release of steam, humidity and a reduction in direct sunlight. The applicant had received compensation in the sum of FF250,000. As to the claim under art 1 of the First Protocol, the commission decided that noise nuisance could seriously affect the
- f* value of real property and thus amount to a partial expropriation. But having regard to the compensation, there was no appearance of a violation of that article. In relation to the complaint under art 8, the commission stated (at 263):

- g* '... Article 8, para. 1 of the Convention, which guarantees [the right to respect for the applicant's private life and the inviolability of her home] cannot be interpreted so as to apply only with regard to direct measures taken by the authorities against the privacy and/or home of an individual. It may also cover indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals ... Considerable noise and other types of nuisance can undoubtedly affect the physical well-being
- h* of a person and thus interfere with his private life. They may also deprive a person of the possibility of enjoying the amenities of his home ... in the circumstances of the present case the noise and other types of nuisance complained of by the applicant amount to an interference with the above-mentioned rights guaranteed by Article 8 para. 1 of the Convention.'

- j* As to the effect of para (2) of art 8, the commission decided that bearing in mind the compensation, the interference did not go beyond what was necessary in a democratic society.

[57] In *Guerra v Italy* (1998) 4 BHRC 63 at 76 (para 58) the European Court of Human Rights held that the effect of toxic emissions from a factory polluting the atmosphere in the applicants' homes fell within art 8, observing:

‘... Italy cannot be said to have “interfered” with the applicants’ private or family life; they complained not of an act by the state but of its failure to act. However, although the object of art 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life ... In the present case it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants’ right to respect for their private and family life as guaranteed by art 8 ...’

[58] In *López Ostra v Spain* (1995) 20 EHRR 277 the European Court of Human Rights found a violation of art 8 by reason of interference with the applicant’s home by fumes and smells emanating from a waste treatment plant.

[59] It is not in issue that the flooding of Mr Marcic’s house falls within the first paragraph of art 8 of the convention and art 1 of the First Protocol. However, Mr Daiches submitted that the interference with those rights was not such as to impair ‘the very essence’ of those rights. It is common ground that Mr Marcic falls within the definition of a victim and is therefore a proper claimant. It is common ground that the defendant is a public authority within the meaning of the 1998 Act.

[60] Section 6(1) of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. Section 6(6) provides that ‘an act’ includes a failure to act. That is clearly a wide expression, and is not expressed to be confined to omissions to carry out a duty, let alone a duty that can be enforced by a claimant otherwise than under the Act. Indeed, if it were confined in the latter way, there would be little point in the Act. On the other hand, someone who suffers an infringement of his human rights by reason of inactivity manifestly cannot pick a defendant at random. Failure to act in my judgment must involve the concept that the defendant could reasonably have acted so as to prevent or put an end to the infringement of the claimant’s human rights. Otherwise the failure would not be ‘incompatible with a Convention right’.

[61] Mr Daiches submitted that the defendant was the wrong defendant. In the case of omissions, it would always be necessary to identify the relevant public authority that is alleged to be under the duty to take the relevant positive steps. I accept that submission, save for the implication that there is necessarily only one relevant public authority. The relevant omission, which he labelled a ‘contravention omission’, constituted a contravention of a statutory requirement contained in s 94(1) of the 1991 Act which was enforceable under s 18 of that Act. He submitted that on the true construction of the 1991 Act, and in particular of s 18(8), the legislature had decided that the relevant public authorities answerable to the courts in respect of contravention omissions were the Secretary of State and the Director General of Water Services. He referred to those two officers generically as ‘the Director’. The legislature had charged the director with the duty of enforcement in relation to contravention omissions, and had enacted a detailed scheme of enforcement, contained in ss 18 to 22 of the 1991 Act, to enable positive steps to be taken to remedy any contravention omissions. Under the statutory scheme of enforcement, the duty was initially on the director to take positive steps to consider whether an enforcement order should be made, and if so, to make an order. It was only if and when an enforcement order was made

a by the director that the undertaker came under a duty, pursuant to s 22, to take the positive steps required under the enforcement order.

[62] Mr Daiches accepted that his argument depended on the true construction of s 18(8) of the 1991 Act. He submitted that the words 'those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting such a contravention' did not include remedies under the 1998 Act for contravention omissions. Mr Harrison submitted that they did, and that the starting point of the argument was the 1998 Act, not the 1991 Act. Mr Daiches said that Mr Harrison's argument begged the question whether there was a remedy under the 1998 Act. In fact the argument is circular, and it seems to me that the starting point is immaterial.

c [63] The foundation of the argument is that the undertaker is under no duty until the enforcement order has been made. I do not think that that foundation bears the weight of the argument. It is true that there is no private law duty under the 1991 Act until s 22 comes into play, but the enforcement order is a means of enforcing an existing statutory duty. The 1991 Act was passed before the 1998 Act. In my judgment, s 18(8) of the former Act is not to be interpreted as showing any intention whether a statutory undertaker is a proper defendant in any given case under the 1998 Act.

d [64] Mr Daiches rightly put forward no argument on the basis that Mr Marcic, by not following up the suggestion of the Department of the Environment that he complain to the Director General of Water Services, had failed to exhaust his remedies.

e [65] The defendant has statutory powers, and indeed is under a statutory duty, effectually to drain its area. In the case of Mr Marcic, it has failed to do so. In my judgment, the defendant is a proper defendant. Section 18(8) of the 1991 Act does not in my judgment purport to prohibit the bringing of Mr Marcic's claim. It is not incompatible with the 1998 Act.

f [66] Mr Daiches submitted that the defendant and its predecessors in title were compelled by s 106 of the 1991 Act to permit householders to connect their drains to the public sewer system, so that the defendant could not have acted any differently. He relied on s 6(2)(a) of the 1998 Act as disapplying s 6(1) in those circumstances. I note in passing, though I have heard no argument on the point, that s 106 does not require an undertaker to accept surface water into a sewer provided for foul water: see s 106(2)(b)(ii), which provides:

g '... nothing in subsection (1) above shall entitle any person ... (b) where separate public sewers are provided for foul water and for surface water, to discharge directly or indirectly ... (ii) except with the approval of the undertaker, surface water into a sewer provided for foul water ...'

h Since, on the evidence, I am satisfied that the foul water sewer would have ample capacity but for the fact that it accepts surface water in addition to sewage, Mr Daiches' argument may not apply to the foul water element of the flooding to which Mr Marcic's property is subjected. But in any case, in my judgment s 6(2)(a) of the 1998 Act does not apply since the defendant's inactivity is not the necessary consequence of any legislation.

i [67] The rights embodied in art 8 of the convention and in art 1 of the First Protocol are qualified rights. The right expressed in para (1) of art 8 is qualified by the provisions of para (2). The right expressed in the first sentence of art 1 of the

First Protocol is qualified by what follows in the remainder of the first paragraph of that article. The second paragraph is irrelevant for present purposes. a

[68] I find that the defendant's failure to carry out works to bring to an end the repeated flooding of Mr Marcic's property constitutes an interference with the exercise of Mr Marcic's right under para (1) of art 8 of the convention. That is so notwithstanding that it is inactivity that is complained of. I reach that conclusion on the authority of *Guerra v Italy*. The right is a qualified right in that interference with it by a public authority may be justified in accordance with the provisions of para (2) of that article. If it is justified, then Mr Marcic's qualified right has not been infringed and the defendant has not acted in a way which is incompatible with Mr Marcic's convention right under art 8. b

[69] As to art 1 of the First Protocol, I find that Mr Marcic has been deprived, at any rate in part, of the peaceful enjoyment of his possessions. Although I have not heard expert evidence of any diminution in value of his property, there is expert evidence of damage to the property and the evidence of Mr Marcic, who considers it to be unsaleable. The value of Mr Marcic's property must have been seriously and adversely affected by the nuisance. That effect has constituted a partial expropriation: in *S v France* (1990) 65 DR 250 at 261 the commission observed that where the value of real property was seriously affected by noise nuisance, that nuisance would amount to a partial expropriation. c

[70] Mr Marcic cannot complain before this court of any infringement or damage occurring before 2 October 2000, when the 1998 Act came into force. I shall consider the question of damage at a later hearing. As to infringement, the interference with the exercise of Mr Marcic's qualified right under art 8 continues; and the deprivation of his possessions continues. I thus have to consider whether the exceptions contained in the two articles apply. d

[71] Mr Daiches submitted that there was a principle of proportionality in the interpretation of the 1998 Act. There was a general principle inherent in the whole of the convention that it is seeking to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see Lester and Pannick *Human Rights Law and Practice* (1999) p 68 (para 3.09)). I accept that in applying the qualifications to the rights in question the court must strike a fair balance between the competing considerations. As to art 8, the only qualifications to the right that it has been suggested or, I think, could have been suggested are relevant in this case are encapsulated in the words: '... necessary in a democratic society in the interests of the economic well-being of the country or for the protection of the rights and freedoms of others.' In art 1 of the First Protocol the public interest is the competing consideration. It is common ground that the burden lies on the defendant to show that there is a justification for the prima facie breach of Mr Marcic's human rights. e

[72] Mr Daiches submitted that in considering the question of proportionality I should apply the principle of judicial deference. An expression of that principle is to be found in the speech of Lord Hope of Craighead in *R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 380–381: f

‘... the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature g

- a between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the convention.'
- b Mr Daiches' submission was that I should defer to the views and specialist expertise of the defendant. In summary, his reasons were these. Prior to the introduction of the 1998 Act it was clear that the legislature intended that the Director, and not statutory sewerage undertakers, should be the public authority responsible for deciding whether to enforce the remedying of contravention omissions. The clear inference was that the legislature intended that decisions
- c whether to enforce such a remedy should involve a discretion, to be exercised having regard to many factors, including the amount of funds available to the relevant undertaker and the priority of the complainant as compared with other owners and occupiers who were suffering from the harmful effects of an old and inadequate public sewerage system. The underlying political question was whether
- d statutory sewerage undertakers should be under a strict duty to provide a perfect public sewerage system for everyone in the country, regardless of cost or whether they should be under some lesser, and if so what, duty. Social and economic factors involved the degree of control by the director, the amount by which the director permitted sewerage undertakers to raise their charges to enable capital and infrastructure works to be carried out, and the amounts which
- e consumers could reasonably be expected to pay to improve the public sewerage system. Social and economic factors also involved consideration of a proper system of priorities to deal with the thousands of owners and occupiers who currently suffered from inadequate public sewerage systems. The court patently lacked the expertise necessary to make a primary finding as to whether the omission to take the relevant steps was proportionate as between the claimant and the community
- f as a whole. The court had not heard any evidence from the other owners or occupiers who might be regarded by the undertaker as having priority over Mr Marcic. It was clearly impractical for the defendant to subpoena all the thousands of owners and occupiers on the defendant's flooding history database. In such circumstances, the court could not properly assess whether Mr Marcic
- g should be entitled to the benefit of new public sewerage works in priority to all the other owners and occupiers who were suffering from old and inadequate public sewers. It was the Director who was the person best fitted to decide whether or not an enforcement order should be made. However, on the premise that the relevant duty was on the defendant, Mr Daiches submitted that the defendant still had more specialist expertise than the court in relation to the issues
- h raised in this case.

j [73] That is a powerful argument. But since I have to decide whether Mr Marcic's human rights have been infringed, it is implicit that I am being asked to conclude that the statutory framework itself, and not simply its operation in this case, provides the appropriate balance of the competing interests. There is precedent for such a conclusion. Mr Daiches cited the case of *Powell v UK* (1990) 12 EHRR 355. The high point of that case from Mr Daiches' point of view is this sentence in the judgment of the European Court of Human Rights (at 369 (para 44)): 'It is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere.' The fact remains that

the court did consider the merits of the case. The discussion appears in paras 40 to 45 of its judgment (at 368–369). The claims related to noise nuisance emanating from Heathrow airport. The facts are fully set out in the report. The court stated in its judgment that in each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home had been adversely affected by the noise. The existence of large international airports, even in densely populated urban areas, and the increasing use of jet aircraft had without question become necessary in the interests of a country's economic well-being. A number of measures had been introduced by the responsible authorities to control, abate and compensate for the noise. Nine such measures were specified in the judgment. Those measures had taken due account of international standards and the varying levels of disturbance suffered by those living around the airport. On the other hand, s 76(1) of the Civil Aviation Act 1982 limited the possibility of legal redress open to the aggrieved person. The court concluded that the assessment of the best policy in that difficult social and technical sphere was an area where the contracting states were to be recognised as having a wide margin of appreciation.

[74] Mr Daiches also relied on *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129 at 137, [1995] 1 WLR 898 at 906. In that case the claimant, the father of a sick child, sought judicial review of a decision of a health authority not to allocate £75,000 for the treatment of the child. Without the treatment the child was thought to have some six to eight weeks to live. The proposed treatment was experimental. Its chance of success was between 10 and 20%. Some of the doctors had thought that it was not in the child's interest to undertake it. The passage on which Mr Daiches relied was from the judgment of Bingham MR in the Court of Appeal, where he said:

'Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court.'

Bingham MR had observed that it was common knowledge that health authorities of all kinds were constantly pressed to make ends meet. And he went on to say that it would be totally unrealistic to require the authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B then there would be a patient C who would have to go without treatment. No major authority could run its financial affairs in a way which would permit such a demonstration. It is clear from the report that the Court of Appeal did very carefully consider the reasonableness of the decision of the health authority.

[75] I conclude that I must consider the merits of this case, albeit giving the defendant a wide margin of discretion.

[76] The defendant is one of the Thames Water plc group of companies. The defendant is a statutory water and sewerage undertaker for the purposes of the Water Act 1989 and the 1991 Act. As statutory sewerage undertaker, the defendant is responsible for an area stretching from Cirencester to Brentwood and from Banbury to Crawley. Within that area, the defendant is responsible for some 80,000 km of public sewers ranging in size from 100 mm to over 6 m in diameter. There are 361 sewage treatment works and over 2,000 sewage pumping

a stations which serve some 5.4 million connected properties and a population of some 12 million.

[77] The revenue of the defendant comes from water and sewerage charges. Those charges are fixed from time to time by the Director General of Water Services (the DG). In fixing the charges, the DG includes allowance for the cost of works necessary to remove properties from the risk of internal flooding. In more
b detail, the procedure is as follows. Every five years the defendant submits a strategic business plan to the DG. That plan includes a statement of the capital funding needed to achieve what the defendant believes to be a reasonable level of alleviation of flooding. The defendant keeps a database of flooding history identifying flooding incidents and the properties concerned. The DG reviews the submissions and sets the number of properties he requires to be removed from
c the flooding history database. He includes allowance for the cost of that in his assessment of the level of charges to be permitted. He issues directives setting out targets for performance by sewerage undertakers, one of which includes the alleviation of the risk of flooding of properties at risk. The category of property at risk of flooding for which allowance is made by the DG in the charges is
d properties at risk of internal flooding by foul or surface water. There is no allowance for properties at risk only of external flooding. Thus, in particular, Mr Marcic's property, which has not suffered internal flooding, is not allowed for.

[78] The flooding history database, which the defendant maintains with the approval of the DG, includes all properties in the defendant's area which are assessed to be at risk of flooding. There are three categories of risk. Risk A applies to
e properties statistically categorised as being at risk of internal flooding twice or more in ten years. Risk B applies to properties at risk of internal flooding once or more, but less than twice, in ten years. Risk X applies to all other properties with a history of flooding, including properties subject only to external flooding.

[79] For the period 1990 to 1995, the DG required 3,910 risk A properties to be
f removed from the risk of internal flooding. In fact, 3,943 properties were so removed. For the period from 1995 to 2000, the target was 3,700 risk A properties. The achieved figure was 4,397 properties and the cost £132m. For the period 2000 to 2005, the defendant is required to remove 1,500 risk A or risk B properties. The cost allowed is £46m.

g [80] Between 1990 and 1997, the defendant has carried out in the London Borough of Harrow 19 flooding projects, affecting 243 properties, at a cost of £9,433,300.

[81] The way in which the defendant determines priorities for spending
h moneys to alleviate flooding is by way of a points system. A customer impact score is attached to a given flooding incident. Points are awarded for various factors, e.g. whether the flooding is of foul water or of surface water, whether it is internal or external, whether the property is a school, hospital or nursing home, and whether the customer has been forced to vacate the property temporarily. In the case of external flooding, additional points are attached by reference to the frequency of such events, provided that the frequency is at least three events in
j five years. In the case of internal flooding, weightings are attached to the total by reference to the number of such incidents in a ten-year period, provided that it exceeds one, and to the time elapsed since the most recent event, provided that it is not more than ten years. The score is compared with the estimated cost of the necessary engineering project. The threshold for what the defendant regards as the viability of an engineering project to alleviate the risk of flooding

is 100 points per million pounds. Cases where the figure falls below 100 points per million pounds can be referred to a review group of the defendant who can consider any additional factors. Examples of such factors are specific vulnerabilities of the customer, (eg old age, sickness or disablement), whether the matter has received press coverage and whether an MP or a local councillor is involved in the matter. a

[82] The cost of scheme 2.2 mentioned in the experts' joint statement is £200,000. The points value, allowing for the benefit to properties adjacent to that of Mr Marcic as well as the benefit to Mr Marcic's own property, is six, equivalent to 30 points per million pounds. b

[83] On the evidence of the defendant's witnesses, I am satisfied that there is no prospect of any work being carried out in the foreseeable future to prevent flooding of Mr Marcic's property. c

[84] There have been put before me some statistics of properties in the defendant's area affected by flooding and at risk of flooding. In the year 1999–2000 the position was this. The number of properties affected by internal flooding incidents caused by overloaded sewers was 851. The number of properties affected by internal flooding incidents from other causes was 911. The number of properties at the end of the year said to be at risk of internal flooding twice or more in ten years was 3,611. The number of properties at the end of the year said to be at risk of internal flooding once or more, but less than twice, in ten years was 14,655. Those latter figures, totalling 18,266, included the former, totalling 1,762. With reference to those figures, Mr Douch said in his witness statement that if the defendant were to allocate the level of funding needed to provide the solutions to Mr Marcic's flooding problem discussed in the experts' joint report, funds would be diverted away from projects to alleviate the risk of flooding of the 18,000 properties that suffer from or are at risk of internal flooding. For both public health and customer interest reasons those must be given priority, he said. He went on to say that the defendant's commitments to fund its regulated public water supply and sewerage functions were such that it was not able to fund all of the many similar cases to Mr Marcic's without compromising its abilities to meet the regulatory requirements for the range of functions it was required to carry out. d
e
f

[85] In his oral evidence, Mr Douch said that Mr Marcic's level of external flooding was quite severe but not exceptional. He had not carried out an analysis, but would suggest that there were, in the defendant's area, several thousand properties experiencing a similar level of flooding. Mr Sitaranjan estimated that there were several hundred properties within the London Borough of Harrow that suffered from foul water flooding and more severe surface water flooding than that experienced by Mr Marcic. g

[86] In cross-examination Mr Douch accepted that there was nothing other than a managerial decision on the part of the defendant to stop it from spending the money necessary to remedy Mr Marcic's flooding problem without diverting resources from the 18,000 properties at risk of internal flooding. He also said that the defendant had spent more on alleviation of flooding than the DG had allowed for. h

[87] I have seen extracts from the reports and accounts of the Thames Water group. Separate accounts for the defendant are not in evidence. The group's financial review for the year 1999–2000 states: j

'Our objective is to create shareholder value by developing and investing in businesses which deliver strong cash flows and are able to provide returns

a in excess of our costs of capital. We continued to make good progress towards this objective in 1999/00, again raising returns through margin improvements, rigorous financial control and the substantial growth of businesses outside the UK Utility ... Despite the substantial regulatory reductions in prices from 2000/01, the UK Utility remains strong with a growing high quality customer base, and provides a solid platform for the vigorous development of our other businesses.'

b The group profits after tax were £344m.

[88] Mr Douch said that the current cost rate of alleviating flooding problems was of the order of £30,000 a property. That figure reflected concentration on schemes where the properties that benefit are grouped together geographically so that several can benefit from a single scheme of alleviation. If all flooding problems were to be alleviated, the unit cost would be substantially in excess of £30,000.

[89] Whilst the evidence on the subject is imprecise to the point of vagueness, I conclude that it would cost the defendant a sum of the order of £1bn to alleviate the flooding problems of all customers in its area who are in a similar position to that of Mr Marcic or whose properties are at risk of internal flooding at least once every ten years. That takes no account of future house-building. It seems, on the limited evidence available, that that alleviation, if it were to be undertaken, would take several, if not many, years in the absence of an increase in sewerage charges.

e [90] Mr Harrison submitted that to carry out the works necessary to remedy Mr Marcic's situation manifestly would not affect the economic well-being of the country, and that there was simply no evidence that the economic well-being of the country would be threatened by a judgment in his favour. I accept that argument so far as it goes, that is to say by taking Mr Marcic's case in isolation. But on the evidence, there may be thousands of customers in a position similar to that of Mr Marcic. For reasons that follow, I consider that Mr Marcic's case must not be taken in isolation.

f [91] Mr Harrison further submitted that the 'interference' by the defendant with the exercise of Mr Marcic's right under art 8 of the convention could not be justified as being for the protection of the rights and freedoms of others, since they had no greater rights or freedoms than Mr Marcic.

g [92] The question is: what is the meaning of the expression contained in the second paragraph of art 8, 'necessary ... in the interests of ... the economic well-being of the country', in the context of the facts of this case? The answer, I think, appears in *Powell v UK* (1990) 12 EHRR 355. The European Court of Human Rights said (at 368 (para 41)):

j 'Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph (1) of art 8 or in terms of an 'interference by a public authority' to be justified in accordance with paragraph (2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.'

The European Court made similar remarks in *López Ostra v Spain* (1995) 20 EHRR 277 at 295 (para 51). Whilst the margin of appreciation enjoyed by a state is not in issue here, I have already indicated that in my judgment the defendant and, I may add, the director enjoy a margin of discretion. I have to decide whether a fair balance has been struck between the competing interests of Mr Marcic and of the other customers of the defendant, allowing the defendant that margin. The economic well-being of the country as a whole is not, I think, in issue since sewerage costs are financed from sewerage charges. No doubt sewerage charges have an effect on the economy of the country, but it has not been suggested that that is a significant consideration. The striking of the fair balance also protects the rights and freedoms of others.

[93] As to art 1 of the First Protocol to the convention, in *S v France* (1990) 65 DR 250 at 262 the commission referred to a statement of the European Court of Human Rights in *James v UK* (1986) 8 EHRR 123 at 147 (para 54) that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under art 1 of the First Protocol. The public interest exception specified in art 1 of the First Protocol raises, in my judgment, the same considerations in this case as those raised in the second paragraph of art 8.

[94] Mr Daiches submitted that where a private individual complains that a statutory body has omitted to exercise a public law discretion so as to confer a benefit on him, the fair balance must always be struck by precluding that individual from bringing a private law action to compel the statutory body to confer that benefit on him. I reject that argument, at any rate where, as here, the benefit is the abatement of a nuisance or other harm emanating from a defendant or its property. Mr Daiches submitted that the courts are not fitted to assess the considerations which dictate a public law decision by a statutory body involving the weighing of competing public interests. That argument purports to prove too much. It implies that the courts must wash their hands of their power under s 8(1) of the 1998 Act to grant such relief or remedy, or make such order, within their powers as they consider just and appropriate. The proposition is vividly put in the words of Bingham MR in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 265, [1996] QB 517 at 556 which are quoted in a case that Mr Daiches cited to me, *R v Secretary of State for the Home Dept, ex p Turgut* [2001] 1 All ER 719 at 724: 'While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to "do right to all manner of people".' That remark was made in the context of proceedings for judicial review, but it applies here also.

[95] Mr Daiches submitted that the striking of the fair balance in relation to a public law decision requires the existence of a system of law which (a) permits a statutory body to exercise its public law discretion freely and without improper or distorting interference from the executive or the courts, (b) precludes a person who feels aggrieved by the exercise of such discretion from bringing a private law action in relation to the decision, but (c) protects that person's convention rights by enabling him to bring a public law action to have the discretion judicially reviewed for irrationality, unfairness or illegality. I reject that argument. If correct, it would have the effect that this court should refuse relief and leave it to another court to grant, if it thought right, the relief that it is within the general powers of this court to grant. Illegality includes acting in a way which is incompatible with

a a convention right, and a court undertaking judicial review would, as regards illegality, take into account precisely the considerations that are before me.

[96] In its system of working out priorities, one of the items that the defendant takes into account, in relation to a customer suffering internal flooding, but not in relation to a customer suffering only external flooding, is the time elapsed since the most recent flooding event. Periods from zero to two years are bracketed together and attract the maximum weighting for this item. It is a matter for consideration whether weightings should be attached for external flooding. The most recent event experienced by Mr Marcic occurred on 6 November 2000, four months before the hearing. It is a matter for consideration whether higher weighting should be given where there has been such a recent event. A related point is the frequency of events. The maximum weighting for this item is given (again only for internal flooding) where the frequency of events is more than ten in ten years. Mr Marcic has suffered three incidents of flooding at his property since 15 May 2000 plus an occasion at the end of October 2000 when flooding took place on two successive days. That may be counted as four or five incidents in a period of less than a year. It is a matter for consideration whether such a high frequency of incidents should attract a higher weighting than it does.

d [97] Mr Marcic has been waiting nine years for something to be done about his flooding problem. No account is taken of the length of time that a customer has been waiting for his problem to be remedied. It is for consideration whether some account should be taken of that.

e [98] Although a small number of points is given where a customer is unable to obtain insurance, no account is taken of the value of the property flooded or of the amount of any diminution in value or of the cost of repair of any damage to the property caused by the flooding. Again, it is for consideration whether those matters ought to be taken into account in assessing priorities.

f [99] Another matter for consideration is whether it is fair that a customer such as Mr Marcic, who has spent £16,000 to prevent the flood waters coming into his house, should have no prospect of relief when customers who have not done so, but might have been able to, have priority.

[100] Some of the matters taken into account in assessing priorities are irrelevant, e.g. whether a complaint has received press coverage.

g [101] The defendant's case depends on there being a large number of properties (they rely on the figure of 18,000) which properly have priority over cases like that of Mr Marcic. There is no evidence before me how many of those properties suffer flooding from foul water. It is by no means obvious that suffering internal flooding from surface water once in eight years, say, is worse than suffering external flooding from foul water more than once a year. Yet the figure of 14,655 properties at risk of internal flooding more than once, but less than twice, in ten years is not broken down. Nor is the figure of 3,611 properties at risk of flooding twice or more in ten years. How many properties suffer flooding twice a year, how many once in eight years, say? And no breakdown seems to have been made of risk X customers, i.e. those whose flooding is entirely external.

j [102] The system of priorities used by the defendant may be entirely fair, and I have no reason to doubt that it is intended to be. But its fairness in balancing the competing interests of the defendant's various customers must depend in part on the numbers in each class, the total costs involved in relation to each class, and the resources of the defendant. The answers to the questions raised above as matters for consideration might depend on the figures. If the exercise of assessing

the fairness of the system were carried out, it might lead to the conclusion that for all its apparent faults, the system fell within the wide margin of discretion open to the defendant and the director. But on the limited evidence available to me, it is not possible to carry out such an exercise.

[103] My conclusions are these. Mr Marcic has suffered from increasingly frequent flooding at his property for nine years. The defendant has known about the original flooding incident since it occurred in 1992, and it has had the means of knowledge of the later incidents. Almost nothing has been done about the flooding, other than the works that Mr Marcic has himself carried out. Under the present system of priorities, there is no prospect of anything being done about it. That, on the face of it, constitutes an infringement of his human rights which requires justification. It would be justified if a system leading to that result and protecting the rights of others were necessary in order to strike a fair balance between the competing interests of Mr Marcic and of the other customers of the defendant, allowing the defendant a margin of discretion. It is common ground that the burden lies on the defendant to provide that justification. It has failed to do so. The fact that the current system does not obviously fail to strike the fair balance is insufficient.

[104] Mr Marcic seeks a mandatory injunction requiring one of the proposed schemes to be carried out. In the exercise of my discretion, I refuse that injunction on the grounds that: (1) the injunction would have to specify the required works precisely; (2) the specification would be a matter of engineering expertise that is not before the court; and (3) performance of the injunction would require the co-operation of third parties, albeit that the defendant has powers of compulsory purchase of land.

[105] As to damages, the effect of s 8(3) of the 1998 Act is that I am to make no award of damages unless I am satisfied that the award is necessary to afford just satisfaction to Mr Marcic. Section 8(4) requires me to take account of the principles applied by the European Court of Human Rights in relation to the award of compensation under art 41 of the convention. That again requires just satisfaction. In *López Ostra v Spain* (1995) 20 EHRR 277 at 299 (para 65) the European Court of Human Rights made an assessment on an equitable basis of non-pecuniary damage (nuisance caused by gas fumes, noise and smells, and distress and anxiety).

[106] The effect of s 22(4) of the 1998 Act is that Mr Marcic has no remedy under that act in respect of any act taking place before 2 October 2000. Mr Daiches submitted that it would have been impossible for the defendant to start works on or after 2 October 2000 so as to have completed them by the time of the hearing. That is clearly true. He submitted that there was no fresh act or omission on or after 2 October 2000 such as to give rise to liability on the part of the defendant. It is clear from the evidence that the defendant intends to continue to operate its existing system of priorities. It intends not to carry out the works necessary to remedy the nuisance. For the purpose of a claim under s 7(1) of the 1998 Act it is sufficient that the defendant proposes to act in a way made unlawful by s 6(1). But the question remains whether any unlawful failure to act has occurred or, if it has, whether it has caused any damage.

[107] The nuisance giving rise to the cause of action for infringement of Mr Marcic's right under art 8 of the convention is a continuing nuisance. The 'act' rendered unlawful by s 6(1) of the 1998 Act is failure to prevent or put an end to the infringement of the claimant's human rights. The concept of failure to prevent

a or put an end to the infringement implies the proposition that the defendant can reasonably act so as to prevent or put an end to the infringement. The defendant can reasonably act in that way, albeit that given the situation existing on 2 October 2000, the defendant could not have put an end to the prima facie breach of Mr Marcic's rights by the date of trial. In my judgment the inactivity of the defendant became unlawful, and hence the cause of action under s 8(1) of the 1998 Act arose, when that Act came into force on 2 October 2000. That cause of action is a continuing cause of action.

b [108] The position in relation to art 1 of the First Protocol in my judgment is this. Assuming (and I have yet to hear evidence on the point) that no further diminution in value of Mr Marcic's property has been occasioned by the nuisance since 2 October 2000, there has been no act of expropriation on that account since that date. However, the state of deprivation of his possessions has continued. In my judgment, for the reasons given in the previous paragraph Mr Marcic has had a cause of action for infringement of his right under art 1 of the First Protocol since 2 October 2000.

c [109] In my judgment, it is no defence that the defendant cannot immediately remedy the situation. That fact can, of course affect the relief granted.

d [110] My answers to the preliminary issues set out in the appendix to this judgment are:

1. No.
2. No.
3. No.
- e 4. No.
5. No.
6. Yes.

Order accordingly.

f Martyn Gurr Barrister.

APPENDIX

g List of preliminary issues

1. Whether, by reason of its omission to execute the works specified in paras 2.2, 2.3, 2.4 or 2.5 of the 'Joint statement by drainage experts' dated June 2000, the defendant is liable in negligence under the principle in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 All ER 17, [1980] QB 485 in respect of such damage to the claimant's property after August 1992, or after some other and if so what date, as was caused by escapes from surface water sewers vested in the defendant.

h 2. Whether, by reason of its utilisation of public sewers vested in it which were known by the defendant to be of inadequate capacity, the defendant is liable in nuisance in respect of such damage to the claimant's property after August 1992 as was caused by escapes from surface water sewers vested in the defendant.

i 3. Whether the defendant is liable under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, [1861-73] All ER Rep 1 in respect of such damage to the claimant's property after August 1992 as was caused by escapes from surface water sewers vested in the defendant.

4. Whether, by reason of its omission to exercise its statutory powers after August 1992 to execute the works specified in paras 2.2, 2.3, 2.4 or 2.5 of the 'Joint statement by drainage experts' dated June 2000, and/or its omission to monitor restrictions imposed by the local planning authority in relation to the drainage of new buildings, the defendant is liable in negligence in respect of such damage to the claimant's property after August 1992 as was caused by escapes from surface water sewers vested in the defendant.

5. Whether, by reason of any omission to provide [such] a system of public sewers as to ensure that the area within which the claimant's property is situated is effectually drained, and/or any omission to make provision for effectually dealing with the contents of its sewers, the claimant has a private law remedy against the defendant for breach of statutory duty in respect of such damage to the claimant's property after August 1992, or after some other and if so what date, as was caused by escapes from surface water sewers vested in the defendant; and if so, whether the defendant is in breach of such duty.

6. Whether the defendant's failure to execute the works specified in paras 2.2, 2.3, 2.4 or 2.5 of the 'Joint statement by drainage experts' dated June 2000 was a failure to act which was incompatible with a convention right within the meaning of s 6(1) of the Human Rights Act 1998.

**National Westminster Bank v
Utrecht-America Finance Company**
[2001] EWCA Civ 658

COURT OF APPEAL, CIVIL DIVISION

ALDOUS, CLARKE AND LAWS LJJ

6, 7 MARCH, 10 MAY 2001

Conflict of laws – Foreign proceedings – Restraint of foreign proceedings – Circumstances in which court will restrain prosecution of foreign proceedings – Agreement not to bring action in respect of non-disclosure of specified information – Contract containing non-exclusive English jurisdiction clause and waiver of objection to English courts as forum – Claimant seeking permanent injunction to restrain foreign proceedings arising out of contract – Whether defendant in breach of agreement – Whether injunction should be granted restraining defendant from continuing foreign proceedings.

UAF, the American subsidiary of a Dutch bank, entered into a take-out agreement (the TOA) with, inter alia, the respondent bank, NWB. By the TOA, UAF bought NWB's interest in a credit agreement. Under cl 8.2(d) of that agreement, UAF acknowledged that 'the Seller shall have no liability to the Purchaser, and the Purchaser shall bring no action against the Seller in relation to the non-disclosure of [a specified category of] information'. The TOA also contained a non-exclusive English jurisdiction clause and a clause waiving objection to the English courts on forum or other grounds (cl 22.3). UAF subsequently brought proceedings in California, seeking, inter alia, rescission of the TOA. In those proceedings, UAF did not allege any misrepresentation by NWB, but relied instead on an alleged breach of a duty of disclosure. That allegation could not have been made in English law since there would have been no such duty. NWB brought proceedings in England, seeking declarations that the Californian proceedings were in breach of the TOA and a permanent injunction to restrain UAF from continuing them. NWB did not seek an interim injunction, but instead applied for summary judgment. On that application, the judge held that the Californian proceedings had been brought in breach of cl 8(2)(d), and that UAF would remain in breach of the TOA in continuing them. He therefore granted the declarations and the injunction sought. UAF appealed, contending, inter alia, that the judge should not have entertained NWB's application for summary judgment. In so contending, UAF submitted that the jurisdiction to grant anti-suit injunctions was to be exercised cautiously and with regard to the principles of comity.

Held – Where the court had held, in a decision on the merits, that a party was in breach of contract in bringing foreign proceedings, and that it would be in continuing breach if it continued with them, the foreign proceedings were vexatious and oppressive and accordingly the grant of a permanent injunction restraining the party in breach from continuing those proceedings would not offend the principles of comity. In the instant case, although the principles invoked by UAF were relevant to the question whether an injunction should be granted at the interlocutory stage, they required significant modification in a case where a permanent injunction was sought after a judgment on the merits. In

such a case the applicable principles were similar to those which applied when an interlocutory injunction was sought to restrain the breach of an English exclusive jurisdiction clause. The court readily granted injunctions restraining foreign proceedings brought in breach of such a clause because it was vexatious and oppressive for a party to maintain proceedings in breach of its agreement not to do so. In the instant case, essentially the same principles applied once it was held that UAF was in breach of the TOA in commencing the Californian proceedings. It would thus be vexatious to allow UAF to continue its breach in circumstances where the award of damages would not be an adequate remedy. There was no good reason for diffidence on the clear and simple ground that UAF had promised not to do what it had since done. There was therefore no reason in principle why comity should stand in the way of the granting of an injunction. UAF could not obtain a stay of the instant proceedings because of its promise in cl 22.3 to waive objection to the English courts on grounds of forum non conveniens or otherwise. Furthermore, given that clause, UAF could not rely upon such grounds to resist the granting of a permanent injunction once it was held that the foreign proceedings were being pursued in breach of contract. Although it would have been inappropriate to grant an interlocutory injunction restraining the Californian proceedings at a time when it was no more than arguable that they were in breach of contract, because it could not have been said that they were vexatious or oppressive, the position was radically different once it was held that UAF was in breach of contract in pursuing its claim in California. It followed that the question whether the judge had been right to hold that UAF were in breach of the TOA in that regard was crucial to the outcome of the appeal and that the judge had been entirely justified in embarking upon NWB's summary judgment application. The essential question in considering the merits was whether the Californian proceedings were in breach of cl 8.2(d) of the TOA. The agreement was clear and unambiguous and protected both banks from liability for non-disclosure, however much each might be liable for negligence under Californian law if there were a duty of disclosure. The judge had been right to hold that UAF was in breach of the TOA, both in bringing the proceedings in California and in breaking its promise not to bring an action against NWB in relation to non-disclosure of information of the specified type, and accordingly the appeal would be dismissed (see [28]–[38], [51], [52], [71], [75], below).

Aggeliki Charis Cia Maritima SA v Pagnan SpA, The Angelic Grace [1995] 1 Lloyd's Rep 87 and *Donohue v Armco Inc* [2000] 1 All ER (Comm) 641 applied.

Notes

For injunctions to restrain foreign proceedings, see 8(1) *Halsbury's Laws* (4th edn reissue) para 1092.

Cases referred to in judgments

Aggeliki Charis Cia Maritima SA v Pagnan SpA, The Angelic Grace [1995] 1 Lloyd's Rep 87, CA.

Airbus Industrie GIE v Patel [1998] 2 All ER 257, [1999] 1 AC 119, [1998] 1 WLR 686, HL.

Amchem Products Inc v British Columbia (Workers' Compensation Board) (1993) 102 DLR (4th) 96, Can SC.

Barclays Bank plc v Homan [1993] BCLC 680, CA.

Canada Steamship Lines Ltd v R [1952] 1 All ER 305, [1952] AC 192, PC.

- a* *Continental Bank NA v Aeokos Cia Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA.
de Dampierre v de Dampierre [1987] 2 All ER 1, [1988] AC 92, [1987] 2 WLR 1006, HL.
Donohue v Armco Inc [2000] 1 All ER (Comm) 641, CA.
Gill (Stewart) Ltd v Horatio Myer & Co Ltd [1992] 2 All ER 257, [1992] QB 600, [1992] 2 WLR 721, CA.
- b* *Grimstead & Son Ltd v McGarrigan* [1999] CA Transcript 1733.
HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2001] 1 All ER (Comm) 719.
Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896, HL.
- c* *Phillips Products Ltd v Hyland* (1984) [1987] 2 All ER 620, [1987] 1 WLR 659, CA.
Smith v Eric S Bush (a firm) [1989] 2 All ER 514, [1990] 1 AC 831, [1989] 2 WLR 790, HL.
- d* *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL.
SNI Aérospatiale v Lee Kui Jak [1987] 3 All ER 510, [1987] AC 871, [1987] 3 WLR 59, PC.
Witter (Thomas) Ltd v TBP Industries Ltd [1996] 2 All ER 573.

Appeal

- e* Utrecht-America Finance Co (Utrecht) appealed from the order of Mr Peter Gross QC sitting as a deputy judge of the High Court on 27 November 2000 whereby he made declarations that several causes of action pleaded by Utrecht in proceedings commenced in California against the defendant, National Westminster Bank plc (NWB), were in breach of a take-out agreement made between Utrecht and NWB and that Utrecht was accordingly liable to indemnify NWB in respect of all costs and expenses, save the costs of the instant action, and granted an
- f* injunction, inter alia, restraining Utrecht from pursuing those causes of action in California or taking any further steps in relation to them except as provided by that order. The facts are set out in the judgment of Clarke LJ.

- g* *Michael Brindle QC and Bankim Thanki* (instructed by *Herbert Smith*) for Utrecht.
Lord Grabiner QC and Robin Dicker QC (instructed by *Allen & Overy*) for NWB.

Cur adv vult

10 May 2001. The following judgments were delivered.

- h* **CLARKE LJ** (giving the first judgment at the invitation of Aldous LJ).

Introduction

- j* [1] This is an appeal by Utrecht-America Finance Co (Utrecht) against an order dated 27 November 2000 made by Mr Peter Gross QC sitting as a deputy judge of the High Court. The appeal is brought with the permission of the judge. The action arises out of an agreement known as a take-out agreement (TOA) between Utrecht, National Westminster Bank plc (NWB) and others dated 15 October 1997 under which Utrecht bought NWB's interest in a credit agreement dated 21 March 1996 (as subsequently amended). Utrecht brought proceedings in California in order inter alia to obtain rescission of the TOA. NWB commenced this action in order to obtain declarations that the Californian

proceedings were begun in breach of the TOA and sought a permanent injunction to restrain Utrecht from continuing them against NWB in so far as they are in breach of the TOA. a

[2] NWB did not seek an interlocutory injunction against Utrecht but issued an application for summary judgment. Utrecht contended that the judge should not entertain the application for summary judgment, that (if he did) he should not give summary judgment and that, in any event, he should not grant an injunction restraining Utrecht from pursuing any part of the proceedings in California. The judge rejected all those submissions, gave summary judgment and granted an injunction. b

[3] The judge made declarations that the ninth, tenth and twelfth causes of action pleaded in the Californian proceedings were brought by Utrecht in breach of the TOA and that Utrecht is liable to indemnify NWB in respect of all costs and expenses (except for the costs of this action) incurred and to be incurred in defence of the ninth, tenth and twelfth causes of action. He also granted an injunction restraining Utrecht from pursuing those causes of action against NWB in California or from taking any further steps in relation to them except as provided in para 4 of his order. Paragraph 4 ordered Utrecht forthwith to withdraw those causes of action as against NWB. The judge further ordered Utrecht to pay damages to NWB in respect of the loss and damage suffered by reason of the commencement and pursuit by Utrecht of the same causes of action together with interest and costs. Utrecht's application for a stay of the action was refused. Utrecht appeals against that order and essentially advances the same arguments as it did before the judge. c
d
e

Background

[4] The underlying facts are not in dispute. I take them largely from the judgment. Utrecht is a company incorporated under the laws of Delaware with its principal place of business in New York. It is indirectly a wholly-owned subsidiary of a Dutch bank called Rabobank Nederland (Rabobank). By a written agreement dated 21 March 1996 (the credit agreement) NWB and Rabobank agreed to provide Yorkshire Food Group plc (YFG) and certain subsidiary companies of YFG with a credit facility of up to \$US100,000,000, of which NWB and Rabobank each agreed to provide up to \$US50,000,000. The subsidiaries were incorporated either in England or in the United States. The total sum of \$US100,000,000 was subsequently increased by a further \$US19,000,000 in the form of \$US9,500,000 from each of NWB and Rabobank. f
g

[5] The parties to the TOA were NWB, Utrecht, Rabobank, YFG and a Delaware subsidiary of YFG called Yorkshire Dried Fruit & Nuts Inc. As already stated, the essential purpose of the TOA was to effect a novation under which Utrecht took out or purchased NWB's interest in the credit agreement. At the time of the TOA the sums advanced under the various facilities in the credit agreement were already due and were unpaid. The price which Utrecht paid NWB to purchase its interest in the credit agreement was at a discount to the outstanding amounts of the loans. In accordance with a pricing letter dated 14 October 1997 Utrecht paid the sum of \$US39,525,386.30 which was calculated in such a way as to ensure that the overall discount did not exceed £11,300,000. Whether that discount represented good business for Utrecht or not depended of course upon what the judge called the quality of the debt. h
j

a The Californian proceedings

[6] The Californian proceedings were commenced on 28 October 1999 by Rabobank and Utrecht against NWB and various individual directors and officers of certain subsidiaries of YFG based in California. The case against NWB originally comprised the ninth, tenth, twelfth and fourteenth causes of action pleaded in the complaint. The fourteenth cause of action has recently been abandoned so that we are concerned only with the ninth, tenth and twelfth causes of action. I shall return to them in a little more detail below, but they essentially allege fraudulent concealment of information, negligent failure to disclose information and a breach of good faith or fair dealing in failing to disclose such information. In each case it is alleged that NWB was under a duty to disclose the information to Utrecht.

[7] On 30 December 1999 the solicitors for NWB wrote a letter before action alleging that the commencement and pursuit of the Californian proceedings by Utrecht against NWB were a breach of the TOA on the ground that by cl 8.2(d) Utrecht had agreed to bring no action against NWB in respect of non-disclosure of the classes of information alleged in the complaint. The letter asked for an undertaking from Utrecht that it would withdraw the relevant parts of the proceedings, failing which NWB would commence proceedings in England for appropriate relief. No such undertaking was or has been given and the whole purpose of this appeal is to enable Utrecht to continue to advance the ninth, tenth and twelfth causes of action in California against NWB.

[8] On 3 January 2000 NWB filed an answer and cross-complaint in California. However, it did so under cover of a letter from its Californian attorneys indicating in effect that it was doing so without prejudice to its position in the English proceedings which it intended to commence. In short the letter asserted that NWB was advancing certain causes of action in order to preserve its right to assert them under the Californian procedural code and without prejudice to its right to commence proceedings in England and that it would pursue its cross-claims in California only to the extent necessary to preserve its rights to those claims. It is not now in dispute that NWB had to take those steps to preserve its position in California and that it did not make an irrevocable election by doing so. It is right to add that there is no suggestion that the courts of California do not have jurisdiction to determine either the claims or cross-claims in those proceedings.

[9] On 18 January 2000 NWB commenced this action in England and on 9 February it issued its application for summary judgment seeking the declarations and the injunction which the judge subsequently granted. It is important to note (as I have said already) that NWB did not seek an interlocutory injunction prior to the determination of its summary judgment application. Indeed, as I understand it, if summary judgment is refused, NWB intends to obtain directions for the trial of the action in England and does not intend to seek an interlocutory injunction in the meantime. On 1 August 2000 Utrecht served an application for an order staying this action until after the conclusion of the proceedings in California.

The TOA

[10] The terms of the TOA are central to the issues in this appeal as they were before the judge. It provides, so far as relevant, as follows:

1. INTERPRETATION

1.1 Definitions

"Collateral" means any property ... in which or over which an Encumbrance has been ... granted to or for the benefit of the Banks under any Security Document ...

"Purchaser Warranties" means the warranties, representations and indemnities made by, and the covenants and agreements of, the Purchaser in this Deed.

"Seller Warranties" means the warranties, representations and indemnities made by, and the covenants and agreements of, the Seller in this Deed ...

"Transfer Assets" means all rights, title and interests ... of the Seller under the Credit Agreement, the UK Facility Agreement, the Security Documents and any Collateral: (a) in, under and to: (i) the Advances; (ii) ... all interests, fees, costs, expenses and other amounts in relation to the Advances and the Commitments; (iii) the Credit Agreement, the UK Facility Agreement, the Security Documents and any Collateral; (b) to or in respect of any and all other claims, rights or causes of action against persons arising from or otherwise in relation to or in connection with the rights, title and interests described in paragraph (a) ...

2. AGREEMENT TO NOVATE

2.1 Agreement to novate

In consideration of the mutual covenants and agreements contained in this Deed and subject to the terms and conditions of this Deed the Parties ... agree as follows: (a) that the Seller with full title guarantee, subject to payment of the Purchase Price to the Seller ... will novate ... in favour of the Purchaser ... the Transfer Assets and the Novated Obligations ...

7. REPRESENTATIONS AND WARRANTIES

7.1 Representations and warranties of the Seller

The Seller hereby represents and warrants to the Purchaser that, at the Completion Date ... (f) ... the Seller will be the sole beneficial owner of, with good title to, the Transfer Assets free and clear of any Encumbrance ...

7.2 Representations and warranties of the Purchaser ... (e) the Purchaser is a sophisticated buyer with respect to the Transfer Assets (who has made its own enquiries into, and who has adequate information concerning, the business and financial condition (including without limitation, the creditworthiness) of the Obligors, the value of any Collateral, the perfection, validity and priority of any Security Interest forming part of the Transfer Assets, and the status of, and its rights with respect to the Transfer Assets in, any relevant Insolvency Proceedings or proposed Insolvency Proceedings), the Credit Agreement and the UK Facility to make an informed decision regarding the Novation of the Transfer Assets and the Novated Obligations and has independently and without reliance upon the Seller, and based on such information as the Purchaser has deemed appropriate, made its own analysis and decision to enter into each of the Transfer Documents, except that the Purchaser has relied upon the Seller Warranties:

8. ACKNOWLEDGMENTS

8.1 Acknowledgement by the Seller ... (c) the Purchaser may be in possession of material non-public information relating to the Transfer Assets and which may affect the Purchase Price which the Purchaser shall be under no obligation to disclose to the Seller and the Seller hereby acknowledges and agrees that the Purchaser shall have no liability to the Seller, and the

a Seller shall bring no action against the Purchaser in relation to the non-disclosure of such information, provided that nothing in this sub-clause (c) shall affect the right of the Seller in relation to the Purchaser's Warranties ...

8.2 Acknowledgements by the Purchaser

b The purchaser acknowledges that: (a) the Seller has not made and does not make any representation or warranty, whether express or implied, of any kind or character except as expressly set forth in the Transfer Documents: (b) the novation of the Transfer Assets and Novated Obligations is irrevocable and without recourse to the Seller, except with respect to breaches of, or pursuant to, the Seller Warranties and is in any event subject to (e) below; (c) save for the Seller's Warranties, the Seller makes no representation or warranty, nor assumes any liability for, the due execution, legality, validity, effectiveness, adequacy or enforceability of the Credit Agreement, the UK Facility Agreement, the Security Documents or the collectability or value of the Transfer Assets; (d) the Seller may be in possession of material non-public information relating to the Transfer Assets and which may affect the Purchase Price which the Seller shall be under no obligation to disclose to the Purchaser and the Purchaser hereby acknowledges and agrees that the Seller shall have no liability to the Purchaser, and the Purchaser shall bring no action against the Seller in relation to the non-disclosure of such information, provided that nothing in this sub-clause (d) shall affect the rights of the Purchaser in relation to the Seller Warranties: (e) the Seller shall be under no obligation to disclose any documents or correspondence between it and any member of the Group in relation to: (i) the terms of the Credit Agreement ... or (ii) the conduct of the parties in relation to the Credit Agreement (whether in relation to those terms or otherwise), and that the Purchaser has received all the documents or correspondence (whether from the Seller, Rabobank .. or any other person) which it requires in respect of (i) and (ii) above for the purposes of the transactions envisaged by the Transfer Documents ...

9. INDEMNITIES AND RELEASE ...

9.2 Indemnity by the Purchaser

g The Purchaser shall indemnify and keep indemnified, and shall defend and hold the Seller ... harmless from and against any liability, claim, cost, loss, damage or expense (including, without limitation, reasonable legal fees and disbursements) or judgments which they (or any of them) incur or suffer as a result of: (a) the breach of any of the Purchaser Warranties by the Purchaser ...

h 18. ENTIRE AGREEMENT

The Transfer Documents constitute the entire agreement of the Parties about its subject matter and any previous agreements, understandings and negotiations on that subject cease to have any effect ...

22. JURISDICTION AND SERVICE OF PROCESS

j 22.1 Submission

Each party agrees for the benefit of the other Party, that the courts of England shall have jurisdiction to settle any disputes in connection with this Deed and accordingly, submits to the jurisdiction of the English courts.

22.2 Service of process

The Purchaser irrevocably appoints Rabobank, London Branch ... as agent with full authority to receive, accept and acknowledge ... for the appointor

and on the appointor's behalf, service of all process issued out of or relating to any proceedings in England, and ... the Purchaser ... agrees that service on the relevant agent shall be deemed due service for the purposes of proceedings in those courts without prejudice to any other mode of service. a

22.3 Forum convenience and enforcement abroad

Each Party: (a) waives objection to the English courts on grounds of inconvenient forum or otherwise as regards proceedings in connection with this Deed; and (b) agrees that a judgment or order of an English court in connection with this deed is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction. b

22.4 Non-exclusivity

Nothing in this clause 22 limits the right of any Party to bring proceedings in connection with this Deed: (a) in any other court of competent jurisdiction; or (b) concurrently in more than one jurisdiction. c

23. Governing Law

This Deed is governed by English law.'

Issues on the appeal

[11] It is clear from Utrecht's skeleton argument and indeed from Mr Brindle's oral submissions that the principal object of this appeal is to remove the injunction in order to enable Utrecht to continue its proceedings against NWB in California. The judge considered first Utrecht's application for a stay of this action before considering whether he should give summary judgment for NWB. He was in my judgment right to do so because, if it were appropriate to grant a stay, it would be wrong to consider the application for summary judgment since no question of giving judgment for NWB (whether summary or otherwise) would then arise. As already stated, the judge refused a stay. I do not understand Utrecht to be formally challenging that refusal on this appeal, but since the purpose of the appeal is to allow the Californian proceedings to continue to judgment ahead of the English action, it seems to me that logically the first question for consideration is indeed whether a stay should be granted or whether the English action should be allowed to proceed to judgment. d

[12] If the judge was right to refuse a stay, the next question for consideration is whether he was justified in embarking on the NWB's application for summary judgment, if so, whether he was right on the merits and, if so, whether he was right to grant the declarations and/or the injunctions which he did. I shall therefore consider the issues in that order, but before doing so it is I think important to set out in a little more detail the reasons why Utrecht wishes to proceed in California and not in England, which involves some further consideration both of the differences between Californian and English law and of the content of the two sets of proceedings. e

The law of California and England compared

[13] In England a contract like the TOA is not a contract uberrimae fidei and neither party owes a duty to disclose material facts to the other. The only bases upon which a party can seek damages from the other or seek rescission of such a contract is by relying upon a misrepresentation, whether innocent, negligent or fraudulent. The law of California is different. f

[14] I am not sure to what extent the principles of the law of California are in dispute, but for present purposes it is appropriate to assume that the law is as asserted by Utrecht (as may indeed be the case). As already stated, the relevant g

- a assertions can be seen from the ninth, tenth and twelfth causes of action alleged in the complaint. As I read them, each of the causes of action alleges a duty to disclose material facts and the difference between them is that the ninth cause of action alleges fraudulent concealment of those facts, the tenth alleges negligent failure to disclose them and the twelfth alleges that the failure to disclose them was in breach of a duty of good faith or fair dealing. As I read the twelfth cause of action, it does not depend upon fraud or negligence but simply on a failure to disclose facts in circumstances where the facts are material such that it would be a breach of the duty of good faith or fair dealing not to disclose them.
- b

The proceedings compared

- c [15] In support of the ninth, tenth and twelfth causes of action Utrecht relies upon non-disclosure of facts in circumstances which the judge correctly identified from the following quotation from Utrecht's skeleton argument:

- d '... the individual directors or officers of YFI and its subsidiaries who are sued are alleged to have acted in breach of fiduciary duties owed to the lending banks and negligently misrepresented the financial position of their companies to the banks over a period of time. Some of these individuals caused their companies to transfer property and funds for no consideration to three other companies, Almond Farms I, Almond Farms II and White Rose Farming. These transfers were made at a when YFI and Treehouse were insolvent and were not properly reflected in the accounting records of the companies. They also committed YFI to enter into long term leases with Almond Farm I and II. These liabilities (which exceeded US\$20 million) were also not reflected in the companies' accounting records. Rabobank and Utrecht's case is that NatWest was fully aware of these activities and that it provided additional funds for the Almond Bank ventures ... Rabobank and Utrecht claim that NatWest induced them to enter into the Take Out Agreement. Had NatWest disclosed its knowledge and its involvement in these transactions Utrecht and Rabobank would not have entered into the Take Out Agreement.'
- e
- f

- g [16] In short Utrecht's case in California is that NWB failed to disclose material information of the kind set out in that extract. The ninth, tenth and twelfth causes of action all rely upon the same non-disclosure. The difference between them is the mental element. The ninth cause of action alleges fraudulent concealment, which as I understand it involves saying that an honest bank would have disclosed the information, whereas NWB did not and thus acted dishonestly. The tenth cause of action alleges a negligent failure to disclose the information and the twelfth cause of action does not allege dishonesty or negligence but simply a failure to disclose contrary to a duty of good faith or fair dealing.
- h

- j [17] As already stated, none of those allegations could be made in an action based on English law because they all depend upon there being a duty to disclose the relevant facts and there is no such duty in English law. Under English law it would be necessary to allege a misrepresentation, which Utrecht has not done, either in California or in England. As I understand it, Utrecht's claim in the Californian proceedings depends entirely on the proposition that NWB owed it a duty to disclose certain facts.

[18] As I said earlier, NWB has brought this action in England in order to obtain a declaration that the Californian proceedings are a breach of the TOA. In

para 5 of its defence Utrecht has admitted the novation contained in the TOA, but— a

‘without prejudice to Utrecht’s and Rabobank’s contentions set out in the Complaint that they were induced to enter into the TOA by fraud on the part of NWB which, if proved, would avoid the TOA in its entirety.’

[19] Utrecht was asked for further information and clarification of para 5 of the defence under CPR Pt 18. In particular it was asked to clarify whether para 5 was intended to contain an allegation of fraud against NWB and, if not, what, if any, reliance it was intended to be placed on the matters alleged in para 5. Utrecht’s answer was that it is not intended to establish in these proceedings that NWB has been guilty of fraud, but that that allegation, having been made in the Californian action, ought properly to be determined in that action. Utrecht further asserted that the relevant matter alleged in para 5 is that fraud ‘in the form of fraudulent concealment of material information’ has been ‘alleged’ (the pleader’s emphasis) in California. Utrecht concluded its clarification in this way: b
c

‘The relevance of the allegation of fraudulent inducement having been made in the Californian action is apparent from the matters contained in paragraphs 6 and 10(iii)(3) and (4) of the Defence, in summary: since Utrecht has made such an allegation in the Californian action it is an issue in these proceedings whether or not NWB can, by the means it has adopted and relied upon in the Particulars of Claim, exclude its liability for its own fraud if proved and can, therefore, prevent the matter being tried out in the Californian action or elsewhere.’ d
e

[20] It is important to note that (as stated above), although the pleading refers to fraudulent inducement, the pleading itself defines fraudulent inducement as being in the form of fraudulent concealment of material information and not in the form of misrepresentation. It is for that reason that, save for its submissions relating to the TOA itself, Utrecht does not seek to rely upon any principle of English substantive law to avoid liability. Nor does it seek to rely upon any rule of English conflicts of laws in order to assert a right to rely upon the law of California in England. f

[21] As to the paragraphs of the defence referred to in the information quoted above, para 6 simply alleges that NWB’s claim is premature and contrary to the principles of comity by reason of its direct interference with the Californian proceedings. Paragraph 10(iii) makes a number of points on the true construction of the TOA and asserts that cl 8.2(d) is unreasonable and of no effect pursuant to s 3 of the Misrepresentation Act 1967. I shall return to those points below because they are relevant to the question whether the judge should have given summary judgment for NWB. g
h

Should the action in England be stayed?

[22] The judge considered this question first and held that the action should not be stayed. There were two alternative bases upon which the action could in theory have been stayed. The first was based on principles of forum non conveniens and the second was based on principles of case management. j

[23] The judge said that Mr Brindle did not press Utrecht’s application for a stay on the ground of forum non conveniens because he recognised the force of the argument based on cl 22.1 to 22.3 of the TOA. Mr Brindle did not seek a stay on that ground in this court either. He was in my judgment right not to do so

a because those clauses are fatal to any such case. Their effect is that each party submitted to the jurisdiction of the English courts, waived any objection it might otherwise have to the English courts on the ground of forum non conveniens or otherwise and agreed that any judgment or order of the English court in connection with the TOA would be conclusive and binding on it. Those clauses make any application for a stay on the ground of forum non conveniens unarguable.

b [24] Faced with that difficulty, Mr Brindle submitted to the judge that the English action should be stayed under its inherent power to control its proceedings and under its powers of case management and relied upon the decision of this court in *Reichhold Norway ASA v Goldman Sachs International* [1999] c 2 Lloyd's Rep 567. The judge accepted that there was jurisdiction to grant a stay on that basis but rejected the submission that the action should be stayed, essentially because of the express terms of cl 22 of the TOA. He said that, looked at overall, the scheme of cl 22 tells overwhelmingly against a stay of the English proceedings so as to await the outcome of and effectively to grant precedence to proceedings elsewhere. In short, he said, such a stay would not reflect the bargain d made by the parties.

e [25] I entirely agree with the conclusions of the judge in this regard and it was no doubt because of their undoubted force that Mr Brindle did not submit before us that the judge should have stayed the action. Instead he sought to achieve the same result by a somewhat different route. He did so by submitting that the judge was wrong to approach the applications in the order in which he did and that he should not have entertained the application for summary judgment.

Should the judge have entertained the application for summary judgment?

f [26] The reasons given in Utrecht's skeleton argument in support of the submission that the answer to that question is No were these:

g '(a) It would have been consistent with comity to consider the validity of NWB's entitlement to an anti-suit injunction first, before entertaining argument on and deciding issues (raised in the summary judgment application) which the judge accepted were already before the Californian court. This was imperative given that the judge rightly held that California was a natural forum for the resolution of the dispute and that England was not the natural forum. (b) Utrecht's application for a stay was made simply to ensure that the appropriate remedy was before the court if it declined to grant NWB the anti-suit injunction sought. In such circumstances the judge should have decided to stay the application after or at the same time as deciding NWB's application for an anti-suit injunction. (c) The judge should not have entertained the summary judgment application by NWB, unless he had been prepared at the first stage of the analysis to grant an anti-suit injunction in favour of NWB. The judge recognised his decision on the application for summary judgment as being critical to the exercise of his discretion to grant an anti-suit injunction, holding that unless he had decided the summary judgment application in favour of NWB he would not have granted the anti-suit injunction. Deciding, in such circumstances, issues which were properly pending before the Californian court was fundamentally inconsistent with the principles of comity, particularly when accompanied by an order restraining those proceedings.'

[27] Mr Brindle submitted that the Californian court has jurisdiction to determine the issues raised, that the action in California was already on foot, that the Californian court is just as capable of determining the issues raised by NWB as the English court and that in these circumstances, as it was put in Utrecht's skeleton argument, it was inappropriate and inconsistent with comity for the judge to have interfered with the proceedings before the Californian court and accordingly the judge should have refused the injunction. It was further submitted that it follows that the judge should have refused to entertain the application for summary judgment.

[28] In support of those submissions Utrecht relied upon the principles governing the grant of anti-suit injunctions restraining foreign proceedings stated in a number of cases including *SNI Aérospatiale v Lee Kui Jak* [1987] 3 All ER 510, [1987] AC 871, *Barclays Bank plc v Homan* [1993] BCLC 680 and *Airbus Industrie GIE v Patel* [1998] 2 All ER 257, [1999] 1 AC 119. In particular Mr Brindle submitted that such an injunction should only be granted where the foreign proceedings are vexatious or oppressive and that in deciding that question the English court should have regard to the following principles (among others). The jurisdiction should be exercised with caution and having regard to the principles of comity. In a case in which there is a difference of view between the English court and the foreign court as to which is the natural forum the English court cannot arrogate to itself the power to resolve that dispute by granting an injunction. It should allow the foreign court to decide whether or not to stay its own proceedings because it will ordinarily be in a better position than the English court to decide that question. As a general rule the English court should only grant an injunction where it concludes that it is the natural forum for the dispute and that the proceedings in the foreign court are vexatious and oppressive. It should not grant an injunction where to do so will deprive a plaintiff of advantages in the foreign forum. The court must have due regard for the respect owed to the foreign court and should seek to strike a balance between the interests of the parties.

[29] I accept that those are among the considerations which are relevant to the question whether an injunction should be granted at an interlocutory stage. I am also conscious of the principle stated by the Supreme Court of Canada in *Amchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96 at 118–119, which was quoted with approval by Lord Goff in the *Airbus Industrie* case:

'... the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens ... the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed.' (See [1998] 2 All ER 257 at 269, [1999] 1 AC 119 at 139.)

[30] It is common ground that those principles require significant modification where the foreign proceedings are brought in breach of an English jurisdiction clause because the English court will readily grant an injunction restraining a party from commencing or continuing foreign proceedings which are in breach of contract: see e.g. *Continental Bank NA v Aeokos Cia Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, *Aggeliki Charis Cia Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 and *Donohue v Armco Inc* [2000] 1 All ER (Comm) 641.

a Mr Brindle submitted that those principles have no application here because the TOA does not contain an exclusive jurisdiction clause.

[31] Equally, in my opinion, the principles identified above require significant modification in a case where a permanent injunction is sought after a judgment on the merits. If the English court gives judgment for the claimant on the merits and the judgment includes a declaration that the defendant has brought foreign proceedings in breach of contract, and it is asked to exercise its equitable jurisdiction to grant a permanent injunction to restrain a continued breach of contract by further pursuing such foreign proceedings, different considerations arise from those which arise at an interlocutory stage.

b [32] Indeed it seems to me that the principles which then become applicable are very similar to those which apply in the case where an interlocutory judgment is sought on the ground that the foreign proceedings are in breach of contract. The relevant principles in that class of case can be seen from the judgments in *The Angelic Grace*. Although that was a case in which the clause provided for arbitration in London and not for the exclusive jurisdiction of the English courts, it is plain that the same principles apply to both classes of case. Thus in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 94 Leggatt LJ followed this statement of principle from the judgment of Steyn LJ in *Continental Bank NA v Aeakos Compania Naviera SA*, as reported in [1994] 1 Lloyd's Rep 505 at 512 (where the report is more accurate than in the WLR):

e 'In our view the decisive matter is that the bank applied for the injunction to restrain the defendants' clear breach of contract. In the circumstances a claim for damages for breach of contract would be a relatively ineffective remedy for the appellants' breach of contract. If the injunction is set aside, the appellants will persist in their breach of contract, and the bank's legal rights as enshrined in the jurisdiction agreements will prove to be valueless. f Given the total absence of special countervailing factors, this is the paradigm case for the grant of an injunction restraining a party from acting in breach of an exclusive jurisdiction agreement. In our judgment the continuance of the Greek proceedings amounts to vexatious and oppressive conduct on the part of the appellants. The Judge exercised his discretion properly.'

g [33] In *The Angelic Grace* this court rejected in robust terms the argument that the grant of an injunction to restrain foreign proceedings which were in clear breach of contract would offend against comity. It did so on the basis that it is vexatious and oppressive for a party to maintain proceedings in breach of its agreement not to do so: see eg [1995] 1 Lloyd's Rep 87 at 96 per Leggatt LJ. h Millett LJ expressed his views in the following passages (at 86) which have been much quoted since:

j 'In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the

question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them ... I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline ... In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank NA v Aeakos Compania Naviera SA* ([1994] 2 All ER 540, [1994] 1 WLR 588). The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.'

[34] In *Donohue v Armco Inc* [2000] 1 All ER (Comm) 641 Stuart-Smith LJ adopted those principles, although he said that he thought that we should adhere to the expressions 'strong cause' or 'strong reason' rather than 'good reason'. I should add that it seems to me that the English court should not feel diffidence in granting such an injunction in order to restrain a breach of contract whether or not it would be the duty of the foreign court to decline jurisdiction.

[35] Those principles apply to the granting of an interlocutory injunction to restrain foreign proceedings which are brought in breach of an exclusive jurisdiction clause. Mr Brindle correctly submitted that in this case cl 8.2(d) is not an exclusive jurisdiction clause. However, once it is held that Utrecht were in breach of the TOA in commencing the Californian proceedings and that they remain in breach of the TOA in continuing to pursue them, as held by the judge, it seems to me that essentially the same principles apply. Thus it would be vexatious to allow Utrecht to continue its breach in circumstances where damages would not be an adequate remedy. As Millett LJ put it, there is no good reason for diffidence on the clear and simple ground that Utrecht promised not to do what it is now doing. I can see no reason in principle why comity should stand in the way of the granting of an injunction.

[36] In these circumstances I am unable to accept Utrecht's submissions which I quoted in [26] above. I should add that almost all the submissions advanced in this regard rely upon what are essentially forum non conveniens points. They include the submission that it is significant that proceedings are pending in California. However, the authorities show that the existence and state of foreign proceedings are relevant to the exercise of the court's discretion to stay an action on the ground of forum non conveniens: see e.g. *de Dampierre v de Dampierre* [1987] 2 All ER 1 at 10, [1988] AC 92 at 108 per Lord Goff of Chieveley.

[37] The position as I see it may be summarised in this way. Utrecht cannot obtain a stay of these proceedings because of its promise in cl 22.3 to waive objection to the English courts on grounds of forum non conveniens or

- a otherwise. Further, given that clause, Utrecht cannot rely upon such grounds to resist the granting a permanent injunction once it is held that the foreign proceedings are being pursued in breach of contract, especially in the light of cl 22.3(b). It would no doubt have been inappropriate to grant an interlocutory injunction to restrain the Californian proceedings at a time when it was no more than arguable that they were brought in breach of contract because it could not be said that they were vexatious or oppressive, especially in the light of the many factors connecting the case with California and having regard to cl 22.4 of the TOA, which expressly permits a party to bring proceedings in connection with the TOA in any court other than England.
- b

- [38] However, for the reasons I have given, the position is radically different once it is held that Utrecht are in breach of contract in pursuing their claim in California. It follows that the question whether the judge was right to hold that Utrecht were in breach of the TOA in that regard is crucial to the outcome of this appeal and that the judge was entirely justified in embarking on NWB's summary judgment application.
- c

- d *Summary judgment—the merits*

- [39] The essential question under this head is whether the proceedings in California are in breach of cl 8.2(d) of the TOA. That question must, in my judgment, be determined by reference to English law because cl 23 provides that the TOA is governed by English law. The correct approach seems to me to be to identify the nature of the claims being advanced in California and to decide whether to pursue them amounts to a breach of cl 8.2(d). In this regard the role of Californian law is limited because it does not seem to me to be relevant how the claims would be classified as a matter of that law.
- e

- [40] NWB's case is straightforward. It is that by cll 8.1(c) and 8.2(d) of the TOA both parties respectively agreed that neither would be under any obligation to disclose to the other 'material non-public information relating to the Transfer Assets and which may affect the purchase price', that neither would have any liability to the other in relation to the non-disclosure of such information and that neither would bring an action against the other in relation to such non-disclosure. NWB says that all Utrecht's claims in California allege just such non-disclosure and that it follows that it is bringing that action in breach of the TOA.
- f

- [41] Utrecht takes three points by way of response. The first is that on the true construction of cl 8.2(d) it is not wide enough to exclude claims in negligence, let alone fraud. The second is that, if the clause is wide enough to exclude claims in negligence, it is wide enough to exclude claims in fraud and is therefore unreasonable and thus contrary to s 3 of the 1967 Act. In that regard it was submitted that the burden of satisfying the test of reasonableness is on NWB and that it has failed to discharge it. The third point is that cl 8.2(d) does not apply to the claims in California because the alleged non-disclosure is not of information 'relating to the Transfer Assets' within the meaning of the clause. I shall address each of these points in turn in the order in which they were advanced in argument before us.
- g
- h
- j

Scope of cl 8.2(d)

[42] Mr Brindle submitted that this clause is an exclusion clause because it purports to exclude NWB's liability for non-disclosure and that, since it is relied upon by NWB as excluding negligent and fraudulent non-disclosure, in order to be effective it must satisfy the well-known tests laid down by Lord Morton in

Canada Steamship Lines Ltd v R [1952] 1 All ER 305 at 310, [1952] AC 192 at 208, which were approved by the House of Lords in *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165. a

[43] Those tests were:

‘(i) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called “the *proferens*”) from the consequence of the negligence of his own servants, effect must be given to that provision ... (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens* ... (iii) If the words used are wide enough for the above purpose, the court must then consider whether “the head of damage may be based on some ground other than that of negligence” ... The “other ground” must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it, but, subject to this qualification ... the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are, *prima facie*, wide enough to cover negligence on the part of his servants.’ b
c
d

[44] Mr Brindle submitted that those principles apply, as Lord Fraser put it in *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18 at 25, [1978] 1 WLR 165 at 172, to ‘clauses which purport to exempt one party to a contract from liability’. He further submitted that in order to decide whether the clause in question is such a clause it is necessary to look at the effect of the clause and not its form. In this regard he relied upon the following statement made by Slade LJ giving the judgment of this court in *Phillips Products Ltd v Hyland* (1984) [1987] 2 All ER 620 at 626, [1987] 1 WLR 659 at 666: e

‘There is no mystique about “exclusion” or “restriction” clauses. To decide whether a person “excludes” liability by reference to a contract term, you look at the effect of the term. You look at its substance.’ f

Slade LJ was there considering the question whether the clause in question could properly be said to ‘exclude or restrict’ liability within the meaning of s 2(2) of the Unfair Contract Terms Act 1977.

[45] Mr Brindle also relied upon *Smith v Eric S Bush (a firm)* [1989] 2 All ER 514, [1990] 1 AC 831, where the House of Lords was also considering the 1977 Act. In particular he relied upon this statement by Lord Jauncey: g

‘The words “liability for negligence” in s 2(2) must be read together with s 13(1), which states that the former section prevents the exclusion of liability by notices “which exclude or restrict the relevant obligation or duty”. These words are unambiguous and are entirely appropriate to cover a disclaimer which prevents a duty coming into existence. It follows that the disclaimers here given are subject to the provisions of the Act and will therefore only be effective if they satisfy the requirement of reasonableness.’ (See [1989] 2 All ER 514 at 543, [1990] 1 AC 831 at 873.) h
j

Mr Brindle recognised that those statements were made in the context of the 1977 Act but submitted that they reflect the general law.

[46] He submitted that they support the conclusion that cl 8.2(d) is, as Lord Fraser put it, a clause which purports to exclude liability and that, on NWB’s case, it excludes liability for negligence even though it does so by providing that no

a duty to disclose is owed. Thus it expressly exempts NWB in relation to non-disclosure of relevant facts and is relied upon to exempt it from liability to Utrecht in California, where the ninth and tenth causes of action depend upon fraud and negligence. It follows, Mr Brindle submitted, that since cl 8.2(d) does not satisfy Lord Morton's tests, it cannot protect NWB from liability in California.

b [47] I see the force of that submission, which was attractively presented on behalf of Utrecht and I entirely accept that there may be many cases in which a clause excluding the existence of a duty is properly treated as an exclusion or exemption clause to which Lord Morton's tests should be applied in their full rigour. I am, however, unable to accept that this is such a case. Lord Morton's tests are essentially rules or principles of construction. They are valuable tools to that end but, in every case where the question is one of construction of the contract, the role of the court is to try to identify what the parties intended by the words that they have used. In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] 1 All ER (Comm) 719, Aikens J said with regard to the rules in the context of a contract of insurance (at 743):

d 'The court's task is still to discern what the parties intended by the wording that they have agreed in the context of the particular type of contract under consideration. But although "rules" of construction are a guide to the intention of the parties, they are not the masters of the parties' intention'

I agree.

e [48] Like any clause, cl 8.2(d) must be construed in its context and in the context of the contract as a whole having regard to its factual matrix or surrounding circumstances. Moreover, as Lord Hoffmann put it in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Investors Compensation Scheme Ltd v Hopkin & Sons (a firm)*, *Alford v West Bromwich Building Society*, *Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912:

g 'Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'

[49] Clause 8.2(d) seems to me to be a far cry from the kind of clause which the courts have had in mind in the kind of case in which they have applied Lord Morton's tests. The background to this contract may be summarised in this way. The contract was negotiated at arm's length by two large banks, both of which were advised by skilled commercial lawyers. Each bank knew that the other might have information of the type described in the clause which would affect the price if it were disclosed. Yet each bank expressly agreed that there would be no duty on the part of either bank to disclose the information. It was thus agreed by each that the other could deliberately keep to itself information which it knew would assist it to negotiate the price or indeed to decide whether to enter into the contract at all.

j [50] Clause 8 must be construed in the light of cl 7, which includes in cl 7.2(e), quoted above, a representation that Utrecht is a sophisticated buyer which has made its own enquiries into and has adequate information concerning the business and financial condition of the borrowers and others, and that it has independently and without reliance on NWB made its own analysis and made a

decision to enter into the TOA based on such information as it deemed appropriate. a

[51] In these circumstances it appears to me to be plain that each agreed that there was no question of the other acting fraudulently or negligently or in breach of a duty of good faith or fair dealing, as alleged in the Californian proceedings. They simply agreed that neither need disclose the information to the other. Their motives for not disclosing the information are entirely irrelevant. Applying Lord Hoffmann's approach, it seems to me that the meaning which the TOA (and in particular cl 8.1(c) and 8.2(d)) conveys to a reasonable person with knowledge of the background is that, whatever its reasons, each was absolutely entitled to keep important information to itself and that each agreed that the other would not be liable for failing to disclose such information and that it would not bring an action anywhere in relation to such non-disclosure. On the true construction of the clause no question of negligence or fraud can arise. b
c

[52] In these circumstances there is no room for the application of Lord Morton's tests. The agreement is clear and unambiguous and protects both banks from liability for non-disclosure, however much each might be liable for negligence or fraud under Californian law if there were a duty of disclosure. If there is no duty to disclose I do not see how either bank can be liable for breach of it, whatever its intentions and wherever the action is brought. Moreover each expressly agreed not to sue the other anywhere relying upon non-disclosure of the information referred to in cl 8.1(c) and 8.2(d). Yet, subject to Mr Brindle's third point, Utrecht has sued NWB in America alleging just such non-disclosure. The fact that it has done so in order to seek rescission of the contract is to my mind irrelevant, just as it is irrelevant that Californian law may classify its cause of action otherwise than in contract. d
e

[53] The judge reached the same conclusion. For example, he said:

'To my mind, against the background of no pre-existing duty of disclosure under the general law, the scheme of cl 7.1(e) and 8.2(a)–(e) serves to emphasise the importance placed by the contracting parties on (i) the principle of caveat emptor; (ii) a clear allocation of risk based on the principle of caveat emptor, no doubt reflected in or capable of being reflected in the pricing of the TOA; and (iii) with reference in particular to cl 8.2(d), certainty, finality and the avoidance of litigation.' f
g

I agree.

[54] For these reasons I would hold that there is nothing in Lord Morton's tests which requires the court to reach a conclusion that the contract does not mean what it says, namely that neither bank owed a duty to disclose information of the kind identified in the clause to the other. This reasoning seems to me to be similar to that of Aikens J in the *HIH Casualty* case. It follows from the agreement that there was no duty to disclose that neither bank can be liable for breach of a duty to disclose, whether the failure to disclose is categorised by a foreign law as negligent, fraudulent or otherwise. h

[55] The position would be different if it were alleged that NWB made a material misrepresentation which induced the contract, whether innocent, negligent or fraudulent. In that event cl 8.2(d) would not be relevant because it is concerned only with non-disclosure. However, since (as explained earlier) each of Utrecht's allegations in California against NWB allege not misrepresentation but non-disclosure, albeit with a different mens rea in each case, in bringing and j
e

a pursuing the Californian action, subject to what follows, Utrecht is in breach of the clause.

[56] The judge I think regarded Lord Morton's tests as applicable only to what may be called English law negligence or fraud. I see the force of that approach, but for myself I would not so restrict them. They are simply principles of construction which apply in appropriate cases to aid the court in its attempt to discover what the parties intended. It is no doubt possible to think of cases in which they would apply to negligence as it is understood under a system of foreign law. However, for the reasons which I have tried to give, I do not think that they assist in the construction of cl 8.1(c) and 8.2(d) here.

Reasonableness

c [57] The judge held that if NWB is to be entitled to rely upon cl 8.2(d), it must satisfy the test of reasonableness, whether under s 3 of the 1967 Act or s 2(2) of the 1977 Act. NWB has served a respondent's notice which challenges that conclusion if it is necessary to do so. However, I shall assume for present purposes that the clause must indeed satisfy that test and, indeed, that the burden of doing so is on NWB. The test of reasonableness is stated in s 11(1) of the 1977 Act as follows:

e 'In relation to a contract term, the requirement of reasonableness ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably have been, known to or in the contemplation of the parties when the contract was made.'

[58] Mr Brindle submitted that if the effect of the clause is to exclude NWB's fraud it must fail the test of reasonableness. The judge rejected that submission and held that the clause satisfied the test. He accepted Lord Gribner's submissions that the parties were sophisticated and of equal bargaining power, that the clause was tailor-made for the transaction, that the TOA included both cl 8.2(d) and 8.1(c) so that it might in other circumstances have been Utrecht and not NWB that was relying upon it, that there was nothing unreasonable in giving effect to the principle caveat emptor and that the price was substantially discounted.

g [59] I entirely agree with the judge. There was nothing unreasonable about either cl 8.1(c) or cl 8.2(d), freely negotiated as they were between banks of this kind. It should be noted that the clauses do not purport to exclude liability for negligent or fraudulent misrepresentation or, indeed, any notion of fraud as it is known to English law. Some reliance was placed upon the decision of this court in *Gill (Stewart) Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257, [1992] QB 600 but, given that the clause is concerned only with non-disclosure and not misrepresentation, I can see nothing in that decision which leads to the conclusion that these clauses were not reasonable. Nor is there anything in the decision of Jacob J in *Witter (Thomas) Ltd v TBP Industries Ltd* [1996] 2 All ER 573 which leads to the conclusion that cl 8.2(d) is unreasonable.

j [60] The judge placed some reliance upon these observations made by Chadwick LJ in the unreported decision of this court in *Grimstead & Son Ltd v McGarrigan* [1999] CA Transcript 1733 made on 27 October 1999:

'There are ... at least two good reasons why the courts should not refuse to give effect to an acknowledgement of non-reliance in a commercial

contract between experienced parties of equal bargaining power—a fortiori, where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document which they have signed. They want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings. Second, it is reasonable to assume that the price to be paid reflects the commercial risk which each party—or, more usually, the purchaser—is willing to accept. The risk is determined, in part at least, by the warranties which the vendor is prepared to give. The tighter the warranties, the less the risk and (in principle at least) the greater the price the vendor will require and which the purchaser will be prepared to pay. It is legitimate and commercially desirable, that both parties should be able to measure the risk, and agree the price, on the basis of the warranties which have been given and accepted.’

[61] I respectfully agree with those views. Although this case is not of course the same as that, the TOA contains a non-reliance clause in cl 7.2(e) to which very similar considerations apply. They also seem to me to support the general proposition that commercial parties are likely to desire certainty. Clause 8.2(d), if construed as in my view it should be in accordance with its express terms, helps to achieve certainty (as indeed does its counterpart cl 8.1(c)) because it prevents either party from alleging non-disclosure of relevant facts against the other and avoids (or should avoid) litigation.

[62] In all the circumstances I entirely agree with the judge that NWB has established that cl 8.2(d) satisfies the test of reasonableness. It follows that it is not necessary to determine the question whether s 2(2) of the 1977 Act or s 3 of the 1967 Act applies and I shall not further add to the length of this already excessively long judgment by doing so.

‘Transfer Assets’

[63] The remaining question is whether the information which it is alleged in California that NWB failed to disclose is ‘information relating to the Transfer Assets and which may affect the Purchase Price’ within the meaning of cl 8.2(d) of the TOA. The judge said that he had no doubt that it is. In reaching that conclusion the judge was willing to assume that the clause should be construed contra proferentem. He presumably did so on the assumption that NWB was the proferens. Mr Brindle submitted to us that NWB was indeed the proferens and that that the judge construed the clause too widely.

[64] For my part, I am not persuaded that NWB was the proferens in this regard any more than Utrecht. As I have stressed earlier, cl 8.2(d) has its counterpart in cl 8.1(c) so that it is by no means clear which party proposed the clauses or indeed the definition of ‘Transfer Assets’. On the other hand I too am willing to assume that the clause should be construed on the assumption that NWB was the proferens. I should add that the burden is in any event upon NWB to establish the breach of cl 8.2(d) which it alleges and it must therefore satisfy the court that Utrecht is relying on non-disclosure of information within the meaning of the clause.

[65] In Utrecht’s skeleton argument it summarises the information which it says that NWB wrongfully failed to disclose as information relating to—

- a ' (a) the interests of YFI and some of YFI's officers in California corporations described in the complaint as "White Rose" and "Almond Farms I and II"; (b) loans for US\$ 1.2 million made by NWB indirectly through an Isle of Man trust of which the family of Michael Firth (YFG's chairman and a director of YFI and some of its subsidiaries) were beneficiaries. The purpose of these loans was to enable officers of YFI to buy property through the medium of
- b White Rose Farming LLC (a Californian limited liability corporation) and Almond Farms I and II using inside information acquired as officers of YFI and Treehouse; (c) irrecoverable sums amounting to US\$ 600,000 expended by YFI in relation to the purchase of property ultimately acquired by Almond Farms I and II; (d) leases by which YFI agreed to pay Almond Farms I and II approximately US\$ 20 million over a number of years which were above the
- c market rate and were made at a time when YFI was insolvent; (e) [a YFI company] Treehouse's payment of US\$ 233,000 from its NWB account in December 1996 to cover certain White Rose expenses relating to the Almond Farm property at a time when Treehouse was insolvent and for which Treehouse received no consideration; (f) NWB's attempts in or about
- d April 1997 to secure repayment of its advances to the Isle of Man trust and other loans to officers of YFI in preference to the sums due to YFI.'

[66] Mr Brindle conceded that that information was relevant to the purchase price but submitted that none of those matters related to 'rights, title and interests' of NWB within the meaning the definition of 'Transfer Assets' in cl 1.1 of the TOA quoted in [10] above. He submitted that it related only to the conduct and quality of the underlying loans and that cl 8.2(d) was directed at matters relevant to the transferability of the transfer assets rather than the quality of the loans which NWB was transferring to Utrecht and which Utrecht was taking out under the TOA.

f [67] The judge rejected those submissions having regard to four particular considerations. First, he observed that cl 8.2(d) refers to information 'relating to' the transfer assets. Secondly, he concluded that there was a close relation between the information which is the subject of the Californian proceedings and the transfer assets, having regard in particular to para (b) of the definition of transfer assets, which extends the definition to NWB's rights title and interests 'to

g or in respect of any and all other claims, rights and causes of action against persons arising from or otherwise in relation to or in connection with the rights title and interest described in paragraph (a)'. Thirdly, the judge said that the relation between the information in question and the transfer assets was underlined by Utrecht's case in California because that case depends upon the

h linkage between the information allegedly not disclosed and Utrecht being induced to enter into the TOA. Fourthly, he expressed the view that information which was said to undermine the value of the transfer assets and hence the 'worth' of the TOA was information which related to the transfer assets.

j [68] Mr Brindle submitted that the judge was wrong because he failed to appreciate that the expression 'Transfer Assets' was concerned with NWB's title and not with their value and that all the points made by the judge merely showed that the information in question might 'affect the Purchase Price' but were not relevant to NWB's title to the assets as defined.

[69] In my judgment the conclusions reached by the judge were correct. I do not think that the expression 'relating to the Transfer Assets' should be construed as narrowly as Mr Brindle submitted. I agree with the judge that information

relevant to the likelihood or otherwise of the borrowers repaying the loans is directly relevant to the value of the transfer assets as defined and is thus 'information relating to the Transfer Assets and which may affect the Purchase Price' (my emphasis) within the meaning of cl 8.2(d) (and indeed cl 8.1(c)).

[70] The rights of NWB to recover the amounts advanced under the 'Credit Agreement' and the other agreements referred to in the definition to my mind include rights to recover from the borrowers. They are within the expression 'all rights, title and interests ... of NWB ... (b) to or in respect of any and all other claims, rights or causes of action against persons arising from or otherwise in connection with the rights, title and interests in paragraph (a)' in the definition. The prospects of the borrowers repaying the loans seem to me crucially important factors in any consideration of the value of the assets being transferred. In these circumstances any information which is relevant to the value of those rights must be information 'relating to' the rights and thus to the transfer assets as defined. For these reasons I would uphold the decision of the judge on this point.

Conclusion on the merits

[71] For the reasons which I have tried to give I have reached the conclusion that the judge was right to hold that Utrecht was in breach of the TOA in bringing the proceedings in California and because it promised 'to bring no action against NWB in relation to non-disclosure' of 'information relating to the Transfer Assets and which may affect the Purchase Price' and yet did so.

[72] I should add in this regard that I do not accept a final point made by Mr Brindle, which was that NWB cannot rely upon the terms of the TOA to lead to that conclusion because it involves relying upon the very contract the validity of which Utrecht impeaches in order to defeat the claim for rescission. The TOA is governed by English law. It is valid by English law since no relevant misrepresentation is alleged which might enable Utrecht to challenge it. It follows that, if the contract forbids the action being taken in California, NWB is entitled to a declaration to that effect. Since, in my judgment, the TOA does forbid that action, it also follows that the judge was entitled to grant the declaration which he did. Moreover he was entitled to do so by way of summary judgment because Utrecht would have no realistic prospect of success at a trial.

Permanent injunction

[73] I have already set out in some detail the principles which govern the grant of an injunction once it is held that proceedings are being brought in breach of contract. The grant of an injunction is of course an equitable remedy and the court thus had a discretion whether or not to grant it. However, the conclusions that Utrecht is in breach of contract in bringing the proceedings in California and that it would be in continued breach of contract if it were to continue with them make such proceedings vexatious and oppressive. There is a plain risk that, unless restrained, Utrecht will continue with them.

[74] The grant of an injunction in these circumstances does not offend the principles of comity in any way. The application of the principles discussed in [31]–[38] above leads to the conclusion that the judge was right to grant the injunction and to make the orders which he did. In these circumstances there is no question of NWB being required to elect whether to rely upon its claims in these proceedings or its cross-claims in California, as is suggested in Utrecht's skeleton argument.

Conclusion

- a* [75] For these reasons I would dismiss the appeal. Finally I would like to record that both counsel expressly paid tribute to the high quality of the judge's judgment and I would like to add my own tribute to theirs.

LAWS LJ. I agree.

- b* **ALDOUS LJ.** I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Capital Trust Investments Ltd v Radio Design TJ AB and others

CHANCERY DIVISION

JACOB J

19 JANUARY, 16 FEBRUARY 2001

Arbitration – Stay of court proceedings – Application – Conditional application – Application for summary judgment in event that application for stay unsuccessful – Whether step in proceedings – Arbitration Act 1996, s 9(3).

The claimant investment company subscribed, via a private placement, to an issue of shares in the first defendant, R, a Swedish company. Prior to its investment the claimant had received a document called a 'Confidential Information Memorandum', which was in effect a prospectus, issued by E, a division of a Swedish bank. In the document E was referred to as 'the placement agent'. The purpose of the share issue as described in the memorandum was to raise money for the development and launch of a system to improve analogue mobile telephone networks. The application form provided for any dispute arising out of the application for shares in R to be settled exclusively by arbitrators in Stockholm and for the application to be governed by Swedish law. The claimant alleged that the memorandum painted a false picture of the state of development and workability of the system and accordingly sued R in deceit. In February 2000 R applied pursuant to s 9^a of the Arbitration Act 1996 for a stay of the proceedings on the ground that the issues in the claim were governed by the arbitration clause. Under s 9(3) of the 1996 Act, an application for a stay pending arbitration could not be made by a person before taking the appropriate procedural step, if any, to acknowledge the legal proceedings against him or after he had taken any step in those proceedings to answer the substantive claim. In May 2000, when the stay application was still pending, with a date for the hearing set for June, R applied for summary judgment in the event that the stay application was unsuccessful. The master, having heard both applications together, stayed the proceedings as between the claimant and R and gave summary judgment for R, striking out the whole claim as against it. On appeal, the parties were agreed that if the stay was the right order the second order could not stand. The claimant contended, inter alia, that by applying for summary judgment, albeit conditionally, R's application for a stay was barred by s 9(3) of the 1996 Act.

Held – A application for a stay pending an arbitration was not a 'step in the proceedings' within the meaning of s 9(3) of the 1996 Act if the applicant, either simultaneously or subsequently, invoked or accepted the court's jurisdiction, provided it did so only conditionally on the application for a stay failing. Such an application was not an attempt by the party 'to have it both ways' by simultaneously asking for arbitration and inviting the court to rule on the dispute. In the instant case, there was a reasonable case management purpose in R's application, as there was a significant link between the substantive claim and the

a Section 9, so far as material, is set out at [17], below

a arbitration clause and, further, if the application for a stay had failed, a second hearing would have been saved. R had never invoked the court's jurisdiction unconditionally and, in particular, had never unconditionally asked for the order striking out the claim. Accordingly, as the arbitration clause was obviously part of a contract between the claimant as investor and R, the action would be stayed as against R (see [18]–[24], [29], below).

b **Notes**

For acknowledgement of service and step in the proceedings, see 2 *Halsbury's Laws* (4th edn reissue) para 627.

For the Arbitration Act 1996, s 9, see 2 *Halsbury's Statutes* (4th edn) (1999 reissue) 573.

c **Cases referred to in judgment**

Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep 357, CA.

Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317, HL.

Patel v Patel [1999] 1 All ER (Comm) 923, [2000] QB 551, [1999] 3 WLR 322, CA.

d *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151, CA.

Appeals

The claimant, Capital Trust Investments Ltd, appealed from orders of Master Bowman made on 27 June 2000 and 31 July 2000 whereby he respectively stayed proceedings as between the claimant and the first defendant, Radio Design TJ AB, and gave summary judgment for the first defendant and struck out the claim. The second to seventh defendants, Tor Bjorn Johnson, Erik Miteregger, Arnfinn Roste, Chris Bataillard, JP Morgan International Capital Corp and Brummer & Partner Kapitalförvaltning AB, did not appear. The facts are set out in the judgment.

f *Stephen Smith QC* (instructed by *Gouldens*) for the claimant.
Alan Steinfeld QC (instructed by *Reynolds Porter Chamberlain*) for the first defendant.

The second to seventh defendants did not appear.

g *Cur adv vult*

16 February 2001. The following judgment was delivered.

JACOB J.

h [1] These are two appeals from orders of Master Bowman. The first order is dated 27 June 2000, the second 31 July 2000. The master gave permission for both appeals. By the first order the master stayed the proceedings as between the claimant and the first defendant; by the second he gave summary judgment for the first defendant, striking out the whole claim as against it. The parties were agreed that the two orders were inconsistent: logically you cannot stay an action and then give judgment on it. It was common ground, therefore, that if the stay was the right order the second order could not stand.

j [2] The claimant is an investment company. It subscribed, via a private placement, to an issue of shares in a Swedish company called Radio Design TJ AB, the first defendant. Prior to its investment the claimant had a document which was in effect a prospectus, though it went out of its way to disclaim a formal status as such. The document was called a 'Confidential Information Memorandum' and

is dated 27 May 1988. It was issued by a division (called Enskilda Securities) of a Swedish bank. In the document Enskilda was called 'the placement agent'.

[3] The purpose of the share issue as described in the memorandum was to raise money for the development and launch of a system which improved existing analogue mobile networks. The improvement was claimed to be much cheaper than replacement with a digital system and so attractive in many countries where a switch to digital had yet to occur. The claimant alleges that the memorandum painted a wholly false picture of the state of development and workability of the system. It says this picture was knowingly and deliberately false—the system was no more than an inchoate heap of junk and the company and its directors knew that.

[4] So the claimant sues Radio Design in deceit. It also sues the directors identified in the memorandum and two other parties. It says they were each responsible for the misleading information it was given. I am only concerned with the claim against Radio Design.

[5] Enskilda, as I have said, describing itself as 'placement agent' supplied the memorandum. However, the memorandum begins with 'notices to investors' which make it plain that this document is the responsibility of Radio Design. It commences with the words:

'Radio Design is furnishing this confidential information Memorandum solely for the consideration of institutional and other sophisticated investors who have sufficient knowledge and experience to evaluate the merits and risks of an investment.'

The memorandum explicitly indicates that: 'Radio Design and its directors [who are named] accept responsibility for the information contained in this memorandum.' The memorandum clearly was intended for potential investors in a number of countries: it contains special notices directed to investors in the United Kingdom and Sweden and a general notice pointing out that it has not been registered or approved by the SEC in the USA.

[6] Enskilda had been appointed placement agents in the September of the previous year. I do not think anything turns on the terms of appointment. The terms expressly empower Enskilda to arrange that all legal agreements be put in place and to 'close the transaction (eg subscription and purchase agreement, settlement, transfer of funds, etc.)'. Mr Stephen Smith QC, for the claimant, made a point that there is nothing expressly empowering Enskilda to put a choice of law and arbitration clause into the application form. Whilst that is true, the terms I have referred to were quite wide enough for that. Moreover the clause was in the form and the claimant signed that form. Whether or not Radio Design knew about the clause does not matter.

[7] I turn to the form. It is upon the meaning of this that the case turns. It commences with the words 'Application Form for Subscription of Shares in Radio Design'. It says it is to be submitted by a certain date to Enskilda and goes on to say:

'With reference to the Confidential Information Memorandum dated 27 May 1998, issued by the Board of Directors of Radio Design TJ AB ("Radio Design") regarding issuance of series B 3 preferred shares (the "Shares") we hereby subscribe for 33,333 shares, issued at a price of SEK 1,200 per share.'

There is then a section of the form which commences with the emboldened words: '[The claimant] acknowledges and accepts that ...'

a [8] The matters 'acknowledged and accepted' are a mixed bag. The first two read as follows:

'This application for shares is binding and irrevocable;—By submitting this application for shares we irrevocably authorise Enskilda Securities to subscribe for the above indicated number of Shares on our behalf.'

b A number of other items of the mixed bag are simply a recognition of things that have got to happen if the application is to proceed at all, eg alteration of the articles of association, approval of the new issue and so on. It is worth noticing in passing that the claimant expressly acknowledges having read and understood the memorandum (which, it will be recalled, was issued as a Radio Design document). Further parts of this mixed bag deal with payment for the shares. c These parts clearly go beyond merely 'acknowledgement and acceptance' by the investor. They create obligations on Enskilda. What is set up is the machinery for payment. Enskilda is to open an 'Escrow Account'. Provision is made as to what happens to the interest if the issue does not go forward or the application is accepted only in part.

d [9] Following these matters the form, still under the same emboldened heading, goes on to say:

e 'In connection with the submission of this application form we agree to arrange for an amount of SEK 40 million to be deposited in the Escrow Account, on a date yet to be determined but not later than 29 July 1998, in order that Enskilda Securities can, on our behalf, subscribe for the Shares as agreed above.'

[10] Finally there is the combined choice of law/arbitration clause under a new emboldened heading:

f 'Applicable Law, Arbitration

This application for subscription of shares in Radio Design TJ AB shall be governed by and construed in accordance with the laws of the country of Sweden with regard to the conflict of laws. Any dispute arising out of this application for shares in Radio Design TJ AB shall be settled exclusively by arbitrators in accordance with the Swedish Arbitration Act. The rules of the Swedish Procedural Code governing combined trials, voting and the division of legal costs in disputes shall apply. The arbitration proceedings shall take place in Stockholm.'

g [11] By an amended application notice dated 22 February 2000, Radio Design h applied for a stay of the proceedings against it on the grounds that the issues in the claim were governed by this arbitration clause. The application was made pursuant to s 9 of the Arbitration Act 1996. It was supported by evidence of Swedish law as to the effect of the application form. The matter was adjourned and in the end took two days before the master, with cross-examination of j experts on Swedish arbitration law. In retrospect, having regard to the size of the case and the length of the hearing, all were agreed that the matter should have been referred directly to a judge. In similar cases in the future it is desirable that this course be given earlier active consideration, both by the parties and by the master. I say this without intending in any way to deprecate what was done in this case. By the time Radio Design asked for such a reference it was too late. The master, understandably, refused the application.

[12] In the end, it turned out that the Swedish law evidence was irrelevant. For it was common ground that Swedish contract law did not differ materially from English law as to how the application form should be construed. One must read the document as a whole and in the light of the circumstances known to both sides at the time. I think it is a pity that Radio Design embarked on evidence of Swedish law without fully considering what proposition(s) of Swedish law it wished to establish. And again, with hindsight at least, it would have been better if the master had required Radio Designs to identify the proposition(s) at the outset. Then evidence as to Swedish contract law would have been unnecessary. a
b

[13] When the stay application was still pending with a date for the hearing set as 5 June, Radio Design took out a second application on 2 May 2000. It said:

‘The First Defendant Radio Design AB has applied to the Court by Amended Application Notice dated 22nd February 2000 for a stay in the proceedings against it on the ground that the issues in the claim against it are governed by an arbitration agreement and it wishes those issues to be determined by arbitration in Sweden. In the event that its application for a stay is unsuccessful, the First Defendant applies for summary judgment against the Claimant under CPR 24 on the whole of its claim against the First Defendant. The grounds of this application are that the Claimant has no real prospect of succeeding on its claim because: (1) The claim is governed by Swedish law; (2) As a matter of Swedish law, a company is not liable in damages to a shareholder for misrepresentations made on its behalf in connection with an issue of shares, and there is no other reason why the case should be disposed of at trial.’ c
d
e

[14] Evidence of Swedish law supporting this second application was included by way of a distinct section of the Swedish law evidence following that supporting the stay application. The parties agreed that both applications be heard together and they were. The master gave a reserved judgment on the stay application first. Immediately after he delivered it on 27 June he was asked for permission to appeal which he granted. He then asked the parties whether they wanted a judgment on the strike-out. They said they did, the matter having been argued and there being a possibility of the stay decision being upset on appeal. So the master gave a reserved judgment on the strike-out on 31 July 2000. In due course orders were made and entered on both applications which is how the matter came before me. f
g

[15] It appeared to me that it was undesirable for me to hear the matters together for, if there was to be a stay, that was an end of the case as far as this jurisdiction is concerned. My views on whether a claim could be maintained under Swedish law would be wholly irrelevant to the Swedish arbitration. There was some logic in having both points argued together, as the master allowed. The logic is this: the point relating to the stay is linked, or possibly linked, with part of the argument on the strike-out. The strike-out seeks to invoke a rule of Swedish law which it is claimed gives immunity to a company (as opposed to directors or others) for misstatements in connection with an issue of its shares. (The purpose of the rule is to protect company creditors. We used to have a similar rule, see *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, a rule reversed by s 111A of the Companies Act 1985 inserted by s 131(1) of the Companies Act 1989.) The link is that to invoke the Swedish rule it had to be shown that Swedish law governed the share subscription. The most direct way of doing that would be by establishing that the choice of law/arbitration clause h
j

a of the application form applied as between Radio Design and the claimant. So it was sensible for the master to hear both matters together.

[16] Mr Smith takes two points on the stay application. First he submits that by applying for summary judgment, albeit conditionally, Radio Design's application for a stay is barred by s 9(3) of the 1996 Act. Secondly he submits that the arbitration clause of the application form is not part of any contract between the claimant and Radio Designs: it takes effect only as between the claimant and Enskilda.

b [17] I turn to the first point, which was not raised before the master. It was only raised shortly before the hearing before me. If it were right, I am not sure how much good it would do the claimant—probably what it needs is not only avoidance of the stay but also avoidance of the rule of Swedish law invoked in the strike-out. However, that it not a matter for me. I have to rule on the point as
c an isolated one of law. Section 9(3) of the 1996 Act provides:

'An application [for a stay pending arbitration] may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.'

It is undisputed that Radio Design's amended application form for a stay was served within the appropriate window. It was served on 22 February whereas the application for a conditional strike-out form was only served in May. Mr Smith contends that the 'application' must mean something more than the initiation of the process—the application is initiated by the form but continues until it is disposed of by the court or in some other way. So, he submits, the 'application' continued to be made at least until Master Bowman ruled upon it. And, by then, the application for a strike-out had been initiated and was running. So the strike-out application was made (or continued to be made) after the step to
e answer the claim had been made.

[18] This argument would be right if the strike-out application had been simply that. Until the stay application is disposed of it remains an application. So if a party takes an unequivocal step in the proceedings to answer the substantive claim before his stay application is concluded, he is outside the s 9(3) window. And rightly so, for he would then be blowing hot and cold—on the one hand asking for arbitration and on the other positively inviting the court to rule on the dispute. Mr Steinfeld QC for Radio Designs accepted as much. But, he said, that is not what his client was doing. Its application for a stay was not an unconditional step in the action—on its face it was only asking the court to rule on the dispute if the stay application was unsuccessful. Such a conditional invocation of the
g court's jurisdiction was not a 'step in the proceedings'.

[19] Neither side could find an authority directly in point—a case where a defendant openly, but conditionally on his stay application failing, took what would otherwise be a step in the action. As a matter of principle I think Mr Steinfeld is right. Moreover the dicta in all the authorities support him. I say
h principle supports Mr Steinfeld for the reason I have already indicated. A party who makes an application upon which he seeks a ruling only if a stay is not ordered is not trying to have it both ways. Such a course is normally not sensible since if the stay is granted costs are likely to be wasted on the substantive point. Sometimes, however, there may be a good case management reason for a conditional application. For instance there may be a significant link between the substantive claim and the invoked arbitration clause. In this case, there was such
j

a
b
c
d
e
f
g
h
i

a link. And there was also a reasonable case management purpose in hearing the two points together—if the stay failed, it saved a second hearing. But never did Radio Design invoke the court's jurisdiction unconditionally. In particular it never unconditionally asked for the order striking out the claim. The order was made, as I understand it, on the court's own initiative after the master had expressed his views on the strike-out—by which time he had no power to give a formal judgment because he had ordered a stay. In that connection I do not think it matters when the orders were formally entered. As a practical matter the stay was ordered in June and the 'judgment' on the merits was in July. To be fair, Mr Smith took no point on the actual dates of entry of the respective orders. Indeed I am not sure they are both in the rather illogically prepared bundles.

[20] As to authority, there have been many cases over the years on what constitutes a 'step'. I do not propose to go to all the cases cited. The parties were agreed that the pre-1996 authorities on the meaning of 'step' in previous Arbitration Acts (s 4 of the 1889 Act, s 4 of the 1950 Act and s 1 of the 1975 Act) were applicable to the 1996 Act. As I have said, no case actually considered explicitly whether a conditional application of the kind I am concerned with would do. But they strongly so indicate.

[21] In *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 Goddard LJ was of the opinion that a defendant could, without taking a step, in response to an application for summary judgment, apply for a stay and, conditionally upon that failing, answer the claim on its merits. The other members of the court (Slessor and MacKinnon LJJ) reserved their opinion on this point, which did not arise in the case itself since the defendant had answered the claim on the merits well before asking for a stay.

[22] In *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 the defendants simultaneously applied for a stay and answered a claim on the merits. This they did in response to an application for summary judgment under RSC Ord 14. Actually there had been earlier events—the defendants had applied to have an earlier statement of claim and the action struck out on the basis of the wholly unsatisfactory statement of claim. The plaintiffs had conceded the correctness of that application by abandoning that statement of claim and proceeding with another. It was upon the latter that they sought summary judgment. The Court of Appeal held both that there was a triable defence and that the defendants had not taken a step in the action. So far as the latter argument was concerned, the argument centred on whether the application to strike out the abandoned statement of claim constituted a step. In the circumstances it was held that it did not. No one suggested that resisting the Ord 14 on the merits and applying for a stay at the same time could not be done—it was simply assumed. Lord Denning MR, with whom Goff and Shaw LJJ agreed, said (at 361):

‘... it seems to me that in order to deprive a defendant of his recourse to arbitration a “step in the proceedings” must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.’

[23] Finally, there is a case under the 1996 Act, *Patel v Patel* [1999] 1 All ER (Comm) 923, [2000] QB 551. The plaintiff had obtained judgment in default of defence. The defendant applied for an order that the judgment be set aside and that he be given leave to defend and bring a counterclaim. At the same time he asked for a stay pending arbitration. The Court of Appeal held that the defendant

a had not taken a step in the proceedings to answer the substantive claim. Lord Woolf MR (with whom Otton and Ward LJ agreed) accepted a passage in Mustill and Boyd *Commercial Arbitration* (2nd edn, 1989) p 472 where the authors summarised the old law:

b 'The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the Court.'

c Applying that test there was obviously no 'step'—nothing Radio Design did pursuant to their second application indicated any election to abandon its contractual right to a stay. Lord Woolf MR in *Patel's* case said 'that it all turns on the language of the summons'. The language in this case was clearer than it was in that case: obviously no election was being made here.

[24] Otton LJ approved two statements in Merkin *Arbitration Law* (1991) p 6–15:

d 'The old authorities, which remain good law under the 1996 Act, established the following propositions ... (e) An act which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay ... The right to apply for a stay will also be lost if the defendant in the judicial proceedings

e has expressly or impliedly represented that he does not intend to refer the issues in dispute to arbitration. The matter is determined by the usual rules applicable to estoppel, ie has the defendant unequivocally represented that there will be no reference to arbitration, and has the plaintiff conducted his affairs on the basis that the matter will be determined by the court, in

f reliance on that representation?'

Both of these statements are directly applicable here. Accordingly I hold that a party who has initiated an application for a stay pending an arbitration has not taken a 'step' in the proceedings within the meaning of s 9(3) of the 1996 Act if he, either simultaneously or subsequently, invokes or accepts the court's jurisdiction provided he does so only conditionally on his stay application failing. Whether

g or not the court should consider his conditional application before determination of the stay application is simply a matter of case management.

[25] I turn to the second point—is the arbitration clause part of a contract between the claimant as investor and Radio Design? I think the answer is obviously so. The form is an application form for the purchase of shares in Radio

h Design. The form is submitted to Enskilda who are not only Radio Design's agents but known to be so by the investor. The investor acknowledges Radio Design's memorandum. By the form, the investor 'hereby subscribes' for the shares. That must mean in substance subscribes to the company. It is true that Enskilda are authorised to subscribe for the shares—but that is only machinery.

j Swedish company law requires a subscriber to sign the subscription list so Enskilda are authorised by the investor to act as the investor's agent for that purpose. It is also true that the escrow system was set up—it was necessary machinery because the subscription might not be accepted or accepted in full and in any event it was at least possible that the necessary EGM would not approve the necessary alteration of articles. Significantly it was for Radio Design to accept or refuse the offer. Once one appreciates that the document is an offer

document, there really is only one answer to the question 'to whom is the offer made'?

[26] Moreover the very terms of the choice of law/arbitration clause are obviously applicable to the relationship between the investor and the company. The clause governs 'this application'. The application is not made merely to Enskilda. It is to Enskilda as agent for the company. Any businessman filling in the form would so think and I think so too.

[27] Finally there is this further compelling point—one I think not specifically argued by Mr Steinfeld for Radio Design. The clause is not merely an arbitration clause but a choice of law clause too. There is an obvious business sense in every share application, from whatever country it comes, being governed by one law and for that law to be Swedish. After all this was an application for shares in a Swedish company. So nothing is more natural than that Swedish law should govern the subscription. The business reader would surely take it that a purpose of the clause was to ensure that his application was so governed, and with it, that the arbitration clause applied to his application.

[28] The heart of Mr Smith's argument was based on the fact that for some purposes Enskilda were plainly made agent for the investor—it had formally to subscribe and it had to hold the money in escrow. But it by no means follows that the clause is only of legal effect between Enskilda and the investor. Mr Smith says 'consider the period between sending in the form and money to Enskilda and the allotment of shares. Plainly at that time there is no contract between the investor and Radio Design. It follows that the clause must govern the relationship between Enskilda and the investor'. He may be right thus far. But his argument needs a further step—that the clause only governs the investor/Enskilda relationship. That does not follow at all. It leads to the improbable consequence that the clause is just there for the machinery of application and not the application itself. Mr Smith had to accept that his argument would be near untenable if the first emboldened heading were deleted so that the choice of law/arbitration clause followed the opening words. That to my mind shows the weakness of the argument. The concession means that the claim is capable of applying as between Radio Design and the investor. Once that is so commercial sense dictates that it must do so even with the interposition of some obligations between Enskilda and the investor.

[29] Accordingly I think the master was right. The action should be stayed as against Radio Design. It follows that I do not hear the appeal in relation to the strike-out. The order striking the claim out is, however, discharged.

Order accordingly.

Celia Fox Barrister.

a

Practice Note

CHANCERY DIVISION

SIR ANDREW MORRITT V-C

25 MAY 2001

b

Practice – Administration of estates – Distribution – Retention of assets to meet future liabilities – Estates of deceased Lloyd's names – Application by executors of deceased Lloyd's name for permission to distribute estate – Procedure.

c **SIR ANDREW MORRITT V-C** gave the following direction at the sitting of the court.

1. This Practice Statement replaces the Practice Direction dated 21 November 1997 (see [1998] 1 Lloyd's Rep 223). The references to that Practice Direction in RSC PD 85 and CPR 8.2A should therefore be taken as references to this Practice Statement and paras 26.49–26.55 of, and App 7 to, the Chancery Guide (September 2000) should now be read in light of this Practice Statement.

d

2. Personal representatives or trustees who wish to apply to the court for permission to distribute the estate of a deceased Lloyd's name following the decision of Lindsay J in *Re Yorke (decd)*, *Stone v Chataway* [1997] 4 All ER 907 or to administer any will trusts arising in such an estate, may, until further notice and if appropriate in the particular estate, adopt the following procedure.

e

3. The procedure applies to cases where the only, or only substantial, reason for delaying distribution of the estate is the possibility of personal liability to Lloyd's creditors and: (a) all liabilities of the estate in respect of syndicates of which the name was a member for the years of account 1992 and earlier (if any) have been reinsured (whether directly or indirectly) into the Equitas Group; and (b) all liabilities of the estate in respect of syndicates of which the name was a member for the years of account 1993 and later (if any): (i) arise in respect of syndicates which have closed by reinsurance in the usual way; or (ii) are protected by the terms of an Estate Protection Plan issued by Centrewrite Ltd; or (iii) are protected by the terms of EXEAT insurance cover provided by Centrewrite Ltd.

f

g

4. In these circumstances personal representatives (and, if applicable, trustees) may apply by a CPR Pt 8 claim form (Form N208) headed *In the Matter of the Estate of [.....] decd (a Lloyd's Estate) and In the Matter of the Practice Statement dated 2001* for permission to distribute the estate (and, if applicable, to administer the will trusts) on the footing that no or no further provision need be made for Lloyd's creditors. Ordinarily, the claim form need not name any other party. It may be issued in this form without a separate application for permission under r 8.2A.

h

5. The claim form should be supported by a witness statement or an affidavit substantially in the form set out in schedule 1 to this Practice Statement adapted as necessary to the particular circumstances. (Adaptation will be necessary where, for example, the claimants are trustees rather than personal representatives or where one claimant makes the statement on behalf of the others and with their authority.) The claim form should also be accompanied by a draft order substantially in the form set out in schedule 2 to this Practice Statement.

j

6. If the amount of costs has been agreed with the residuary beneficiaries (or, if the costs are not to be taken from residue, with the beneficiaries affected) their signed consent to those costs should also be submitted. If the claimants are inviting the court to make a summary assessment they should submit a statement of costs in the form specified in the Costs Practice Direction. If in his discretion the master (or outside London the district judge) thinks fit, he will summarily assess the costs but with permission for the paying party to apply within 14 days of service of the order on him to vary or discharge the summary assessment. Subject to the foregoing, the order will provide for a detailed assessment unless subsequently agreed.

7. The application will be considered in the first instance by the master (or outside London the district judge) who, if satisfied that the order should be made, may make it without requiring the attendance of the claimants and the court will send it to them. If not so satisfied, the master or district judge may give directions for the further disposal of the application.

Victoria Parkin Barrister

SCHEDULE 1
DRAFT WITNESS STATEMENT
[Heading as in claim form]

WE, [.....] of [.....] and [.....] of, [occupations] **STATE** as follows:

1. We are the personal representatives of the estate of the above-named Deceased ('the Deceased') who died on [.....]. We obtained [a grant of probate][letters of administration] out of the [.....] Registry on [.....] and a copy of the grant [and the Deceased's will dated [.....]] is now produced and shown to us marked '....1'. We make this witness statement in support of our application for permission to distribute the Deceased's estate [and to administer the will trusts of which we will be the Trustees following administration]. This witness statement contains facts and matters which, unless otherwise stated, are within our own knowledge obtained in acting in the administration of the estate. We believe them to be true.

2. The Deceased was before his death an underwriting member of Lloyd's of London whose underwriting activities are treated as having ceased on [.....]. The estate was sworn for probate purposes at £[.....]. We are now in a position to complete the administration of the estate and to distribute it to the beneficiaries but we do not wish to do so [or to constitute the will trusts] without the authority of the Court because of the existence of possible contingent claims arising out of the Deceased's underwriting liabilities for which we might be liable.

3. The position concerning the Deceased's Lloyd's liabilities is as follows:

[3.1 The Deceased's liabilities in respect of the years of account 1992 and earlier were reinsured into Equitas as part of the Lloyd's settlement. There is now produced and shown to us marked '....2' a copy of the certificate or statement of reinsurance into Equitas].

3.2 [The syndicates in which the Deceased participated in the years of account 1993 and later have [closed by reinsurance in the usual way] [are the subject of an Estate Protection Plan issued to the Deceased by Centrewrite Limited][are protected by an EXEAT policy obtained by the Claimants from Centrewrite Limited].

a 4. There is now produced and shown to us marked '....3' a copy of a letter dated [.....] from the estate's Lloyd's agents confirming that [all] the syndicates have been reinsured to close [with the exception of [.....] which syndicate is protected by [the Estate Protection Plan] [the EXEAT policy]] and confirming that in the case of failure of a reinsuring syndicate to honour its obligations, the primary liability to a creditor will fall on Lloyd's Central Fund.

b [A copy of the [Estate Protection Plan and Annual Certificate] [EXEAT policy] is now produced and shown to us marked '....4'.]

c 5. The Claimants believe that the interests of any Lloyd's claimant are reasonably secured by virtue of the fact that all the Lloyd's syndicates in which the Deceased participated have either been closed ultimately by reinsurance to close (in respect of any open years prior to 1992 into the Equitas group) or, in respect of subsequent years [have all closed by reinsurance] [are protected by the Estate Protection Plan] [are protected by the EXEAT policy]. Equitas remains licensed to conduct insurance business and there is presently no reason to doubt its solvency. A copy of the latest report and accounts of Equitas Holdings Limited is now produced and shown to us marked '....5'. [The [Estate Protection Plan]

d [EXEAT policy] is provided by Centrewrite Limited which is a wholly-owned subsidiary of Lloyd's and the beneficiary of an undertaking by Lloyd's to maintain its solvency. We have no reason to doubt the solvency of Centrewrite. A copy of the latest report and accounts of Centrewrite Limited is now produced and shown to us marked '....6'.]

e 6. As appears from the schedule now produced and shown to us marked '....7' in which we summarise the assets and liabilities of the estate, we have paid all the debts of the Deceased known to us (apart from the costs and expenses associated with the final administration of the estate) and we have also advertised for and dealt with all claimants in accordance with s 27 of the Trustee Act 1925 [*or if not explain why*].

f 7. We know of no special reason or circumstance which might give rise to doubt whether the provision described above can reasonably be regarded as adequate provision for potential claims against the estate and we ask for permission to distribute accordingly.

g

SCHEDULE 2
FORM OF ORDER
[Heading as in claim form]

UPON THE APPLICATION of the Claimants by Part 8 Claim Form dated [.....]

h AND UPON READING the documents recorded on the Court file as having been read

IT IS ORDERED THAT:

j 1. The Claimants as [the personal representatives of the estate ('the Estate') of the above-named deceased ('the Deceased')][and] [the trustees of the trusts of the Deceased's will dated [.....] ('the Will')] have permission to distribute the Estate [and] [administer the trusts of the Will and distribute capital and income in accordance with such trusts] without making any retention or further provision in respect of any contract of insurance or reinsurance underwritten by the Deceased in the course of his business as an underwriting member of Lloyd's of London.

2. The costs of the Claimants of this application [*either* in the agreed sum of £.....] [*or* summarily assessed in the sum of £.....] (with permission to [the residuary beneficiaries] [*name beneficiaries*] to apply within 14 days after service of this order on them for the variation or discharge of this summary assessment] [*or* subject to a detailed assessment on the indemnity basis if not agreed by or on behalf of [the residuary beneficiaries] [*name beneficiaries*]] be raised and paid or retained out of the Estate in due course of administration. a

a

Corbett v Bond Pearce (a firm)

[2001] EWCA Civ 531

COURT OF APPEAL, CIVIL DIVISION

b

BROOKE, LONGMORE LJ AND SIR CHRISTOPHER SLADE

9 MARCH, 11 APRIL 2001

c

Solicitor – Negligence – Will – Duty of care – Instructions to draw up will conferring benefit on identified beneficiary – Defendant solicitors failing to execute valid will giving effect to testatrix's testamentary intentions – Court ordering costs of proceedings challenging validity of will to be paid out of estate – Solicitors paying disappointed residuary beneficiaries sum amounting to full value of residuary estate undiminished by costs of will action – Testatrix's personal representative bringing proceedings against solicitors seeking recovery of costs of will action – Whether negligent solicitors having liability to testatrix's estate for costs of proceedings challenging validity of will.

d

In February 1989 the testatrix executed a valid will (the February will), devising a property known as Lamellyn to A and another property known as Tolcarne to the claimant, C. She left the residue of her estate to A and C, with gifts over in favour of A's sons. Subsequently, the testatrix decided that she wished to dispose of her property differently. Accordingly, in September 1989 she retained the defendant firm of solicitors and instructed them that she wished to make lifetime gifts of Lamellyn and Tolcarne to A and C respectively, and to make a new will bequeathing other properties to them but leaving the residue of her estate to A's sons. The new will (the September will), whose provisions were in accordance with the testatrix's wishes, was ready for execution before the proposed deeds of gift. She signed it on or about 27 September 1989, but failed to date it because, as the solicitors knew, she did not wish it to take effect on her death until the lifetime gifts of Lamellyn and Tolcarne were complete. The deeds of gift were executed on 25 December 1989. Shortly afterwards, the solicitors appended the date 26 December 1989 to the September will. The testatrix died in 1991 without having executed any further testamentary document. C subsequently brought proceedings (the will action) challenging the validity of the September will on the grounds that the testatrix lacked the requisite testamentary intention at the date when she signed it. The Court of Appeal eventually ruled that the September will was invalid and ordered the February will to be admitted to probate. The court also ordered the costs of the proceedings to be paid out of the estate. Before the determination of the will action, A's sons had issued proceedings against the solicitors, alleging that the solicitors had breached a duty owed to them in tort as the testatrix's intended beneficiaries by failing to ensure that the September will was validly executed. Those proceedings were settled on the basis of a payment to A's sons of a sum which represented the full amount of their claim with interest.

h

j

That sum was calculated by reference to the amount of the testatrix's net residuary estate, undiminished by the costs of the will action. In the meantime C, who had become the administrator of the testatrix's estate, brought a further action against the solicitors in that capacity in respect of their admitted breach of duty to the testatrix. On the determination of preliminary issues in that action, the judge concluded that C, as the testatrix's personal representative, was able to recover damages against the solicitors by reference to the loss suffered by the

estate by reason of either or both of (i) the diminution of the value of the estate attributable to the costs payable in the will action, or (ii) any other loss or liability incurred by the estate as a result of the will action, the costs order made in that action and the delay in the administration of the estate caused by the solicitors' breach of contract and negligence. The solicitors appealed. a

Held – Although solicitors who had negligently failed to procure the execution of a valid will were liable to compensate disappointed residuary beneficiaries for the full amount of the residuary estate, undiminished by the costs of proceedings challenging the validity of the will, they could not at the same time be under a liability to the testatrix's personal representative in respect of those same costs. The scope of the duty of care owed by the solicitors to the testatrix had to be determined by reference to the kind of damage from which they had to take care to keep her harmless, having regard to the terms of their retainer. Having such regard in the instant case, it was clear that that kind of damage was the loss which those who would become interested in her estate, whether as beneficiaries under the September will or as creditors, would suffer if effect were not given to her latest testamentary intentions. It was not the loss which the various classes of beneficiaries named in the February will would suffer in that event, because the testatrix had had no wish or intention that the February will should have any effect after she had signed the September will and the two deeds of gift had been perfected. The duties owed by the solicitors in contract to the testatrix and in tort to the beneficiaries named in the September will were not inconsistent, but complementary. It was true that, as a matter of strict analysis, the damages which C was seeking to recover did not represent precisely the same sum as that which formed part of the award to the disappointed beneficiaries. The former represented an actual sum which, as a result of the solicitors' negligence, was not included in the testatrix's net estate, falling to be dealt with under the February will. The latter was a notional sum which, but for the solicitors' negligence, would have been included in the testatrix's net estate, falling to be dealt with under the September will. In substance, however, the two sums represented the same monetary loss. Accordingly, the appeal would be allowed (see [31], [32] and [35]–[37], below). b
c
d
e
f

Carr-Glynn v Frearsons (a firm) [1998] 4 All ER 225 applied. g

Notes

For the liability of solicitors in respect of a failure to procure the execution of a valid will, see 44(1) *Halsbury's Laws* (4th edn reissue) para 96.

Cases referred to in judgments h

British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm) [1996] 3 All ER 667, [1997] 1 BCLC 182.

Caparo Industries plc v Dickman [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.

Carr-Glynn v Frearsons (a firm) [1998] 4 All ER 225, [1999] Ch 326, [1999] 2 WLR 1046, CA; *rvsg* [1997] 2 All ER 614. j

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571, [1979] Ch 384, [1978] 3 WLR 167.

- a *Otter v Church, Adams, Tatham & Co (a firm)* [1953] 1 All ER 168, [1953] Ch 280, [1953] 1 WLR 156.
- Ross v Caunters (a firm)* [1979] 3 All ER 580, [1980] Ch 297, [1979] 3 WLR 605.
- South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.
- b *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187, HL.
- Worby v Rosser* [1999] Lloyd's Rep PN 972, CA.

Appeal

- By notice of appeal dated 21 June 2000, the defendant firm of solicitors, Bond Pearce, appealed with permission of Eady J from his decision on 25 May 2000 ([2000] Lloyd's Rep PN 805) whereby, on the determination of preliminary issues in proceedings brought against the defendants by the claimant, William Corbett, as administrator of the estate of Miss NA Tresawna (deceased), he held that the claimant was able to recover from the defendants damages for breach of contract or negligence by reference to the loss suffered by the deceased's estate by reason of either or both of (i) the diminution of the value of the estate attributable to the costs payable in proceedings challenging the validity of a will signed by the deceased in September 1989, and (ii) any other loss or liability incurred by the estate as a result of the will action, the costs order made in that action and the delay in the administration of the estate caused by the defendants' breach of contract and negligence. The facts are set out in the judgment of Sir Christopher Slade.
- c
- d
- e

Guy Mansfield QC and Daniel Hochberg (instructed by Reynolds Porter Chamberlain) for the defendants.

Jeffrey Onions QC (instructed by Russell Jones & Walker) for the claimant.

f *Cur adv vult*

11 April 2001. The following judgments were delivered.

SIR CHRISTOPHER SLADE (giving the first judgment at the invitation of Brooke LJ).

- g [1] The claimant, Mr Corbett, in his capacity as the sole personal representative of the late Miss NA Tresawna (the Testatrix) seeks to recover damages for negligence from the defendant firm of solicitors, Bond Pearce (the defendants). Eady J was asked to determine certain preliminary issues in the action. When the hearing began, he made an order for determination of those issues and subsequently gave a judgment on them, dated 25 May 2000 ([2000] Lloyd's Rep PN 805). With the leave of the judge, the claimant appeals to this court from that judgment. The judge had before him a statement of agreed facts from which I take most of the facts, supplementing them with a few others which I believe to be common ground.
- h

- j [2] On 3 February 1989, the Testatrix executed a valid will (the February will) disposing of her estate. By this will (among other provisions) (a) she appointed John Somerville, Glending Wight and John Foster to be her executors; (b) she devised her property 'Lamellyn' to her niece, Mrs Arthur; (c) she devised her property 'Tolcarne' to her nephew, the claimant; and (d) she left the residue of her estate to Mrs Arthur and the claimant with gifts over in favour of Mrs Arthur's infant sons, James and Jonathan.

[3] Later in 1989, the Testatrix decided that she wished to dispose of her property rather differently. In September 1989, she accordingly retained the defendants to advise and act for her in relation to her affairs. She instructed them that she wished (a) to make a lifetime gift of Lamellyn to Mrs Arthur, instead of a testamentary gift; (b) to make a lifetime gift of Tolcarne to the claimant, instead of a testamentary gift; (c) to make a new will taking account of these proposed lifetime gifts, appointing John Newey and David Bennett as her executors in place of the executors named in the February will and leaving the residue of her estate to James and Jonathan Arthur. She instructed the defendants to draw up on her behalf a new will and two deeds of gift accordingly. a

[4] In the event, the proposed new will was ready for execution before the proposed deeds of gift. On 22 September 1989, the defendants, having previously sent to the Testatrix a draft of the proposed new will, sent to her a fair copy, together with instructions for signing and dating. On or about 27 September 1989, the Testatrix signed but did not date this will (the September will), which contained no specific gifts in relation to Lamellyn and Tolcarne, but after certain specific and pecuniary bequests devised and bequeathed (a) her properties at Truck and Probus, Cornwall, to Mrs Arthur; (b) her home, Myrtle Cottage, to the claimant; (c) her residuary estate to James and Jonathan Arthur. b
c
d

[5] The provisions of the September will were in accordance with the Testatrix's wishes. But the reason why she did not date it when she signed it, as the defendants knew, was that she did not wish it to take effect on her death until the lifetime gifts of Lamellyn and Tolcarne, in favour of Mrs Arthur and the claimant respectively, were complete. The deeds of gift of these two properties were duly executed on 25 December 1989. Shortly thereafter, and in any event by 29 December 1989, Mr Nicholson of the defendants appended the date 26 December 1989 to the September will. It is common ground that the defendants' failure to procure the execution by the Testatrix of a valid will on the terms of the September will or to procure such a will that could be admitted to probate without a probate action was a breach of contract by, and negligence on the part of, the defendants. e
f

[6] The Testatrix died on 6 February 1991 without having executed any further testamentary document. For probate purposes her estate was valued at £353,761 net. Her residuary estate included the properties at Truck and Probus, Myrtle Cottage and other assets. If the September will was invalid, the whole of her residuary estate would pass to the claimant and Mrs Arthur in equal shares. This would not give effect to the Testatrix's intentions because, as soon as the two deeds of gift had been executed, she intended that the benefits received by the claimant and Mrs Arthur from her estate should be limited to Myrtle Cottage and the Truck and Probus properties respectively and that the other residue should go to James and Jonathan Arthur. g
h

[7] Following the Testatrix's death, the claimant objected to the admission to probate of the September will. On 5 June 1992, he instituted proceedings (the will action), to have the September will declared invalid on the ground that the Testatrix had lacked the requisite testamentary intention at the date when she signed it and to obtain an order that the February will be admitted to probate. In this action, Mr Newey, one of the executors named in the September will, sought to uphold the validity of that will, with the benefit of an indemnity as to the costs of the proceedings from the Solicitors' Indemnity Fund. On 5 May 1994, Mr Eben Hamilton QC (sitting as a deputy judge of the Chancery Division) pronounced for the validity of the September will. j

a [8] On 31 August 1995 and 4 September 1995 respectively, Mr Somerville and Mr Foster renounced probate in relation to the February will. (Mr Wight had by then died.) Following these renunciations, the claimant became one of those entitled to a grant of letters of administration with the February will annexed, if it was held valid. He appealed against the deputy judge's decision. On 26 January 1996, the Court of Appeal allowed the appeal, holding that the September will b was invalid by reason of the lack of testamentary intention on the part of the Testatrix at the time of its execution and ordering that the February will be admitted to probate.

c [9] Subsequently, on 15 February 1996, the Court of Appeal ordered that (a) the costs of all parties in that court and the court below should be paid out of the estate; (b) the executors' costs be taxed on an indemnity basis; (c) the claimant, not the estate, should pay certain costs of the Solicitors' Indemnity Fund incurred by reason of an unsuccessful application by the claimant for an order that the Fund should pay the costs of the will action. The costs payable out of the estate pursuant to this order amount to some £150,000. An application was made to the Court of Appeal in March 1999, when an order was made, subject to d certain undertakings, which had the effect of staying the costs order made in 1996 until after the outcome of the present proceedings. The claimant was faced with the problem that, if Mr Newey's costs had to be paid without any such delay, he would have to realise certain assets which the beneficiaries might wish to retain—as well as creating a liability to capital gains tax. The loss and inconvenience e could never be compensated for by the reimbursement of those costs if these proceedings were successfully concluded. It was that timing problem that the court was concerned to alleviate by the order made on that occasion.

f [10] In August 1995, before the determination of the will action, Jonathan and James Arthur issued proceedings against the defendants (the disappointed beneficiaries' action) to recover damages on the footing that in September 1989 the defendants had owed them a duty of care in tort as the Testatrix's intended beneficiaries, by virtue of the principle in *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207. In their amended statement of claim, they alleged that the defendants were in breach of that duty in failing to ensure that the September will was validly executed by the Testatrix, and that such breach had caused them damage.

g [11] These proceedings were eventually settled in December 1997 on the basis of the payment to James and Jonathan Arthur (the disappointed beneficiaries) of £275,000, representing the full amount of their claim with interest. It is common ground that this sum was calculated by reference to the amount of the net residuary estate of the Testatrix *undiminished by the costs of the will action*.

h [12] On 21 September 1995, before this settlement was concluded, the claimant had issued a writ in the present proceedings asserting a claim against the defendants as a beneficiary under the February will. At the date of the settlement, the defendants were aware that this writ had been issued but that with the permission of the court it had been amended in October 1997 by withdrawing any claim by the claimant as beneficiary under the February will and substituting a claim as j the Testatrix's administrator. He had obtained a grant dated 28 October 1996 of letters of administration with the February will annexed.

[13] In the light of the agreed facts, Eady J was asked to determine the following issues:

'(1) In the above circumstances, is the claimant, as personal representative of Miss Tresawna, able to recover damages for breach of contract or for

negligence against the defendant firm by reference to the loss suffered by the estate by reason of either or both of the following: (a) the diminution of the value of the estate attributable to the costs payable in the Will action; or (b) any other loss or liability incurred by the estate as a result of the Will action, the costs order made in the Will action and the delay in the administration of estate caused by the defendant's breach of contract and negligence?

(2) Does the answer to the question posed in paragraph (1) above, or any part of it, depend upon whether the estate, after payment of the liabilities referred to in sub-paragraphs (a) and (b), would contain sufficient assets to discharge all the creditors of the estate, distribute specific legacies and still leave a balance to form a residue for distribution in accordance with the terms of the February will?' (See [2000] Lloyd's Rep PN 805 at 807.)

[14] By his judgment of 25 May 2000, Eady J answered question (1)(a) and (1)(b) above in the affirmative and question (2) above in the negative.

[15] While the defendants suggested in argument that there will be a residue for distribution in accordance with the terms of the February will, this is not at present accepted by the claimant. The effect of the defendants' negligence, in financial terms, on the estate of the Testatrix has yet to be determined.

The legal background

[16] The law in this field has in recent years developed in stages. Before turning to the judgment of Eady J it may be convenient to refer to a few of the relevant authorities. Until 1953, it was uncertain whether an action of the present kind, brought by the personal representative of a deceased person against the deceased's solicitor, could ever give rise to a claim for substantial damages. That question was answered in the affirmative in *Otter v Church, Adams, Tatham & Co (a firm)* [1953] 1 All ER 168, [1953] Ch 280. In that case the plaintiff, as sole administratrix of her son Michael, who had died on active service intestate, sued the defendant solicitors for negligence. She claimed that in breach of their duty to exercise care and skill as solicitors, they had failed to advise her, acting as the agent of Michael, that his interest in certain settled property was an entailed interest and, that having recently attained 21, he was in a position to disentail and make the property his own. Upjohn J, having found that the plaintiff had established a breach of contract by the defendants, then had to consider the measure of damages. It was argued on behalf of the defendants that a personal representative can have no better rights than the person he represents and that, since Michael could have received no more than nominal damages in his lifetime, the plaintiff, as his personal representative, could have no better claim than that. Upjohn J, having stated ([1953] 1 All ER 168 at 169, [1953] Ch 280 at 287) that the matter was 'admittedly free from authority', held ([1953] 1 All ER 168 at 169, [1953] Ch 280 at 288) that the right of action which had previously been vested in Michael vested in his personal representative and that the damage had to be ascertained in accordance with principles affecting damages for breach of contract 'at the time that the damage accrues'.

[17] No decision has been brought to our attention in which the correctness of the decision in *Otter's* case has been questioned. In the present case, since negligence on the part of the defendants, involving a breach of duty to the Testatrix, is admitted by the defendants, the claimant, as her personal representative, has, at least at first sight, a good cause of action. But the damages fall to be ascertained

a at the time when the damage accrued after her death. And the problem is to determine where the burden of that damage truly fell.

[18] In *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207 the negligent delay of a firm of solicitors in carrying out the instructions of a testator for a new will was followed by the death of the testator before the will had been executed. The plaintiffs, who would have benefited under the new will, brought a claim
b against the solicitors in negligence. Their Lordships had to consider for the first time the correctness or otherwise of the decision in *Ross v Caunters (a firm)* [1979] 3 All ER 580, [1980] Ch 297, in which case Megarry V-C had upheld a claim in negligence brought against solicitors by a disappointed beneficiary under a will which, owing to the solicitors' negligence, had not been properly attested. The principal issue falling for decision by the House of Lords in *White's* case, as
c described by Lord Goff of Chieveley ([1995] 1 All ER 691 at 697, [1995] 2 AC 207 at 254), was 'whether in the circumstances of cases such as *Ross's* case and the present case the testator's solicitors are liable to the disappointed beneficiary'. The majority approved the decision in *Ross's* case and held that they were liable. Lord Goff, who was one of the majority, and with whose reasons Lord Browne-
d Wilkinson and Lord Nolan agreed ([1995] 1 All ER 691 at 718, 736, [1995] 2 AC 207 at 276, 295), explained a primary consideration which led him to conclude that a duty of care should be owed by the testators' solicitor to a disappointed beneficiary as follows:

e 'In the forefront stands the extraordinary fact that, if such a duty is not recognised, the only persons who might have a valid claim (ie the testator and his estate) have suffered no loss, and the only person who has suffered a loss (ie the disappointed beneficiary) has no claim: see *Ross v Caunters* [1979] 3 All ER 580 at 583, [1980] Ch 297 at 303 per Megarry V-C. It can therefore be said that, if the solicitor owes no duty to the intended beneficiaries, there
f is a lacuna in the law which needs to be filled. This I regard as being a point of cardinal importance in the present case.' (See [1995] 1 All ER 691 at 702, [1995] 2 AC 207 at 259–260.)

Lord Goff expressed his conclusion thus:

g 'In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle [see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465] by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended
h beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.' (See [1995] 1 All ER 691 at 710, [1995] 2 AC 207 at 268.)

[19] In *Carr-Glynn v Frearsons (a firm)* [1998] 4 All ER 225, [1999] Ch 326 a
j testatrix had executed a will drawn up by the defendants' solicitors in which she left the plaintiff, her niece, her share in a property which the testatrix owned jointly with her nephew. She subsequently died without having severed the joint tenancy. On her death her share in the property thus automatically vested in the nephew as surviving joint tenant, and the gift in the will to the plaintiff was ineffective. The plaintiff sued the defendants claiming damages for breach of a duty of care owed to her to ensure that the testatrix was properly advised of the need to sever the joint tenancy, in order for the gift in the will to take effect.

Lloyd J ([1997] 2 All ER 614) dismissed the claim, holding that the defendants had not been negligent and that, in any event, where a solicitor's breach of his duty of care to a testatrix in preparing her will resulted in a loss to the estate, the solicitor owed no duty of care to an intended beneficiary under the will, whose gift was thereby rendered ineffective.

[20] The Court of Appeal allowed the plaintiff's appeal. Chadwick LJ, who delivered the leading judgment and with whose reasoning Thorpe LJ and Butler-Sloss LJ agreed, having found negligence on the part of the defendants, proceeded to consider the question of duty of care. He referred ([1998] 4 All ER 225 at 231, [1999] Ch 326 at 333) to the second of the two passages from Lord Goff's judgment in *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207 and said this:

'At first sight the facts in the present case take it outside the principle as stated by Lord Goff. This is a case in which the estate, itself, would have a remedy. The question, therefore, is whether the remedy which the House of Lords was prepared to extend to a disappointed beneficiary in *White v Jones* is confined to those cases, of which *White v Jones* was an example, in which the estate itself has no remedy—so that, absent a remedy at the suit of the beneficiary, there is no remedy at all; or is to be further extended to cases in which the estate does have a remedy but where the estate's remedy will be of no advantage to the disappointed beneficiary [because the estate's remedy would have enured for the benefit of residue instead of the disappointed specific legatee]. The judge answered the question in the negative. He said ([1997] 2 All ER 614 at 628): "It seems to me unacceptable that solicitors should be at risk of two separate claims for identical loss at the suit both of the personal representatives and a beneficiary, when recovery by one would not bar recovery by the other." I agree. If that were the result which the law required it would properly be regarded as unacceptable and unjust. But, as it seems to me, it ought properly [to] be regarded as equally unacceptable and unjust if the result which the law requires is that, because of the solicitors' negligence, the loss which the personal representatives are able to recover on behalf of the estate passes to someone who was not the beneficiary intended by the testatrix; leaving the intended beneficiary without recompense.' (See [1998] 4 All ER 225 at 231–232, [1999] Ch 326 at 333–334.)

[21] A little later Chadwick LJ observed:

'If the law in this field is to reflect what would generally be recognised as acceptable and just, the application of the relevant principles should lead to the result that the estate and its beneficiaries are restored to the position in which they would have been if the solicitors had not failed in their duty to the testatrix.' (See [1998] 4 All ER 225 at 232, [1999] Ch 326 at 334.)

After pointing out ([1998] 4 All ER 225 at 233, [1999] Ch 326 at 336) that, on a proper analysis, the service of a notice of severance was part of the will-making process and that the plaintiff was as much an intended beneficiary of the severance as she was of the specific gift in the will, he said:

'I am satisfied that, subject to the need to avoid the injustice of imposing double liability on the solicitors, it would be consistent with the approach of the majority of the House of Lords in *White v Jones* to recognise that the appellant is a person in relation to whom the assumption of liability by the

a respondents towards their client, the testatrix, ought to be extended.’ (See [1998] 4 All ER 225 at 233–234, [1999] Ch 326 at 336.)

[22] However, Chadwick LJ twice repeated the point ([1998] 4 All ER 225 at 234, [1999] Ch 326 at 336–337) that it could not be right to fashion a remedy to avoid injustice to the disappointed legatee if that itself would lead to the injustice of imposing a double liability on the solicitors, by exposing them to claims for loss of the relevant property at the suit of both the personal representatives and the specific legatee. He gave his answer to this problem in the following passage which is of crucial importance in the present case:

c ‘The key, as it seems to me, is to recognise that, in a case of this nature, the duties owed by the solicitors are limited by reference to the kind of loss from which they must take care to save harmless the persons to whom those duties are owed—see per Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 581, [1990] 2 AC 605 at 627, cited by Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd*, *United Bank of Kuwait plc v Prudential Services Ltd*, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 370, [1997] AC 191 at 212.

d The duty owed by the solicitors to the testator is a duty to take care that effect is given to his testamentary intentions. That is the context in which the duty to take care to ensure that the relevant property forms part of the estate arises. The duty in relation to the relevant property is a duty to take care to ensure that that property forms part of the testator’s estate so that it can pass to the intended beneficiaries on his death. It is not in contemplation, in a case of this nature, that the testator will dispose of the property in his lifetime. The loss from which the testator and his estate are to be saved harmless is the loss which those interested in the estate (whether as creditors or as beneficiaries) will suffer if effect is not given to the testator’s testamentary intentions. The duty owed by the solicitors to the specific legatee is not a

e duty to take care to ensure that the specific legatee receives his legacy. It, also, is a duty to take care to ensure that effect is given to the testator’s testamentary intentions. The loss from which the specific legatee is to be saved harmless is the loss which he will suffer if effect is not given to the testator’s testamentary intentions. That is the loss of the interest which he would have had as a beneficiary in an estate comprising the relevant property. The duties owed by the solicitors to the testator and to the specific legatee are not inconsistent. They are complementary. To the extent that the duty to the specific legatee is fulfilled, the duty to the testator is fulfilled also. If and to the extent that the relevant property would have been distributed to the

h specific legatee in the ordinary course of administration, the other persons interested in the estate can suffer no loss. In so far as the relevant property or any part of it would have been applied in the ordinary course of administration to discharge liabilities of the estate, the specific legatee can suffer no loss. To impose duties on the solicitors which enabled both the

j personal representatives and the specific legatee to recover for the loss of the relevant property would involve both double recovery and double liability. The duties would not be commensurate with the loss against which the persons to whom they were owed were to be saved harmless. But there is no reason in principle, as it seems to me, why, in cases of this nature, the law should not impose complementary duties; so that for breach of the one the specific legatee is enabled to recover the loss which he has suffered and for

breach of the other the personal representatives are enabled to recover, and recover only, the loss suffered by the other persons interested in the estate. Justice will be done to each of the three interests concerned—the specific legatee, the estate and the solicitors—if solicitors who, in the course of carrying out the testator's testamentary instructions, have failed to take care to ensure that the relevant property forms part of the estate are liable to compensate the specific legatee for the loss which he has suffered as a result of the breach of duty owed to him; and are liable to compensate the estate for the loss (if any) suffered by the other persons interested in the estate for breach of the duty owed to the testator.' (See [1998] 4 All ER 225 at 234–235, [1999] Ch 326 at 337–338.)

[23] As will have appeared, the problem facing the court in *Carr-Glynn's* case was that of reconciling its desire to recompense the disappointed specific legatee for the loss of the half share in the property, in accordance with what it considered the just application of the principle of *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, while at the same time ensuring that the defendant solicitors would not be exposed to a claim by the testatrix's personal representatives for the same loss, which the court considered would be obviously unjust. The court met this problem by an analysis of the duty owed by the solicitors to the testatrix in the light of the principles stated by Lord Bridge and by Lord Hoffmann. This duty, it considered, was a duty to take care that the property formed part of the testatrix's estate, so that it could pass to the specific legatee on her death; the loss from which the testatrix and her estate was to be saved harmless was the loss which those interested in her estate, whether as the specific legatee or as creditors, would suffer if, as a result of the solicitors' negligence, effect could not be given to her testamentary intentions. It is in my judgment necessarily implicit in the judgment of Chadwick LJ that the court would have regarded the personal representatives themselves as having no right of recovery in respect of the lost half share of the relevant property, at least if the estate was solvent. Any such recovery would have enured for the benefit of the residuary beneficiary rather than the intended specific legatee. The court's objective was to ensure that the compensation ultimately found its way to the pocket where the loss had ultimately fallen.

[24] Still more recently, in *Worby v Rosser* [1999] Lloyd's Rep PN 972, proceedings were brought by three beneficiaries under a will made in 1983 against a solicitor who prepared a later will which, after contested proceedings, was refused probate. The plaintiffs sought to recover from the solicitor the substantial costs which they incurred in resisting probate of the later will. It was said that the solicitor owed a duty to them as beneficiaries named in the 1983 will to take care that the testator did not execute a later will in which he lacked testamentary capacity and was subject to the malign influence of a third party. The Court of Appeal rejected the claim, holding that there was no lacuna which required to be filled, as there had been in *White's* case and *Carr-Glynn's* case. In the words of Chadwick LJ (at 978):

'If the solicitor's breach of duty under his retainer has given rise to the need for expensive probate proceedings, resulting in unrecovered costs, then, *prima facie*, those costs fall to be borne by the estate for the reasons which I have already sought to explain. If the estate bears the costs thereby and suffers loss then, if there is to be a remedy against the solicitor, it should be the estate's remedy for the loss to the estate. There is no need to fashion an

- a independent remedy for a beneficiary who has been engaged in the probate proceedings. His or her costs, if properly incurred in obtaining probate of the true will, can be provided for out of the estate. If there has been a breach of duty by the solicitor, the estate can recover from the solicitor the additional costs (including the costs to which the beneficiary is entitled out of the estate). The practical difficulties which would be likely to arise if solicitors were held to owe duties directly to beneficiaries under earlier wills provide powerful support for the view that it would not be appropriate to provide a remedy in circumstances in which it is not needed.'
- b

- For present purposes the significance of this case lies in the fact that the Court of Appeal accepted that in a case where a solicitor's negligence in regard to the preparation or execution of a will was the cause of expensive probate proceedings after the testator's death, this could give rise to a claim for damages against the solicitors at the suit of the testator's personal representatives for the benefit of the estate generally. On the particular facts of that case, the testator's personal representatives would have had a good cause of action for the loss suffered and, if they had pursued this claim, the solicitor would have been exposed to no double liability.
- c
- d

The claimant's case

- [25] The argument presented to Eady J on behalf of the claimant by Mr Onions QC and the reasons which led Eady J to accept that argument sufficiently appear from paras 20 to 38 of his judgment ([2000] Lloyd's Rep PN 805 at 808–812). I hope and believe that I will do no injustice to the submissions presented by Mr Onions to this court in support of the judgment, if I summarise their essential features as follows.
- e

- [26] Unlike *White's* case and *Carr-Glynn's* case, this is not a case in which the court is required to fashion a remedy as a result of a lacuna in the law. There is no lacuna here. It is not contended that the claimant has a personal cause of action arising from a duty of care owed to him as a residuary legatee under the February will. He sues as the Testatrix's sole personal representative. The purpose of the defendants' retainer in September 1989 was to procure a legally effective will for her to execute in accordance with her latest testamentary intentions. The defendants' admitted negligence in carrying out the terms of their retainer involved a breach of their duty to the Testatrix and in the event caused loss to her estate by exposing it to an expensive probate action, the costs of which were in the event ordered to be paid out of the estate in accordance with the court's usual practice. Her cause of action for the breach of the duty owed to her vested in her personal representative and he can enforce it, no less than the personal representatives could have enforced their cause of action in *Worby's* case.
- f
- g
- h

- [27] The submissions made on behalf of the claimant continue on the following lines. The fact that the defendant solicitors have made a voluntary payment to the disappointed beneficiaries by way of settlement of their claims is irrelevant in the present case, and cannot have absolved them from their duty to the Testatrix, in respect of which the cause of action is now vested in her personal representative. Even if the disappointed beneficiaries have been compensated, the Testatrix's assets have none the less been diminished by the costs of the will action. To compel the defendants to reimburse the claimant for the costs of the will action would not impose double liability on the defendants, since they would be compensating not for the same loss but for a separate and quite distinct type
- j

of loss. The payment to the disappointed beneficiaries was a collateral payment which did not even purport to compensate them for the costs of the will action. This was not a loss which they had incurred because, in view of the invalidity of the September will, they had no interest in the estate out of which the costs were being paid. The payment to the disappointed beneficiaries was made because, in the event, the defendants' breach of duty had deprived them of their interests as intended residuary beneficiaries under the September will. Even though they had been compensated, the Testatrix's assets, as a result of the defendants' breach of duty to the Testatrix, had been reduced by the amount of the wasted costs of the will action. The defendants had an obligation to the Testatrix to ensure that that kind of loss was not incurred and would not cause a diminution in the estate. There is no occasion here for the court to impose 'complementary' duties, as there was in *Carr-Glynn's* case. The crucial question, it is submitted, is: has the Testatrix's estate been compensated for the relevant loss caused by the defendants' breach of duty to the Testatrix, that is to say for the costs of the will action? The answer, it is submitted, must be No and the claimant must accordingly be entitled to succeed in these proceedings.

The defendants' case

[28] These submissions, which were ably and forcefully presented by Mr Onions, at first sight have considerable logical force. Before explaining why I find myself unable to accept them, I mention three points which I believe to be common ground on this appeal. First, the retainer is the basis of the duties which a solicitor owes to his client. And '[t]he extent of his duties depends on the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do' (see *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571 at 583, [1979] Ch 384 at 402 per Oliver J). Secondly, on the facts of the present case, as the judge put it, 'the purpose of the retainer was to procure a legally effective will for Miss Tresawna to execute in accordance with her latest testamentary intentions and thus to give effect to those intentions' (see [2000] Lloyds Rep PN 805 at 808). Thirdly, while the defendants' duty of care was owed to the Testatrix herself and to the intended beneficiaries under the September will, it was *not* owed either to her personal representatives or to the residuary beneficiaries named in the February will. Indeed the imposition of any such duty would have imposed on the defendants an unacceptable conflict of interest.

[29] However, with all respect to the judge's judgment and to the claimant's argument, neither of them in my judgment, in considering the duty owed by the defendants to the Testatrix, gave sufficient consideration to the question whether the alleged duty was a *duty in respect of the kind of loss which in the event was suffered*. And this was the main thrust of the argument presented by Mr Guy Mansfield QC on behalf of the defendants.

[30] As Lord Hoffmann said in his judgment in *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 370, [1997] AC 191 at 211–212:

'A duty of care such as the valuer owes does not, however, exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed

a to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders
b who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said ([1990] 1 All ER 568 at 581, [1990] 2 AC 605 at 627): "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless." In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was
c owed.'

d All their Lordships agreed with Lord Hoffmann's judgment. Though these observations were made in a case which concerned the duty owed by a valuer, I see no reason why any different principles should apply in the case of solicitors. However, as Carnwath J observed in *British Racing Drivers' Club Ltd v Hextall*
e *Ersine & Co (a firm)* [1996] 3 All ER 667 at 681:

'It needs of course to be borne in mind that, in cases of solicitor's negligence, it is unlikely that the conduct of the solicitor will itself be the direct cause of the damage which is suffered. More usually the basis of the claim is the solicitor's failure to protect the client against some other effective
f cause. The question, therefore, is whether the particular loss was within the reasonable scope of the dangers against which it was the solicitor's duty to provide protection.'

[31] Accordingly, in the present case, it is necessary to determine the scope of the duty of care owed by the defendants to the Testatrix by reference to the kind
g of damage from which they had to take care to keep her harmless, having regard to the terms of their retainer. Having such regard, I think it clear that this kind of damage was the loss which those who would become interested in her estate, whether as beneficiaries under the September will or as creditors, would suffer if effect were not given to her latest testamentary intentions. It was *not* the loss
h which the various classes of beneficiaries named in the February will would suffer in that event, because the Testatrix had no wish or intention that the February will should have any effect after she had signed the September will and the two deeds of gift had been perfected.

[32] The duties owed by the defendants (in contract) to the Testatrix and (in
j tort) to the beneficiaries named in the September will were not inconsistent, but complementary. In the light of *Carr-Glynn v Frearsons (a firm)* [1998] 4 All ER 225, [1999] Ch 326, the defendants were under an indisputable liability to compensate the residuary beneficiaries under the September will for the full amount of the residuary estate, undiminished by the costs of the will action, and they were in my judgment right in doing so. However, following what (as explained above) I understand to be the rationale of that decision, I think that the defendants could

not at the same time be under a liability to the Testatrix's personal representative in respect of these same costs. It is true that in *Carr-Glynn's* case the damages recovered by the disappointed beneficiaries represented precisely the same sum as that which the testator's personal representatives would have sought to recover if they had chosen to sue the solicitors—namely the value of the lost half share of the relevant property. If one looks at the present case as a matter of strict analysis, I agree with Mr Onions that the damages which the claimant now seeks to recover do not represent precisely the same sum as that which formed part of the award to the disappointed beneficiaries. The former represents an actual sum which, as a result of the defendants' negligence, is not included in the Testatrix's net estate, falling to be dealt with under the February will. The latter was a notional sum which, but for the defendants' negligence, would have been included in the Testatrix's net estate, falling to be dealt with under the September will. In substance, however, the two sums represent the same monetary loss. In my judgment this is the relevant point for present purposes.

[33] The matter may be tested in this way. In *Carr-Glynn's* case Chadwick LJ suggested ([1998] 4 All ER 225 at 253, [1999] Ch 326 at 338) that it would have been appropriate (though not essential) for both the personal representatives and the specific legatee to be parties to an action brought by either against the solicitors. In the present case, if a successful application had been made for the present claimant's action and the disappointed beneficiaries' action to be consolidated, the court, when the case came to trial, would in the light of *Carr-Glynn's* case presumably have regarded itself as bound to award the disappointed beneficiaries damages equal in amount to the net residuary estate of the Testatrix, undiminished by the costs of the will action. I cannot, however, believe that the court would have proceeded in addition to award the claimant a sum of damages equal to the costs of the will action. To have done so would in substance have involved the double liability and double recovery which the Court of Appeal, in affording the remedy for the assistance of the disappointed beneficiary in *Carr-Glynn's* case, was so explicitly determined to avoid. And the money recovered would have gone into the pockets of persons whom the Testatrix did not intend to benefit as her residuary legatees.

[34] In the events which have happened, if there proves to be a residue for distribution, the two residuary beneficiaries under the February will (Mrs Arthur and the claimant himself) will be better off than they would have been if there had been no breach of duty on the part of the defendants, because they would have received no part of the residuary estate if the September will had been effective. In reaching my conclusions, I am fortified by the consideration that if there proves to be a residue, justice scarcely demands that these benefits, unintended by the Testatrix, to whom alone the defendants owed the duty of care now invoked by the claimant, should be received by the claimant at the expense of the defendants.

Conclusions

[35] For the reasons set out above the judge's order cannot stand, although I have great sympathy for him, because I have not found it an easy case. I would therefore allow this appeal. I would answer questions (1)(a) and (b) submitted to the judge in the negative. On the information before us, it appears that question (2) does not arise, but I would give the parties liberty to apply to a judge of the Queen's Bench Division to apply on appropriate evidence, should it become relevant.

a **LONGMORE LJ.**
 [36] I agree.

BROOKE LJ.
 [37] I also agree.

Appeal allowed. Permission to appeal refused.

Dilys Tausz Barrister.

Vinos v Marks & Spencer plc

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON AND MAY LJJ

8 JUNE 2000

Claim form – Service – Extension of time for service – Whether court having general power to extend time for service of claim form where application for extension made after expiry of time prescribed for service – CPR 1.2, 3.1(2), 3.10, 7.6(3).

The claimant, V, suffered injuries in an accident at work. After lengthy negotiations with the defendant's insurers had failed to produce a final settlement, V's solicitors issued proceedings about a week before the expiry of the limitation period. Due to an oversight, however, they did not serve the claim form until nine days after the expiry of the four-month period prescribed by the CPR. V subsequently applied for an extension of time for serving the claim form, while the defendant applied to set aside service. Under CPR 7.6(3)^a, where a claimant applied for an order to extend the time for service of the claim form after the end of the prescribed period for service, the court could make such an order 'only if' (a) the court had been unable to serve the claim form, or (b) the claimant had taken all reasonable steps to serve the claim form but had been unable to do so, and (c) in either case, the claimant had acted promptly in making the application. The district judge held that he had no discretion to extend time since the case fell outside paras (a) and (b) of r 7.6(3). Accordingly, he dismissed V's application and granted the defendant's application. The district judge's decision was upheld by the circuit judge, and V appealed to the Court of Appeal. On the appeal, V accepted that he could not rely on r 7.6(3) or on r 3.1(2)^b which gave the court a power to grant a post-expiry application for an extension of time for complying with a rule except where the CPR provided otherwise. He nevertheless contended that the court had power to grant the extension under CPR 3.10^c which provided that where there had been an error of procedure, such as a failure to comply with a rule, the court could make an order to remedy the error. In particular, V contended that r 3.10 contained a general power to rectify matters where there had been an error of procedure, that a failure to serve the claim form within the prescribed period was an error of procedure and that the only restriction on the power in r 3.10 was that to be derived from the CPR's overriding objective, namely to enable the court to deal with cases justly. Alternatively, he contended that r 1.2^d, which required the court to give effect to the overriding objective when interpreting any rule, meant that any conflict or ambiguity between rr 3.10 and 7.6(3) was to be resolved by a liberal interpretation of r 3.10 which achieved the overriding objective.

Held – Where a claimant, after the expiry of the time limit for serving a claim form, applied for an order extending the time for service, the court had no power

a Rule 7.6(3) is set out at p 787 c d, below

b Rule 3.1 provides, so far as material: '... (2) Except where these Rules provide otherwise, the court may—(a) extend ... the time for compliance with any rule ... (even if an application for extension is made after the time for compliance has expired) ...'

c Rule 3.10 is set out at p 788 g, below

d Rule 1.2 provides: 'The court must seek to give effect to the overriding objective when it—(a) exercises any power given to it by the Rules; or (b) interprets any rule.'

a to make such an order if the circumstances fell outside CPR 7.6(3). The general words of r 3.10 could not extend to enable the court to do what r 7.6(3) expressly forbade, nor to extend time when the specific provision of the rules which enabled extensions of time specifically did not extend to making that extension of time. Interpretation to achieve the overriding objective did not enable the court to say that provisions which were quite plain meant what they did not mean, nor
 b that the plain meaning should be ignored. Even though r 3.10 differed from r 3.1(2) in not having wording to the effect of 'except where these rules provide otherwise', that was too slight an indication to make r 3.10 override the unambiguous and restrictive conditions of r 7.6(3). Accordingly, the appeal would be dismissed (see p 789 g to j, p 791 e, p 792 a to c, below).

c **Cases referred to in judgments**

Amerada Hess v Rome [2000] TLR 185.

Boocock v Hilton International Co [1993] 4 All ER 19, [1993] 1 WLR 1065, CA.

Cases also cited or referred to in skeleton arguments

- d *Baker v Bowkett's Cakes Ltd* [1966] 2 All ER 290, [1966] 1 WLR 861, CA.
Battersby v Anglo-American Oil Co Ltd [1944] 2 All ER 387, [1945] KB 23, CA.
Biguzzi v Rank Leisure plc [1999] 4 All ER 934, [1999] 1 WLR 1926, CA.
Bua International Ltd v Hai Hing Shipping Co Ltd, The Hai Hing [2000] 1 Lloyd's Rep 300.
Doble v Haymills (Contractors) Ltd (1988) 132 SJ 1063, CA.
Easy v Universal Anchorage Co Ltd [1974] 2 All ER 1105, [1974] 1 WLR 899, CA.
 e *Heaven v Road and Rail Wagons Ltd* [1965] 2 All ER 409, [1965] 2 QB 355.
UCB Corporate Services Ltd v Halifax (SW) Ltd [1999] CPLR 691, CA.

Appeal

f The claimant, Michael Vinos, appealed with permission of Judge McDowall from his decision at the Ilford County Court on 8 December 1999 dismissing Mr Vinos' appeal from the decision of District Judge Thomas on 17 November 1999 whereby he (i) dismissed Mr Vinos' application for an order extending time for the service of the claim form in his action for personal injuries against the defendants, Marks & Spencer plc, and (ii) granted the defendants' application for an order setting aside service of the claim form. The facts are set out in the
 g judgment of May LJ.

Oliver Peirson (instructed by *Cornish & Co*, Essex) for Mr Vinos.

Timothy Lord (instructed by *Beachcroft Wansboroughs*) for the defendants.

h **PETER GIBSON LJ.**

1. May LJ will give the first judgment.

MAY LJ.

j 2. This is an appeal from a decision and orders of Judge McDowall in the Ilford County Court on 8 December 1999. The judge then dismissed the claimant's appeal from the decisions of District Judge Thomas made on 17 November 1999.

3. The appellant, Mr Vinos, was employed by Marks and Spencer plc, the defendants, as an operations supervisor at their premises in High Street, Kensington. On 28 May 1996, he was unloading pallets from the store's goods lift. As he wheeled a pallet out of the goods lift it toppled over and the pallet and the stock on it fell onto him causing him injury. He consulted solicitors on

6 June 1996 and they wrote on his behalf on 20 June 1996 to the defendants notifying a prospective claim for personal injury. The defendants passed the matter to their insurers. On 24 December 1996, the insurers wrote to Mr Vinos' solicitors saying that, without admitting liability, they were willing to compensate him in full for his injuries. They asked for medical evidence to be provided when it was available.

4. Mr Vinos had been quite badly injured in the accident. He suffered injury to his left knee, straining to his back and had bruising to the front of his chest. The back and chest injuries resolved themselves quite quickly, but he continued to have trouble with his left knee. A consultant orthopaedic surgeon diagnosed him as suffering a degenerative tear in the posterior horn of the medial meniscus with fluid within the joint. He continued to have pain and discomfort and limited movement in the knee. He had various treatment and had a course of physiotherapy, but unfortunately by the early summer of 1999 the prognosis was that his injury and symptoms were permanent.

5. There were co-operative negotiations between Mr Vinos' solicitors and the defendants' insurers and the defendants made interim payments to him amounting to £5,000. However, in May 1999, the negotiations were not concluded and the three-year statutory limitation period for bringing proceedings was about to expire. So on 20 May 1999, about a week before the expiry of the limitation period, Mr Vinos' solicitors issued a claim form on his behalf in the Ilford County Court. The claim form gave brief details only of the claim. The value of the claim was stated to be in excess of £250,000. The claim form said that particulars of claim were to follow. These were prepared. The copy which this court has bears the date of 15 July 1999. A schedule of special damages was then prepared. The court's copy of this has the date of 17 September 1999.

6. Mr Vinos' solicitors did not serve the claim form on the defendants when it was issued. They wrote to the defendants' insurers telling them that proceedings had been issued. The insurers apparently had some problems finding their papers. It was agreed that the solicitors would serve the proceedings on the defendants directly. But they did not do so until they posted a letter enclosing the claim form, the particulars of claim and the schedule of special damages on 27 September 1999. This resulted under CPR 6.7 in deemed service being effected on 29 September 1999. It is accepted on behalf of Mr Vinos that this was nine days after the expiry of the four-month period after the date of issue within which r 7.5 stipulates that the claim form had to be served. The solicitors have no explanation for this failure other than that it was an oversight. By this stage, of course, the statutory limitation period had run out.

7. On 21 October 1999 Mr Vinos applied for an extension of time for serving the claim form and for an order remedying the error which his solicitors had made. On the same day, the defendants applied for service of the claim form to be set aside and for costs on the ground that the claim form was not served within the four month period. The district judge dismissed Mr Vinos' application for an extension of time and acceded to the defendants' applications. Judge McDowall dismissed Mr Vinos' appeal against the district judge's decision, made costs orders which by agreement were not to be enforced unless Mr Vinos recovered compensation from the Solicitors' Indemnity Fund, and ordered repayment of the interim payment of £5,000. He also gave permission to appeal to this court, notwithstanding that the appeal would be a second appeal, which the terms of the then current Court of Appeal Practice Direction discouraged, where both the district judge and the judge had reached the same conclusion.

a 8. CPR 7.5 provides, subject to exceptions which do not apply in this case, that a claim form must be served within four months after the date of issue. It is accepted that the claim form was not served within that four months. Rule 7.6(1) provides that the claimant may apply for an order extending the period within which the claim form may be served. Rule 7.6(2) provides as a general rule that an application to extend the time for service must be made within the period for serving the claim form specified by r 7.5 or within the period for service specified in an order extending the initial period. So the general rule is that an application for an extension has to be made before the stipulated period for service has run out. In the present case the application was made after the stipulated period had run out.

b 9. Rule 7.6(3) provides:

c 'If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—(a) the court has been unable to serve the claim form; or (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and, d (c) in either case, the claimant has acted promptly in making the application.'

10. In the present case, the judge held that Mr Vinos had acted promptly in making the application, but the court had not been unable to serve the claim form—it had not been asked to do so—and Mr Vinos by his solicitors had not taken all reasonable steps to serve the claim form but been unable to do so—the solicitors had simply made an error and had allowed the time to run out. So r 7.6(3) not only did not empower the court to extend the time but, by virtue of the words 'only if', positively precluded the court from doing so. This was the essence of the district judge's and the judge's reasoning. The judge held that the court had no discretion to consider whether to extend time. He noted that e f r 3.1(2)(a) empowers the court to extend time for compliance with any rule even if an application for extension is made after the time for compliance has expired. But that power is expressed to apply 'except where these rules provide otherwise' and r 7.6(3) does provide otherwise in that it prescribes the only circumstances in which the court is able to extend the period for serving the claim form if the application is made after the period for service has expired.

g 11. The judge said this on the subject of discretion:

h 'It is accepted by the defence that if the court had a discretion the court would only realistically exercise it in favour of the claimant, because it is not suggested for a moment that any prejudice has arisen or that any other considerations would apply to say that any kind of injustice would be done to the defendant.'

12. Having discussed the meaning of r 7.6, the judge said this:

j 'In this matter I find myself distinctly unhappy as to the correct approach. The instinct that one has is to say, "No harm is done, let the action proceed", so that the appropriate person, that is the defendants' insurers, can meet the claimant's apparently justified claim for compensation. But on the other hand it does seem to me that where the rules have specifically provided for failure to serve a claim form within a set time and provided two, and only two, circumstances under which extensions can be given, that it would be wrong to ignore those. It seems to me, therefore, that I am persuaded that

a
a rigid interpretation is called for, and that accordingly the district judge was right in the decision which he made. I wish to repeat, for the avoidance of any doubt at all, that it is not merely a matter of the defendants' concession, that I would make it clear that if and in so far as I was persuaded that I did have a discretion, it seems to me overwhelmingly a case where I would have exercised it in favour of the claimant. I think that if I had been exercising such a discretion it would have been my concern to make sure that the appropriate person bore the costs of this unfortunate hiccup in the progress of the claimant's case—in other words I would have needed a lot of persuading not to make the solicitors pay the entire costs of what was their fault. But as it is, it seems to me that the order which I must make is to refuse this appeal. I record again, as a side observation, that I am comforted to this extent in terms of overall justice: that it is quite plain that the claimant, Mr Vinos, is going to receive 'an appropriate level of compensation', and that the only live question in one sense was whether it was going to be recovered from the defendant's insurers or from the Solicitors' Indemnity Fund.'

b
c

13. The unease which the judge expressed in the earlier part of this last passage from his judgment no doubt influenced him in giving permission to appeal even though the appeal would be a second appeal. Although it is of largely historic interest only, now that there is a new structure for appeals to be found in CPR Pt 52 and its Practice Direction which came into force on 2 May 2000, I am inclined to think that the judge was right to do so, even though, as will appear, I consider that his decision was correct and that this appeal should be dismissed. (Under s 55 of the Access to Justice Act 1999 and CPR 52.13, for second appeals permission may now, subject to transitional provisions, only be given by the Court of Appeal.)

d
e

14. Mr Vinos' essential case on this appeal is that the overriding objective of the CPR, r 1.2 and r 3.10 give the court a discretion to extend the time for serving the claim form and that the judge was wrong to decide otherwise. The overriding objective of the rules is to enable the court to deal with cases justly. By r 1.2, the court is obliged to give effect to the overriding objective when it exercises any power given to it by the rules or when it interprets any rule. Rule 3.10 provides:

f

'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.'

g

15. Mr Peirson on behalf of Mr Vinos accepts that the application to extend time could not be made under r 7.6(3) nor under r 3.1(2)(a). But he submits that the judge was wrong to hold, as he did, that r 3.10 did not give the court a discretion, which the judge would clearly have exercised in Mr Vinos' favour if he had decided that there was a discretion.

h

16. Mr Peirson submits that r 3.10 contains a general power to rectify matters where there has been an error of procedure. Not serving the claim form within the period prescribed by r 7.5 was an error of procedure. The judge was wrong to hold that r 7.6(3) positively prevented him from extending time. The power conferred by r 3.10 is not restricted to provisions in other rules, as is r 3.1(2) by its introductory words 'except where these rules provide otherwise'. The only restriction on the power in r 3.10 is that to be derived from the overriding objective. Alternatively, Mr Peirson submits that r 1.2 obliges the court to give

j

a effect to the overriding objective when it interprets the rules, and any conflict or ambiguity between rr 3.10 and 7.6(3) should be resolved by a liberal interpretation of r 3.10, which achieves the overriding objective. The discretion which, it is submitted, r 3.10 gives is a general discretion whose ambit is not limited to the considerations to be found in r 7.6(3). To the extent that Colman J decided otherwise in *Amerada Hess v Rome* [2000] TLR 185, he was, it is submitted, wrong.

b 17. Mr Lord, on behalf of the defendants, made written submissions and Mr Peirson made oral submissions by reference to what they submit the position would have been under the former Rules of the Supreme Court. In my judgment, these submissions are not in point. The CPR are a new procedural code, and the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former rules. The court is not in the first instance concerned with the exercise of a discretion. Decisions about the exercise of the court's discretion to strike out cases for delay are not in point. There is, in my judgment, no basis for supposing that r 7.6 in particular was intended to replicate, or for that matter not to replicate, the provisions of former rules as they had been interpreted.

c 18. Mr Lord emphasises that the words 'only if' in r 7.6 expressly limit the circumstances in which the court has power to extend time, when the application is made after the period has run out, to circumstances which do not apply in this case. He submits that Pt 3 is concerned with case management decisions and that r 3.10 does not come into play until proceedings are properly started by service of the claim form; that the power under r 3.10 cannot extend to enable the court to do what r 7.6 specifically provides it may not do; that r 3.10 cannot extend to enable the court to extend a time period when the part of Pt 3 which specifically provides for extending time periods—r 3.1(2)—does not apply because of the words 'except where these rules provide otherwise'; that an interpretation of r 3.10 wide enough to make r 7.6(3) nugatory would also render ineffective many, if not all, of the other requirements of the rules expressed in mandatory terms; that interpretation of the rules to give effect to the overriding objective should not result in the court making exclusively discretionary decisions unregulated by any structure; and that a main element of the overriding objective is that civil litigation should be conducted without delay. If necessary, Mr Lord seeks to withdraw the concession made before the judge that, if there were a discretion, it would be bound to be exercised in Mr Vinos' favour.

g 19. In my judgment, the judge's conclusions were correct essentially for the reasons which he gave, which I express in my own words as follows.

h 20. The meaning of r 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out 'only if' the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods—r 3.1(2)(a)—does not apply because of the introductory words. The general words of r 3.10 cannot extend to enable the court to do what r 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time—calling it correcting an error does not change its substance. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos' case is a

deserving case, the rules must be interpreted to accommodate his particular case. The first question for this court is, not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the CPR to extend the period for service of a claim form if the application is made after the period has run out and the conditions of r 7.6(3) do not apply. The merits of Mr Vinos' particular case are not relevant to that question. Rule 3.10 concerns correcting errors which the parties have made, but it does not by itself contribute to the interpretation of other explicit rules. If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos' solicitors in this case may be muted and limited to one error capable of being represented as small; but there are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in r 7.6(3), your claim is lost and a new claim will be statute-barred. You have had three years and four months to get things in order. Sensible negotiations are to be encouraged, but protracted negotiations generally are not. In the present case, there may have been an acknowledged position between the parties that the defendants' insurers would pay compensation; but it is not suggested that they acted in any way which disabled the defendants in law or equity from relying on the statutory limitation provisions and on the CPR as properly interpreted.

21. In the *Amerada Hess* case, Colman J had to consider in complicated circumstances whether 40 writs had been effectively served on defendants who were Lloyds' underwriters. He concluded that none of them had been effectively served. All the relevant events took place before the CPR came into force, but applications on behalf of the claimants to recover the position were made after they came into force. These included both applications under the former Rules of the Supreme Court and under CPR 3.10. Counsel presented the applications on the basis of the provisions of the former Rules of the Supreme Court and I read Colman J's decision to be under those provisions. He made extensive reference to authorities decided under the former rules; but he also considered what the position would be under the CPR and specifically considered rr 7.6 and 3.10. Of these he said:

'In a case where the claimant has effected service ineffectively prior to expiration of the period for validity for service under r 7.5 and, after that period, applies to remedy that "error of procedure" under r 3.10, there is no reason why the court should not exercise its discretion to grant what is in substance and in effect an extension of time for service by reference to the considerations identified in r 7.6(3) and every reason why it should. The overriding objective in r 1.1 does not, in my judgment, lead to any different approach. For there to be different or wider discretionary considerations in relation to granting what is in substance the same relief under r 3.10 from those under r 7.6 would be open to those very objections in principle which

a have persuaded me that the decision in *Boocock v Hilton International Co* [1993] 4 All ER 19, [1993] 1 WLR 1065 should not be followed.'

22. Having decided that the applications failed under the Rules of the Supreme Court, Colman J then said:

b 'If one approaches the problem by way of r 7.6(3), the difficulties confronting AH are no less insuperable. They have to establish that they took all reasonable steps to serve the claim form but were unable to do so and that they acted promptly in making the application. They are unable to establish either. They did not take any steps to effect service, reasonable or otherwise, between 2 February and 26 March. Nor did they act promptly in making an application. They ought to have applied at the very latest on 22 March, but failed to do so.'

c
d
e 23. I am not sure that Colman J's interpretation of rr 7.6 and 3.10 and their relationship is entirely clear. In the first passage to which I have referred he is, I think, clearly saying that, in cases to which r 7.6(3) applies, there is a discretion under r 3.10 to grant what in substance is an extension of time, but the exercise of the discretion is limited to the considerations in r 7.6(3). In the second passage, he may have been saying that, if the conditions in r 7.6(3) are not fulfilled, there is no discretion and the application fails. There may be little or no practical difference between the two interpretations. But, in my judgment, for the reasons which I have given, the second is correct. On the simple facts of the present case, the conditions in r 7.6(3) were not fulfilled and the court has no discretion. It is not therefore necessary to consider Mr Peirson's submission that, if there were a discretion, Colman J's analysis of its ambit was erroneous.

24. For these reasons, I would dismiss this appeal.

f **PETER GIBSON LJ.**

25. The question raised by this appeal is a question of construction of the CPR. Does the court have the power to extend time for service of a claim form if the claimant only applies after the period provided for in r 7.6(2) has expired and the conditions in r 7.6(3) are inapplicable?

g
h
j 26. The construction of the CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR, unlike their predecessors, spell out in Pt 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But the use in r 1.1(2) of the word 'seek' acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the CPR were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.

27. A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision. Rule 7.6 is a specific sub-code dealing with the extension of time in all cases where the time limits in r 7.5 have not been or are likely not to be met. The sub-code sets out in some

detail what the claimant must do if he wants an extension of time and the circumstances in which the court may exercise the discretion conferred on it to extend the time: r 7.6(3). That the circumstances specified in sub-para (a), (b) and (c) of r 7.6(3) are the sole relevant conditions for the discretion to be exercisable seems to me to be made crystal clear by the words 'only if'. It is plain that the general power in r 3.1(2)(a) to extend time cannot override r 7.6. Nor, in my judgment, could the general power in r 3.10 to remedy a failure to comply with a rule be pressed into service to perform the like function of, in effect, extending time. Even though r 3.10 differs from r 3.1(2) in not having wording to the effect of 'except where the rules provide otherwise', that is too slight an indication to make r 3.10 override the unambiguous and restrictive conditions of r 7.6(3). a
b

28. I reach that conclusion on the wording of the CPR alone. Like May LJ, I have not found helpful reference to the Rules of the Supreme Court, couched as they were in different and less strong language, nor the cases decided thereunder. For these as well as the reasons given by May LJ, I also would dismiss this appeal. c

Appeal dismissed.

James Wilson Barrister (NZ).

a Nangleman v Royal Free Hampstead NHS Trust

[2001] EWCA Civ 127

b COURT OF APPEAL, CIVIL DIVISION

THORPE AND BUXTON LJ

23 JANUARY 2001

c *Claim form – Service – Service on defendant’s solicitors – Whether rules requiring claimant to serve claim form on solicitors nominated by defendant to accept service – CPR 6.5, 7.5, 7.6(3).*

d In 1996 the claimant, N, sustained an injury at work while employed by the defendant NHS trust. She instructed a solicitor, M, to act for her. Proceedings were issued on 4 May 1999, the last day of the limitation period. N then had four months in which to serve the claim on the trust. Under CPR 6.5(2)^a, a party was required to give an address for service within the jurisdiction. Rule 6.5(3) provided that, where a party did not give the address of his solicitor as his address for service, and resided or carried on business within the jurisdiction, he had to give his residence or place of business as his address for service. Under r 6.5(4),
e ‘any document’ to be served by, inter alia, first class post or fax had to be sent or transmitted to the address for service given by the party to be served. Rule 6.5(5) provided that where a solicitor was acting for the party to be served, and the document to be served was not the claim form, the party’s address for service was the business address of his solicitor. However, r 7.5(1)^b provided that, after a claim form had been issued, it had to be served on the defendant. In prior
f correspondence with M, the trust’s insurers had stated that they were instructing solicitors to accept service. On 5 July 1999 those solicitors wrote to M’s firm, confirming that they were instructed to accept service. On 31 August M relied on his secretary to serve the claim. Instead of serving on the trust’s solicitors, the claim was sent, wrongly addressed, to the trust itself. M discovered the mistake,
g within time, on the evening of Friday 3 September, and left a taped message for his secretary to telephone the trust’s solicitors to explain what had happened. On Monday 6 September the secretary duly despatched the claim to the trust’s solicitors and it was received the following day. A week later, the trust’s solicitors issued a notice of application, seeking an order that there had not been valid service of the proceedings within the prescribed period. Three days before the
h hearing, which was fixed for 15 November, M’s firm issued a notice of application, seeking an order retrospectively extending time for service to 10 September. The district judge held that the purported service did not comply with the rules, but extended time for service of the claim under r 7.6(3)^c. That rule empowered the court to grant such an extension ‘only if ... (b) the claimant has taken all
j reasonable steps to serve the claim form but has been unable to do so; and ... (c) ... the claimant has acted promptly in making the application [for an extension]’. The judge allowed the trust’s appeal, holding both that the service

a Rule 6.5, so far as material, is set out at [8], below

b Rule 7.5(1) is set out at [6], below

c Rule 7.6, so far as material, is set out at [11], below

had failed by virtue of r 6.5, and that the case fell outside r 7.6(3). N appealed to the Court of Appeal, contending that different regimes applied to the service of a claim form and the service of subsequent documents, and that, in the case of a claim form, the effect of rr 7.5 and 6.5 in conjunction was to give the claimant an option, either to serve on the solicitors who had been nominated for service or on the defendant himself. Alternatively, she contended, *inter alia*, that the judge had been wrong to conclude that r 7.6(3) did not apply on the facts of the case.

Held – Where, as in the instant case, a defendant had elected to give his address for service and nominated his solicitor to accept service shortly after the issue of proceedings and well within the four months allowed for service of the claim form, CPR 6.5(4) required service upon that nominated solicitor. The primary obligation on a party under r 6.5 was to give an address for service, and once there had been compliance with that obligation, ordinarily speaking, service would be at the address given. Paragraph (3) seemed to give a party a choice. If he had not elected to give the business address of his solicitor as his address for service, he could instead give either the address of his residence or, alternatively, the address of his place of business if he carried on business within the jurisdiction. However, the general obligation created by para (2), and the election created by para (3), was then to some extent confined by the terms of para (5). Accordingly, if a party had elected to give either the address of his residence or the address of his place of business as his address for service, the intervention of para (5) required service of any document, other than the claim form, upon the solicitor acting on his behalf in the case, even if his address had not been specifically given as the address for service. That was a rational construction of a somewhat complex provision. Although there might be cases in which the defendant's first intimation of his involvement in litigation was the receipt of the claim form at what would ordinarily be either his residence or his place of business, there would be very many cases in which there would have been protracted correspondence prior to the issue of proceedings. The defendant should be in a position to nominate, at a very early stage, solicitors to accept service on his behalf, and the obligation then had to be on the claimant to use that nomination. It followed that in the instant case there had been a mandatory requirement upon N to serve the claim at the address of the trust's solicitors, that being the address for service given by the party to be served under r 6.5(4). Moreover, the facts of the case fell outside r 7.6(3). When M had discovered the mistake, within time, on 3 September 1999 he could and should have simply faxed the claim to the trust's solicitors. There had been a history of either incompetent or dilatory practice, and it could not possibly be said that N had satisfied the provisions of r 7.6(3)(b) which was intended to cover cases where the person endeavouring to effect service had taken all reasonable steps, but his reasonable efforts had been frustrated by some near insuperable difficulty or obstacle. Similarly, no step had been taken to seek an extension until the hearing was upon N, and she had therefore also failed to pass the hurdle in r 7.6(3)(c). Accordingly, the appeal would be dismissed (see [10], [16]–[18], [21]–[24], below).

Case referred to in judgments

Vinos v Marks & Spencer plc [2001] 3 All ER 784, CA.

Cases also cited or referred to in skeleton arguments

Axa Insurance Co v Swire Fraser Ltd [2000] CPLR 142, CA.

- a *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, [1999] 1 WLR 1926, CA.
Hannigan v Hannigan [2000] 2 FCR 650, CA.
Smith v Probyn [2000] TLR 240.

Appeal

- b The claimant, Carmelita Nangleman, appealed with permission of Chadwick LJ granted on 26 September 2000 from the decision of Judge Colthart at the Clerkenwell County Court on 11 February 2000 allowing an appeal by the defendant, the Royal Free Hampstead NHS Trust, from the order of District Judge Stary on 15 November 1999 retrospectively extending to 10 September 1999 the time for serving the claim form in the action. The facts are set out in the judgment of Thorpe LJ.

c *Andrew Granville Stafford* (instructed by *Pattinson Brewer*) for the claimant.
Timothy Lord (instructed by *Browne Jacobson*) for the defendant.

THORPE LJ.

- d [1] It seems that on 3 May 1996 Carmelita Nangleman sustained an accident whilst at work at the Royal Free Hospital where she was employed by the Royal Free Hampstead NHS Trust. She instructed a solicitor, Mr Matthews. It was necessary for proceedings to be issued within the three-year period allowed by the statute. 3 May 1999 was in fact a bank holiday, so the claim squeaked in by issue on the following day, 4 May 1999. There was then a period of four months within
e which the claim had to be served on the Royal Free Hospital NHS Trust.

- [2] It seems that there had been prior correspondence between Mr Matthews and the insurance company acting for the trust. The insurers notified Mr Matthews' firm that they were instructing solicitors, Browne Jacobson, to accept service. On 5 July 1999 Browne Jacobson wrote to Mr Matthews' firm confirming that
f they were instructed to accept service.

- [3] Prior to completion of the preparation of the particulars of claim, it was necessary for Mr Matthews to obtain expert evidence in the form of a medical report. He did not instruct the specialist until 9 August. The specialist examined the claimant on 18 August and managed to issue a report in writing on the same day. On 31 August Mr Matthews relied on his secretary to serve the claim on the
g defendant. Instead of serving on Browne Jacobson the particulars were addressed to the Chief Executive, the Royal Free Hospital, Pond Street, NE2 2BB. Assuming that it was open to the claimant to serve the defendant direct, first of all, it was not the Royal Free Hospital but the NHS Trust that was the proper defendant. But of far greater significance is that for the correct postcode of NW3 2QG, the
h sender had selected or invented the thoroughly inaccurate postcode, namely NE2 2BB.

- [4] It seems that Mr Matthews was quitting the office for a holiday commencing Saturday, 4 September. On the eve he went through a number of files in which he anticipated some sort of activity during his fortnight's holiday. One of the
j selected files was this and, as he said in a subsequent affidavit, his inspection of the file led him to the discovery that the proceedings had been inadvertently served on the defendant rather than their nominated solicitors. He said that once he had appreciated the mistake, he left a taped message for his secretary to telephone Browne Jacobson to explain what had happened. It seems that on the following Monday his secretary duly dispatched the claim to Browne Jacobson and that it was received on the following day. Not surprisingly, they took the

view that the claim had not been properly served within the four-month period provided by the rules. On 13 September they issued a notice of application, by which they sought an order that there had not been valid service of proceedings in accordance with the CPR. They further took the point that the claimant had elected to sue the wrong defendant. a

[5] That application was fixed to come before the district judge on 15 November. Three days before the fixture, Mr Matthews' firm issued a notice of application seeking orders (1) that there be leave to rectify the description of the defendant, and (2) that time for service of the particulars of claim be extended retrospectively to 10 September. The district judge reached the conclusion that the purported service did not comply with the rules but she exercised a discretion, which she found under CPR 7.6, to extend time to save the claim. The defendant successfully appealed to Judge Colthart, all this in the Clerkenwell County Court. On 11 February 2000 he held that the purported service did not comply with the rules, although on a different ground to that which the district judge had found, but, in considering the application under r 7.6, he reached the reverse conclusion and brought the case to a summary end. The claimant sought permission to appeal, which was granted on 26 September, largely because the court felt that it would be desirable to clarify the difference of view between the district judge and the circuit judge as to whether the purported service failed, by virtue of CPR 6.4, as the district judge had found, or by virtue of r 6.5, as the circuit judge had found. It is now conceded and agreed between counsel that r 6.4, which is a rule specifically dealing with personal service, is of no application to this case. Accordingly, we have only to consider Mr Granville Stafford's submission, that the effect of rr 7.5 and 6.5 in conjunction is that a claimant has effectively an option, either to serve on solicitors who have been nominated for service, or, alternatively, to serve on the defendant himself, provided the document to be served is the claim form. b
c
d
e

[6] Mr Granville Stafford placed considerable emphasis on r 7.5. The heading to the rule is 'Service of a claim form'. Paragraph (1) of the rule states: 'After a claim form has been issued, it must be served on the defendant.' f

[7] That, he says, is a rule of general application, and it replicates the old law, whereby the requirement was always service on a defendant and that service on nominated solicitors was a technical breach of the practice only validated by judicial decision. He then placed great reliance on r 6.5(5). g

[8] In order to understand and determine his submission, it is necessary to set out this rule in its entirety to the conclusion of the fifth paragraph. It reads as follows:

'(1) Except as provided by section III of this Part (service out of the jurisdiction) a document must be served within the jurisdiction ... h

(2) A party must give an address for service within the jurisdiction.

(3) Where a party—(a) does not give the business address of his solicitor as his address for service; and (b) resides or carries on business within the jurisdiction, he must give his residence or place of business as his address for service. j

(4) Any document to be served—(a) by first class post; (b) by leaving it at the place of service; (c) through a document exchange; (d) by fax or other means of electronic communication, must be sent or transmitted to, or left at, the address for service given by the party to be served.

a (5) Where—(a) a solicitor is acting for the party to be served; and (b) the document to be served is not the claim form; the party's address for service is the business address of his solicitor.

(Rule 6.13 specifies when the business address of a defendant's solicitor may be the defendant's address for service in relation to the claim form).'

b [9] So, says Mr Granville Stafford, it is plain that there is one regime for the service of the claim form and a different regime for the service of any subsequent documents within the case. He says that it is easy enough to understand why the rules have been so drafted. The obligation on the claimant to give an address for service arises at the earliest stage when he completes his claim form, for on the reverse of the form and at its foot is a box to be completed with the claimant's or claimant's solicitor's address, to which documents or payments should be sent. c However, he stresses that the defendant's first opportunity comes when he completes the response pack form which accompanies the claim duly served upon him. Accordingly, as he submits, it would be quite inappropriate for rules to require service of the initial claim form otherwise than on the defendant himself, d who has had no preliminary opportunity to comply with the requirement under para (2) of r 6.5 to give an address for service. Once he has had that opportunity and accordingly made compliance with his obligation under para (2), then, thereafter, any document within the proceedings is to be served on the business address of his solicitor. That argument did not appeal to Judge Colthart, who held that the obligation was primarily stated by para (4) of r 6.5, namely, any document to be e served by first class post must be sent to the address for service given by the party to be served.

[10] The comprehension of r 6.5 is not easy at a first reading, and I have reached this conclusion, that despite the powerful submissions that Mr Granville Stafford has advanced, the primary obligation is on a party to give an address for f service, and that once there has been compliance with that obligation, ordinarily speaking, service will be at the address given. Paragraph (3) of r 6.5 seems to give to a party a choice. If he has not elected to give the business address of his solicitor as his address for service, he may instead give either the address of his residence or, alternatively, the address of his place of business if he carries on business within the jurisdiction. But the general obligation created by para (2), and the g election created by para (3), is then to some extent confined by the terms of para (5) of r 6.5. So if a party has elected to give either the address of his residence or the address of his place of business as his address for service, the intervention of para (5) requires service of any document, other than the claim form, upon the solicitor acting on his behalf in the case, even if his address has not been h specifically given as the address for service. It seems to me that this is a rational construction of the somewhat complex provision. There may be cases in which the first intimation that the defendant has of his involvement in litigation is the receipt of the claim form at what will ordinarily be either his residence or his place of business. But there will be many, many cases in which there will have been j protracted correspondence prior to the issue of proceedings, and I suspect that cases such as this, in which the defendant elects to give his address for service and nominates his solicitor to accept service shortly after the issue of the proceedings and well within the four months allowed for service, will be common. In that event, it seems to me right that para (4) should require service upon that nominated solicitor. There will be many instances in which a defendant does not want service either at his residence or at his place of business. It seems to me right that

he should be in a position to nominate, at a very early stage, solicitors to accept service on his behalf, and the obligation must then be on the claimant to use that nomination. Accordingly, I am satisfied that the judge was right to hold as he did in his judgment:

‘It has been argued that that interpretation is wrong because of the wording of CPR 6.5(5) ... Mr Granville Stafford has argued that in effect means that you cannot serve a claim form on a solicitor. That seems to me to be not the appropriate interpretation of the rules. It would render an awful lot of actions incorrectly commenced. All I take that rule to mean is that once you get past the claim form stage then the address for service is deemed to be the business address of the solicitor. So for those reasons therefore it seems to me that, in this case, there was a mandatory requirement upon the claimant to serve at the address of the solicitors, that being the address for service given by the party to be served under r 6.5(4).’

[11] The judge went on to consider the rival application for an extension of time. He held that the claimant had not satisfied either of the requirements to be found in CPR 7.6(3), which reads so far as is material:

‘If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified ... the court may make such an order only if ... (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and, (c) in either case, the claimant has acted promptly in making the application.’

[12] The judge held that the claimant had not taken all reasonable steps but had been unable to serve and, further, that the claimant had not acted promptly in making the application.

[13] Mr Granville Stafford has endeavoured to run an argument which I do not think was really run in front of the judge, that he did not have to get to r 7.6 since this was a case of irregular service rather than no service at all. So, says Mr Granville Stafford, the provisions of CPR 6.1, alternatively CPR 6.8, are there to save the proceedings from premature end. Rule 6.1 provides: ‘The rules in this Part apply to the service of documents, except where ... (b) the court orders otherwise.’

[14] Accepting for the moment that that seems to be widely drawn, I come on to r 6.8 which is headed ‘Service by an alternative method’. It is plain to me that r 6.8 is written to provide regulation of those cases in which there has to be some alternative service, and has no application at all to the questions raised by this appeal. It seems to me that it would be quite wrong to allow the claimant to place any reliance or to derive any benefit from the terms of r 6.1. This court has made plain in the decision in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, that r 7.6(3) is very plain in its meaning and must be equally plainly applied. It is only necessary for me to cite a short passage from the judgment of May LJ (at 789–790 (para 20)), when he said:

‘The meaning of r 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run-out “only if” the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods—r 3.1(2)(a)—does not apply because of the introductory words. The general words of r 3.10 cannot extend to enable the court to do

a what r 7.6(3) specifically forbids, nor to extend time when the specific
provision of the rules which enables extensions of time specifically does not
extend to making this extension of time. What Mr Vinos in substance needs
is an extension of time—calling it correcting an error does not change its
substance. Interpretation to achieve the overriding objective does not enable
b the court to say that provisions which are quite plain mean what they do not
mean, nor that the plain meaning should be ignored.’

[15] That prescription is recognised by Mr Granville Stafford, but it seems to
me that his alternative endeavour to rely on rr 6.1 and 6.8 are even weaker in
their prospect than the endeavour that was made by Mr Vinos. Any consistent
application of the general principles identified by the court in *Vinos*’ case require
c the summary rejection of that argument.

[16] It only remains to consider Mr Granville Stafford’s last submission, namely
that the judge was wrong to have reached the conclusions which he did on the
facts of the case as to the application of r 7.6(3)(b) and (c). The judge, in reviewing
the circumstances, noted what seems to have been a course of brinkmanship
d throughout, namely the issue of the claim on the very last day of the limitation
period, followed by a period of three months inactivity before the forensic
consultant was instructed, followed by the seemingly dilatory dispatch of the
papers to the hospital on 31 August. The judge then considered what Mr Matthews
had done on Friday, 3 September 1999. He made some seemingly fairly charitable
interpretations of the evidence which he had himself given. It is apparent to any
e objective reviewer that what Mr Matthews could have done, and should have
done on 3 September, when he discovered the mistake and when he was still
within time, was simply to have faxed the particulars of claim to Browne
Jacobson. Against that chronology, I do not see how it can possibly be said with
any degree of conviction that the provisions of r 7.6(3)(b) had been satisfied.
f That rule is clearly intended to cover cases where the person endeavouring to
effect service has taken all reasonable steps, but his reasonable efforts have been
frustrated by some near insuperable difficulty or obstacle. All we have here is a
history of either incompetent or dilatory practice, a history that seems to have
more than one chapter.

[17] Finally, in my opinion the judge was right to say that the claimant had
g equally failed to clear the hurdle presented in r 7.6(3)(c). As I have already
recited, although the claimant was aware that no indulgence was to be given, by
13 September at the latest, no step was taken until two months had elapsed and
only when the hearing before the district judge was upon her. It seems to me that
the whole purpose of these rules is to ensure that those who have claims that
h merit judicial determination take the steps that are required of them by the rules,
and in this instance all that I see is a catalogue of what seems to me to be
risk-taking on the part of the claimant, and it seems to me entirely fair in those
circumstances that the judge should have arrived at the conclusion that he did,
strictly perhaps not in the exercise of the discretion, but more in determining that
j the rules precluded him from the exercise of the discretion. For all those reasons
I would dismiss the appeal.

BUXTON LJ.

[18] I agree. The structure of CPR 6.5, with which we are concerned in this
appeal, is at first sight not entirely easy to elucidate, but on reflection I conclude
that that is principally because this rule, as all the rules, has to address both a

situation where a party is acting by a solicitor and a situation where a party is acting in person. That, in my judgment, explains why in r 6.5(3) there appears to be a choice given to a party as to whether he should give as his address for service the business address of his solicitor or the address of his place of residence, and why in r 6.5(4) the service of a document is said to be required at the address for service given by the party, whatever it might be within the rules.

[19] We then, however, come to r 6.5(5), which lays down a specific rule when a solicitor is acting for the party to be served. When that is the case, the address for service is required to be the business address of the solicitor, as far as I can see whether or not that has been specified by the party as his address for service under the preceding rules. A similar limitation is provided by CPR 6.4 with regard to personal service, because where a solicitor is authorised to accept service on behalf of the party, the document must be served on that solicitor, even when the regime is one addressing personal service. As I understand it, the regime in r 6.5(5) is a novelty or an innovation in the CPR which has no exact parallel in the former Rules of the Supreme Court or the County Court Rules. The reason is, in my judgment, clear. It is that when solicitors are involved it is regarded by the rule-maker, if I may say so rightly regarded, as being most likely to advance the objective of the rules in getting actions dealt with promptly and in proper form if all documents are sent to the solicitors without intervention and possible loss or misunderstanding on the part of the lay client. All that, in my judgment, on reflection (I have had to reflect on it) is a clear explanation of why the rule is structured as it is.

[20] It is also clear why there is exempted from the provisions of r 6.5(5) the situation where the document to be served is a claim form. That is plainly because, where the document to be served is a claim form, it may not be established at that stage that the solicitor, who may or may not be the solicitor for the party to be served, is in fact the appropriate address for that service. The author of the claim form may not know whether the person on whom he seeks to serve the claim is or is not acting by a solicitor. Even if he knows or suspects that he is acting by a solicitor, at that stage he will not necessarily know that that solicitor is authorised to accept service. That, therefore, is the reason why a specific regime is provided under r 6.5(5) for a claim form, and why, when r 6.13 addresses the question of service of the claim form by the court, provision is made that the defendant's address for service may be the business address of the defendant's solicitor, but only provided that he has been authorised to accept service.

[21] The judge, in my judgment, therefore entirely correctly analysed the implications of r 6.5(5) when he said: 'All I take that rule to mean is that once you get past the claim form stage then the address for service is deemed to be the business address of the solicitor.'

[22] In our case there is no question of deeming arising because it is a case where a specific address for the service on the solicitor had already been given in the exchanges between the parties that had taken place before the service of the claim form. That then raises the question whether there should be exempted from the regime of r 6.5(4) the case of the claim form, this being a case where an address for service has been given by the party to be served. Rule 6.5(5), so heavily relied upon by Mr Granville Stafford, does not in my view, and for the reasons that I have already given, bite on that point at all. It does not justify reading the exemption of the claim form at r 6.5(5) back into a case such as envisaged by r 6.5(4) where an address for service has been given by the party to be served: rather than, as under r 6.5(5), being attached to that party by operation

a of the rules. It will not always be the case that an address for service will have
b been given by the party to be served before the claim form was served. But as
Thorpe LJ has pointed out, in the realities of litigation, more particularly the
reality of litigation of the sort with which our present case is concerned, it will
often be the case that what happened in this case will have happened; that is to
say, that an address for service will already have been given. Where that has
c happened I see no reason, as a matter of construction, for exempting the claim
form from the regime provided for by r 6.5(4). That rule refers to any document
and it refers to the fact of an address for service having been given. Both of those
factors were satisfied in this case. Nor, for the reasons that I have already
indicated, do I see any reason of policy for exempting the claim form from that
regime. The policy is that documents should be served on solicitors because that
d helps to expedite the conduct of the matter, as it might be thought this case itself
demonstrates.

[23] That in itself would not be sufficient to support the judge's conclusion if
the rules said otherwise, but they do not say otherwise. The judge was right in
the construction that he applied to r 6.5(4), and I agree with his reasons for that
e construction, as I agree with those given by Thorpe LJ.

[24] Can the claimant escape by reference to any other part of the rules? I
entirely agree with what Thorpe LJ has said about the arguments addressed to us
in respect of rr 6.1 and 6.8. Rule 6.8 is clearly directed to the notion of substituted
service. It does not apply to ex post facto rectification of errors in service. So far
as r 7.6(3) is concerned, this is a case where, not only can it not be said that
f the claimant has taken all reasonable steps to serve the claim form, on the
construction of the law adopted by this court he has taken no steps at all to serve
the claim form, because service of the claim form in this case required service on
the solicitors. Even if that were not the case, it is manifest, as Thorpe LJ has said,
that r 7.6(3) is addressing those cases, familiar enough, where the claimant tries
to find his defendant but cannot do so, either because the defendant is, unknown
to him, out of the jurisdiction, or because he is evading service, or matters of that
sort. The terms of endeavour and lack of success that are set out in r 7.6(3)(b)
clearly address that situation. They do not address a situation such as the present.
So far as r 7.6(3)(c) is concerned, which must also be satisfied, that the claimant
g has acted promptly in making the application, that is a matter for the judgment
of the court below, and I would need to be satisfied that the judge had come to
an irrational conclusion before I would be minded to reverse his finding on that
point. Far from thinking that he was irrational, I consider him to have been
completely correct. For all those reasons, I would dismiss the appeal.

Appeal dismissed.

Gillian Crew Barrister.

Infantino v MacLean

QUEEN'S BENCH DIVISION

DOUGLAS BROWN J

24 MAY, 14 JUNE 2001

Claim form – Service – Dispensing with service – Claimant serving claim form one day late – Whether court having power to dispense with service of claim form in circumstances of case – CPR 6.9(1).

In 1999 the claimant, I, instructed solicitors to prepare a claim for medical negligence against the defendant, M. In accordance with the Pre-action Protocol, the solicitors sent a letter of claim. They also provided M's representatives with information far beyond that which was required by the Protocol, including a draft pleading and medical reports. Proceedings were issued on 31 August 2000, two weeks before the expiry of the limitation period. The claim form and particulars had to be served within four months of the date of issue. On two occasions, I's solicitors agreed to extend time for M's solicitors to respond to the letter of claim. After the letter of response was received in early December 2000, I's solicitors obtained an extension of time for service of the particulars of claim in order to give them time to review the contents of the letter of response with their experts. The parties agreed that the particulars of claim would be placed in the DX system no later than 26 January 2001, leaving 30 January as the last day for service. I's solicitors duly sent out the claim form and the particulars on 26 January, but due to a computer error the DX number was incorrect. As a result, M's solicitors did not receive the documents until 31 January, and they declined to accept service of the proceedings. In subsequent interlocutory proceedings, the issue arose whether CPR 6.9(1)^a, which empowered the court to dispense with service of a document, enabled it to dispense with service of the claim form in the circumstances of the case, and thereby prevent the claim from being struck out.

Held – CPR 6.9(1) gave the court power to dispense with service of a claim form if that were necessary to give effect to the overriding objective of the CPR, namely to deal justly with a case. In the instant case, it had to be arguable, even doubtful, whether any claim for professional negligence would succeed against I's solicitors. They had behaved impeccably apart from using the wrong DX address. Although they had left service until the last day, they had had to consult doctors and counsel in a difficult case. Had it not been for the time taken by M's advisors to reply, they would have served in December 2000. In those circumstances, striking out the claim would not be dealing with the case justly. On the contrary, it would be an affront to justice, and if the CPR required that result there would be something seriously wrong with the rules. Those rules were not, however, defective. Rule 6.9 enabled the court to reach a just result, and in the circumstances it would exercise the power to dispense with service (see [55]–[57], below).

Cases referred to in judgment

Elmes v Hygrade Food Products plc [2001] EWCA Civ 121.

^a Rule 6.9(1) is set out at [43], below

- a *Hannigan v Hannigan* [2000] 2 FCR 650, CA.
Kaur v CTP Coil Ltd [2000] CA Transcript 1328.
Vinos v Marks & Spencer plc [2001] 3 All ER 784, CA.

Case also cited or referred to in skeleton arguments

Barker v Casserley (23 October 2000, unreported), Fam D.

b **Appeal**

The defendant, Professor Allan MacLean, appealed with permission of District Judge Horan from his order made in the Manchester District Registry of the High Court on 14 February 2001 granting the claimant, Constantina Anna Infantino, a retrospective extension of time for the service of the claim form and particulars of claim. The facts are set out in the judgment.

c *John Whitting* (instructed by *The Medical Protection Society*) for Professor MacLean.
Jonathan Glasson (instructed by *Alexander Harris, Altrincham*) for Mrs Infantino.

d *Cur adv vult*

14 June 2001. The following judgment was delivered.

DOUGLAS BROWN J.

e [1] This is an appeal with permission of the district judge from a decision of District Judge Horan on 14 February 2001 when he extended the claimant's time for service of the claim form and particulars of claim to 4 pm on 31 January 2001 on which date the documents were in fact served.

[2] There is no dispute on the facts. The claimant, Mrs Infantino, was in 1995 a patient of the defendant, Professor Allan MacLean, a consultant gynaecological oncologist.

f [3] On 2 October 1995 at the Royal Free Hospital Professor MacLean carried out a radical hysterectomy with the purpose of removing a cancerous tumour. He afterwards informed Mrs Infantino and her husband that the operation had been successful and that the tumour had been completely removed. The tumour was not in fact completely removed and on 14 September 1997 a report following an MRI scan indicated there was evidence that the tumour had recurred. Thereafter Mrs Infantino underwent surgery performed by another surgeon when the pelvic mass as well as the right half of the bladder and upper vagina were removed. The claimant's case is that Professor MacLean failed to remove all visible tumour during the original operation in October 1995 and g failed to follow up that surgery with radiotherapy and further failed to follow up her condition properly with the consequence that the damage to her bladder and kidneys would have been avoided and the chance of long term survival would not have been severely affected.

h [4] The date of knowledge for the purposes of limitation was agreed to be j 14 September 1997.

[5] Mrs Infantino consulted her present solicitors, Alexander Harris, in April 1999. The solicitors who are specialists in the field of clinical negligence then began investigating the situation and preparing a claim. They were faced with a difficult task. Professor MacLean's solicitors described the case in the allocation questionnaire as 'An extraordinarily complex case requiring sophisticated exploration of the evidence'.

[6] In accordance with the Pre-action Protocol for the Resolution of Clinical Disputes, a letter of claim was sent on 7 July 2000 accompanied by draft particulars of claim and a schedule of loss. Following a request a further letter was sent on 9 August enclosing not only a report on Mrs Infantino's condition and prognosis from Mr Monaghan, consultant gynaecological surgeon, but also reports from Mr Hogston, consultant obstetrician and gynaecologist, and Professor Dische, a professor of radiotherapy. These reports provide evidence on the questions of liability and causation. a
b

[7] The provision of the draft pleading together with the medical reports went far beyond the requirements of the Protocol. Mrs Infantino's solicitors were anxious that the Medical Protection Society representing Professor MacLean should have as much information as possible at the earliest stage because of their concerns about the prognosis. c

[8] These proceedings were commenced on 31 August 2000 because of the imminent expiry of the limitation period and accordingly the claim form and particulars had to be served within four months of that date.

[9] The Protocol provides a period of three months for a letter of response to be sent. After that period had elapsed Professor MacLean's solicitors asked for and were given an extension of time to 30 November. They were told by Mrs Infantino's solicitor that if the letter of response had not been received by that date the proceedings which had been already issued would be served. There was a further agreed extension of the time for provision for the letter of response to 5 December and this letter was in fact sent by facsimile transmission and post on 5 December. d
e

[10] Mrs Infantino's solicitors were granted an extension of time for service of the particulars of claim. There had been no reciprocal provision of a copy of a medical report and Alexander Harris explained in their letter of 6 December that the extension was needed because they wanted to review the contents of the letter of response with their experts. It is clear from the statement of Lesley Herbertson, the solicitor dealing with this case, that the extension was needed to see if the draft particulars of claim needed amendment in the light of the letter of response and any comments on it by the claimant's experts. In fact the particulars needed no amendment and when formally served were in identical terms to the draft. f

[11] On 18 December Mrs Silk, a solicitor in the Medical Protection Society's legal department, sensibly agreed to an extension of time for serving the particulars of claim 'which will now be placed in the DX system by no later than the 26 January 2001'. g

[12] On 26 January Mrs Herbertson wrote to the Medical Protection Society in these terms: h

'Dear Sirs

CONSTANTINA ANNA INFANTINO v PROFESSOR ALLAN MACLEAN

We refer to previous correspondence. We now enclose by way of formal service the following: j

1. Claim form.
2. Particulars of claim dated 31 August 2000.
3. Medical report of Mr Monaghan dated 1 July 2000.
4. Provisional schedule of special damages dated 22 September 2000.
5. Defendants response pack.'

a The letter then pointed out that the draft particulars of claim had not been amended and noted an admission made in the letter of response that Professor MacLean had failed to monitor the claimant adequately following the operation and that causation was in issue, and continued:

b 'Despite not amending the particulars of claim we are in a position to update our client's evidence to some extent and therefore enclose by way of service the following:

1. Report of Doctor S Bourne, Consultant Psychiatrist dated 1 October 2000.
2. Updated provision schedule of loss as at 31 December 2000.

We have also obtained a report from Doctor Mansell, Consultant Nephrologist, which will be disclosed to you shortly.'

c [13] The letter then referred to a number of procedural and medical matters all designed to promote the exchange of medical opinion and generally move the litigation forward.

d [14] It is at this point that the difficulties in this case arose. Alexander Harris are in regular communication with the Medical Protection Society on a variety of matters corresponding through the DX system. The society's DX address is DX42736 Oxford Circus North.

[15] Alexander Harris also have regular communication with the Medical Defence Union. Their DX number is DX36505 Lambeth.

e [16] By a mistake attributed to computer error the letter with its accompanying documents was sent to the Medical Protection Society at the DX number of the Medical Defence Union.

f [17] The 26 January was a Friday and in the ordinary way the documents would have been received and service completed on Tuesday 30 January. CPR 6.7(1) provides that service by DX will be deemed on the second day after a document is left at the document exchange. Saturday and Sunday are excluded from the calculation and it is agreed that the second relevant day was 30 January.

g [18] On that date the documents were returned from the DX. Miss Herbertson telephoned the Medical Protection Society on 30 January to explain the mistake and on the same day by the same method sent the same documents for service. These were received on 31 January and the service was a day late. However, Mrs Silk indicated by letter of that date that she was unable to accept service of the proceedings and returned them.

h [19] Alexander Harris did not make their application for their extension of time immediately as they agreed that Professor MacLean's solicitors should have until 5 February to take his instructions. The application, the subject of the appeal, was then made on 5 February.

[20] On 12 March Professor MacLean's defence was served without prejudice to a contention that the claim should be struck out.

[21] Paragraph 18 of the defence is as follows:

j 'It is admitted that the defendant should have undertaken examination under anaesthesia by no later than one year post-operatively. It is further admitted that he was in breach of his duty of care in failing to do so.'

[22] Causation arising from that breach of duty was denied.

[23] Rule 7.5 provides:

'(1) After a claim form has been issued, it must be served on the defendant.

(2) The general rule is that the claim form must be served within 4 months after the date of issue.' a

[24] Rule 7.6 deals firstly with the circumstances in which a claimant may apply for an order extending the period within which the claim form may be served and then:

'... (3) If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule the court may make such an order only if—(a) the court had been unable to serve the claim form or (b) the claimant has taken all reasonable steps to serve the claim form; but has been unable to do so; and, (c) in either case, the claimant has acted promptly in making the application.' b

[25] Before the district judge (a) did not apply and it was conceded that she had acted promptly in making the application. No arguments were advanced on the claimant's behalf that she had taken all reasonable steps to serve the claim form but had been unable to do so. c

[26] The application before the district judge was in these terms:

'We, Alexander Harris, on behalf of the claimant intend to apply for an order the draft of which is attached that "the claimant shall be deemed to have made proper service of the claim form and particulars of claim on Friday 26 January 2001 such that service of the defence is due within 28 days of the date of this order".' d

[27] The district judge observed that the claimant was not seeking an extension of time but added: 'Although it is not clear really what the claimant is seeking from the actual application.' e

[28] In the end the district judge applied r 3.9 which is in these terms:

'(1) On an application for relief from any sanctions imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances ...' f

[29] The rule then sets out various factors that the court should take into account:

'... (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol^(GL); (f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party.' g

(2) An application for relief must be supported by evidence.' h

[30] Rule 3.10 was also apparently in the district judge's mind. This provides: j

'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.'

a [31] The district judge summarised the history of the litigation to date and after considering the circumstances referred to in r 3.9 continued:

b 'There is good explanation from counsel (sic) as to the default. The extent to which the complainant has complied with other rules, practice directions, court orders and any other relevant pre-action protocol: I am satisfied that they have done and indeed after extensions to the defendant. Whether the failure to comply was caused by the party or his legal representation: it is not the claimant's fault. What effect it will have on the trial date: none. The effect of failure to comply on each of the parties of being one day late as I have already said has no prejudicial effect on the defendant. The effect in granting this application will have on each party: again I am satisfied there is no prejudice. I am going to grant today's application.'

d [32] The district judge then made an order extending the claimant's time for service of the claim form and the particulars of claim to 4 p m on 31 January 2001 on which date the documents were served. The district judge then made provision for the time for acknowledgement of service and for service of the defence.

[33] For Professor MacLean on this appeal, Mr Whitting referred to *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 and to *Kaur v CTP Coil Ltd* [2000] CA Transcript 1328.

e [34] *Vinos*' case was cited to the district judge, *Kaur*'s case was not.

f [35] Mr Whitting submitted that the combined effect of these two decisions of the Court of Appeal was that in circumstances such as the present case if a claimant did not come within the provisions of r 7.6, rr 3.9 and 3.10 could not avail him. There was no room for the exercise of discretion or a balancing exercise on prejudice. Accordingly the district judge was in error and the application should have been dismissed with the claim being struck out.

g [36] Mr Glasson for Mrs Infantino, by a respondent's notice, asked me to uphold the order of the district judge on the ground that he had jurisdiction to do so within r 7.6(3)(b) and (c). He argued that 'service' was defined in the glossary to the CPR as 'steps required by rules of court to bring documents used in court proceedings to a person's attention'. These steps had been taken, and reasonably taken, on behalf of the claimant from 7 July onwards. Everything that had to be served, and more, had effectively been served and it was only formal service that was delayed by one day by an error in the incorrect use of the DX number.

h [37] It was conceded by Mr Glasson that the point sought to be raised in the respondent's notice was not argued before the district judge and indeed it appeared to have been conceded that it could not be argued. I take first the question raised by the respondent's notice. Unhappily I do not think it is possible for this point to be argued. No doubt it is possible for points of law not raised below, to be argued on appeal. The ground advanced primarily rests on matters of fact and Mr Whitting is in my view correct when he submitted that it cannot be relied on now. In any event the ground could not succeed. It is an understandable and imaginative attempt by Mr Glasson to make the facts fit r 7.6(3)(b). It must fail however, as 'the claim form' can only mean the claim form which was actually 'served'. It cannot be said that the claimant had taken all reasonable steps to serve that.

[38] Turning to the only ground of appeal, the decisions in *Vinos* and *Kaur* are decisive of the matter. In *Vinos*' case, May LJ, with whom Peter Gibson LJ agreed, said ([2001] 3 All ER 784 at 789 (para 20)):

'The meaning of r 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have the power to do so otherwise. The discretionary power in the rules to extend time periods—r 3.1(2)(a)—does not apply because of the introductory words. The general words of r 3.10 cannot extend to enable the court to do what r 7.6(3) specifically forbids, nor to extend the time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time.'

May LJ continued (at 790):

'It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in r 7.6(3), your claim is lost and a new claim will be statute-barred. You have had three years and four months to get things in order. Sensible negotiations are to be encouraged, but protracted negotiations generally are not.'

[39] In *Kaur*'s case [2000] CA Transcript 1328 Simon Brown LJ, with whom Waller LJ and Gage J agreed, after referring to the judgments in *Vinos*' case continued (at para 19):

'It will be noted that there was no reference in that judgment to r 3.9 but the reasoning of the court is compelling and if the situation were that r 7.6 applies to the situation which exists in this case then as it seems to me the same reasoning there adopted by the court saying that no relief could be claimed under r 3.10 will be applicable to r 3.9.'

[40] Those decisions were binding on the district judge and are binding on me and this appeal in that regard must succeed.

[41] The matter does not end there, however, as by the respondent's notice on behalf of Mrs Infantino an order is sought pursuant to rr 6.1 and 6.9 dispensing with requirement for service.

[42] Rule 6.1 provides the rules in this part apply to the service of documents except where '(b) the court orders otherwise'.

[43] Rule 6.9(1) provides: 'The court may dispense with service of a document.'

[44] Mr Glasson submitted that the purpose of the CPR, quoting the words of Brooke LJ in *Hannigan v Hannigan* [2000] 2 FCR 650 at 659, was to bring to an end 'old turf wars between solicitors over technicalities' to be 'superseded by a new climate in which the emphasis was the achievement of justice'.

[45] He submitted that r 6.9 gave the court a very broad power to dispense altogether with the requirements of service.

[46] He submitted that it could not be just to penalise a claimant who has not only fully complied with the Pre-action Protocol but provided the defendant with

a the fullest possible details of her claim. An order striking out her claim could not possibly be proportionate nor could it be seen as the fair result of the court seeking to deal justly with this case.

[47] Mr Whitting opposing this application, but taking no point on the manner in which it was made, referred me to *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121 a decision of the Court of Appeal (Simon Brown LJ and Penry-Davey J). In that case on the last day of the four-month period for service provided by r 7.5(2) a claim form was faxed to the defendants' insurers instead of to the defendants themselves. The Court of Appeal held that the situation was governed by *Vinos'* case and *Kaur's* case. There was no application under r 6.8 (alternative method of service) or under r 6.9. Both were, however, referred to by counsel for the appellant. Counsel submitted that unless the rules unambiguously required it, claims should not fail because of a mistake which had caused no prejudice and been corrected. Here, he submitted, the rules do not unambiguously require that result. Given that the court has power to dispense altogether with service under r 6.9, it must have a lesser power to deem service upon insurers in appropriate circumstances to be good service on the insured. Simon Brown LJ said (at [13]):

'Attractively though the argument is put and tempting though it is to try and find some way of denying the defendants the windfall of a good Limitation Act defence, thereby throwing the relevant liability upon the claimant's solicitors' insurers, I, for my part, have no doubt that it must be rejected. The fatal flaw in the argument is this. It necessarily implies that r 6.8, the rule which provides for service by an alternative method, can be applied retrospectively. If one asks what order the court is to make to rectify the mistake made here by the claimant's solicitors, it can only be an order under r 3.10 that an order for alternative service, not in fact made under r 6.8, shall be deemed to have been made. But the plain fact is that no r 6.8 order here was made and, of course, there was never an application for alternative service, let alone for an order dispensing with service. Nor, it seems to me worth observing, would it ever have been proper to make any such order in this case. Mr Porter acknowledges as much. As he observes, but for the mistake there would never have been any necessity for such an order.'

[48] Mr Whitting adopted that part of Simon Brown LJ's judgment, contending that it covered exactly the facts of the present case.

[49] Counsel in *Elmes'* case described rr 6.8 and 6.9 as rules which both dealt with the exercise of a discretion to deem service to be good. His submissions appeared to elide the two rules and from them it appeared that the 'good reason' referred to in r 6.8(1) also operated in r 6.9.

[50] That approach appears to have been adopted by Simon Brown LJ in para [13] of his judgment. It is clear that the Court of Appeal was not considering applications and orders under rr 6.8 and 6.9 because there never was an application under either rule. It does seem from the summary of counsel's argument that the Court of Appeal was not invited to consider r 6.9 separately.

[51] In my view they should be considered separately. Rule 6.8 replaces the provisions as to substituted service in the Rules of the Supreme Court. Rule 6.9 on the other hand is a new provision giving the court a general power on application to dispense with the service of a document. There was no such general power in the Rules of the Supreme Court or the County Court Rules. The notes at para 6.9.1 in the White Book speculate that the most likely use of r 6.9 in practice (though

not limited to such cases) would be to dispense with re-service. Rule 6.9 must be read together with the rules as to the overriding objective and thence to its application by the court (rr 1.1 and 1.2). Rule 1.1(1) provides: 'These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.'

[52] Rule 1.2 provides: 'The court must seek to give effect to the overriding objective when it—(a) exercises any power given to it by the Rules ...'

[53] Mrs Infantino did not consult her solicitors until April 1999. She has, however, been seriously unwell for some years.

[54] In this case the claimant's solicitors, in a case which the defendant acknowledged to be extremely complicated, provided the fullest detail of the claim, going well beyond the requirements of the clinical negligence Pre-action Protocol. They twice extended the time for response to assist the defendant and its advising experts. When the response came they obtained an extension of the time for service so that their own experts could be consulted and in the result 'sent' to the defendant, the same pleading and reports they had had since August together with further medical evidence. That they were not received by the defendant in time was due to a clerical error in posting.

[55] In these circumstances it must be arguable, even doubtful, whether any claim for professional negligence would succeed against the claimant's solicitors. Apart from using the wrong DX address, they had behaved impeccably. They did leave service to the last day but had to consult doctors and counsel on this difficult case. Had it not been for the time taken by Professor MacLean's advisors to reply they would have served in December.

[56] In these circumstances striking out this claim is not dealing with the case justly. It would in my view be an affront to justice, and if the rules required that result then there would be something seriously wrong with the rules. The rules, however, are not defective. Rule 6.9 enables the court to reach a just result. If re-service can be dispensed with, so can service in the unusual circumstances of this case.

[57] The remarks of Simon Brown LJ in *Elmes's* case, with which Penry-Davey J agreed, are obiter and although persuasive are not binding on me. The core of Simon Brown LJ's judgment on this point is that r 6.8 cannot be operated retrospectively. He appears to rule out use of r 6.9 for the same reason. The use of r 6.9 here is not strictly retrospective use. The claimant is entitled to say here, with these facts and circumstances in the court's discretion the court should exercise the power to dispense with a service. In all these circumstances I do exercise that discretion and dispense with service. He does lose a fortuitous limitation defence but there is otherwise no prejudice to the defendant on such an order being made and the matter should now proceed on the pleadings as they stand on particulars of claim and defence and no more time should be taken up on procedural wrangling.

Order accordingly.

Alexander Horne Barrister.

Mander v Evans

CHANCERY DIVISION

FERRIS J

2, 15 MAY 2001

Insolvency – Bankruptcy – Discharge – Release of bankruptcy debts by discharge – Fraud exception – Whether undue influence constituting ‘fraud’ for purposes of fraud exception to release of bankruptcy debts by discharge – Insolvency Act 1986, s 281(3).

In July 2000 the claimant, M, brought proceedings against the defendant, E, seeking the repayment of five loans which she claimed to have made to him between 1989 and 1992. Although E had been made bankrupt in 1992 after the alleged loans had been made, M had not proved in the bankruptcy and E had been discharged in 1995. Under s 281(1)^a of the Insolvency Act 1986, discharge released a bankrupt from all bankruptcy debts. That provision was subject to s 281(3) which provided that discharge did not release the bankrupt from any bankruptcy debt incurred in respect of any ‘fraud’ or ‘fraudulent breach of trust’ to which he had been a party. On the determination of a preliminary issue, M accepted that the loans to E were bankruptcy debts, but contended that they fell within s 281(3). In particular, she contended that E had been her solicitor, that she had made the loans under his presumed undue influence and that undue influence constituted ‘fraud’ within the meaning of s 281(3).

Held – For the purposes of s 281(3) of the 1986 Act, ‘fraud’ meant actual fraud and did not include constructive fraud, such as undue influence. Such a construction was consistent with the natural meaning of the word ‘fraud’. It was readily comprehensible that the legislature should consider that a bankrupt who had obtained his discharge should not be relieved of liability for his actual fraud committed before the bankruptcy. It was much less comprehensible that he should remain liable for constructive fraud, which covered a wide range of conduct regarded by equity as unconscionable but not necessarily involving actual dishonesty. If the legislature had intended to preserve liability for such conduct, wider language than the one word ‘fraud’ would have been used. Although ‘fraudulent breach of trust’ indicated an area of concern to equity, the fact that it was referred to in conjunction with ‘fraud’ indicated that ‘fraud’ by itself was not enough to take a case into such an area. In the instant case it had not been suggested that the acts complained of amounted to fraudulent breach of trust. Accordingly, the case did not fall within s 281(3) (see [25], [26], below).

Notes

For debts and liabilities from which discharge is no release, see 3(2) *Halsbury’s Laws* (4th edn reissue) para 631.

For the Insolvency Act 1986, s 281, see 4 *Halsbury’s Statutes* (4th edn) (1998 reissue) 947.

^a Section 281, so far as material, is set out at [3] and [4], below

Cases referred to in judgment

Bartlett v Barclays Bank Trust Co Ltd [1980] 1 All ER 139, [1980] Ch 515, [1980] 2 WLR 430. a

Beaman v ARTS Ltd [1949] 1 All ER 465, [1949] 1 KB 556, CA.

Derry v Peek (1889) 14 App Cas 337, [1886–90] All ER Rep 1, HL.

Masters v Leaver [2000] BPIR 284, CA.

Nocton v Lord Ashburton [1914] AC 932, [1914–15] All ER Rep 45, HL. b

Action

By claim form issued on 10 July 2000 the claimant, Jacqueline Valerie Mander, sought (i) repayment of five loans allegedly made by her to the defendant, Rodney Charles Evans, between 1989 and 1992, alternatively (ii) rescission of certain deeds relating to those loans and return of the monies loaned to the defendant in reliance thereon. The facts are set out in the judgment. c

Hedley Marten (instructed by *Arnold Rosen & Co*) for the claimant.

The defendant did not appear and was not represented. d

Cur adv vult

15 May 2001. The following judgment was delivered.

FERRIS J. e

[1] In this action the claimant seeks repayment of five loans, amounting altogether to £140,000, which she claims to have made to the defendant in 1989, 1991 and 1992. Alternatively she seeks rescission of certain deeds relating to the loans which are referred to in the statement of claim and 'return of the respective monies loaned to the defendant in reliance thereon'. f

[2] On the face of it the action, at any rate in respect of the primary relief claimed, appears to be of the utmost simplicity, particularly having regard to the fact that the defendant, who has acted in person, has served a defence which does not seriously dispute that the five sums in question were paid to him and that he was obliged to repay them. Moreover the defendant has not appeared at the trial, although there is no doubt that he is well aware that it was to take place. g

[3] The action is, however, complicated by the fact that the defendant was made bankrupt in December 1992, after all the alleged loans had been made. The claimant did not, as she might have done, seek to recover the loans by proving in the bankruptcy. Instead she held her fire until this action was commenced on 10 July 2000. In the meantime the defendant was discharged from bankruptcy in April 1995. In addition to the problems of limitation to which this sequence of events gave rise, there exists a formidable obstacle in the claimant's way in the shape of s 281 of the Insolvency Act 1986. Subsection (1) of that section provides, so far as material: 'Subject as follows, where a bankrupt is discharged, the discharge releases him from all bankruptcy debts ...' h
j

[4] The claimant accepts that the loans which she seeks to recover are 'bankruptcy debts' within the definition contained in s 382 of the Act because they are debts or liabilities to which the defendant was subject at the date of his bankruptcy. However she seeks to escape the effect of s 281(1) by relying upon s 281(3) which, so far as material, provides:

a 'Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of ... any fraud or fraudulent breach of trust to which he was a party.'

b [5] The means by which the claimant seeks to bring herself within sub-s (3) is to allege that the defendant was her solicitor and that he caused her to make the loans to himself at a time when she reposed complete trust and confidence in him as her solicitor. In these circumstances it is said that, in accordance with the presumption of equity, the loans are to be deemed to have been procured by the defendant's undue influence. Such undue influence is said to be within the meaning of 'fraud' for the purposes of sub-s (3).

c [6] In his skeleton argument Mr Hedley Marten, on behalf of the claimant, addressed the case on the basis that the only real issue was whether the word 'fraud' in sub-s (3) had this extended meaning. It appeared to me, however, that the case presented a number of other problems from the point of view of the claimant and that, although the defendant was not present to exploit these, it was my duty to raise them.

d [7] In particular it appeared to me that the claimant's particulars of claim and her witness statement were lamentably deficient in a number of respects. For example, in relation to the fundamental allegation that the defendant was the claimant's solicitor, the particulars of claim asserted only that the defendant first acted for the claimant in 1987, that he also acted for her daughter and son and that 'thereafter he continued at all material times so to act'. In her witness statement e the claimant repeated this in the same general terms, except that instead of the words I have quoted from the pleading she said: 'Thereafter whenever I needed a solicitor it was him [ie the defendant] I used.' No further particulars were offered in either the pleading or the witness statement. I completely fail to see f how this can be regarded as a sufficient basis for the court to find that, at the date of the loans, the relationship of solicitor and client was still subsisting, particularly when other facts are pleaded which, although explained imperfectly or not at all, seem to suggest that the context in which the loans were made was completely different.

g [8] Other problems arose from what appeared to me to be a failure to explain the context in which certain important deeds were entered into. The contents of the deeds were pleaded and it was suggested that they operated only by way of security, but this is not in accordance with what seemed to me to be their effect. It was imperative, in my view, that the claimant should explain what led up to the execution of these deeds and how, if at all, they were acted upon. As the deeds appear to constitute part of the claimant's own case, her failure to deal with points h of this kind in her witness statement seemed to me to be most unsatisfactory.

j [9] Mr Marten suggested that any deficiencies in the witness statement might be made good by allowing the claimant to elaborate it when she gave evidence-in-chief. I was not happy about this, partly because it appeared to go against the very positive terms of CPR 32.5(3) and (4) and partly because, if I took a course which was generous towards the claimant, I would be doing so in the absence of the defendant, who might claim with some justification that he understood that the only evidence against him was to be that contained in the witness statement as served. Mr Marten then invited me to adjourn the trial so as to give the claimant an opportunity to seek to amend in whatever way might seem to be appropriate and to serve a supplemental witness statement. Although I could see the advantages of taking this course it did not appear to me to be an

altogether satisfactory solution, despite the generosity involved in giving the claimant a further opportunity to get her case in order. The point of law raised by reliance on s 281(3) would remain to be dealt with and it seemed to me to be wrong to leave the claimant to incur costs in getting her factual case off the ground when there would be a risk that the point of law might be decided against her, in which case the additional costs would have produced no benefit. I therefore suggested to Mr Marten that it might be appropriate for me to determine the question of law as a preliminary issue. He accepted this suggestion.

[10] It was not practicable to formulate the precise issue in writing before I heard argument on it, but it is one which is, I think, reasonably easy to state. I would express it as follows:

‘On the assumption that the loans referred to in the statement of claim were procured by the undue influence of the defendant (such undue influence being presumed by reason of a relationship of solicitor and client), is the defendant’s liability to repay those loans a bankruptcy debt from which the defendant is not released under s 281(1) of the 1986 Act because the case falls within s 281(3)?’

[11] Mr Marten concentrated his argument on the word ‘fraud’ in s 281(3) but to my mind the case requires an earlier piece of analysis to be carried out. This is to determine what ‘bankruptcy debt’ the court is concerned with, because s 281(3) has no application unless that debt was ‘incurred in respect of’ fraud to which the defendant was a party. The difficulty which I feel in the present case is that the advantage which the defendant is said to have procured in this case is the making of loans which were, it seems, repayable on demand. Had it not been necessary to try to bring the case within s 281(3) the claimant would simply have sued for the repayment of money lent. An allegation of undue influence would have added nothing to her claim. What I find difficult to understand is how, subsequent to the bankruptcy, the making of such an allegation changes the nature of the claim. The claimant is still seeking to enforce the defendant’s obligation to repay money which he borrowed. But I find it difficult to see how, even assuming that the claimant was induced by undue influence to make the loans and accept in return the defendant’s obligation to repay and assuming also that ‘fraud’ includes the exercise of undue influence, this makes the repayment obligation one which was ‘incurred in respect of fraud’.

[12] Mr Marten argued that the claimant’s case is not one in which she merely seeks to enforce the repayment obligation but one in which she complains of undue influence. But I do not find it easy to see how this makes a difference. Certainly she seeks, by way of her alternative claim, to have certain deeds rescinded. But this rather emphasises that she has not rescinded hitherto. It is not clear to me how the rescission of the deeds will give rise to an obligation to repay which is different from the contractual obligation which already exists. But even if it did so that right will not exist until rescission takes place. I find difficulty in the concept that a contractual obligation to repay which is not ‘incurred in respect of fraud’ can be replaced by an obligation to repay which is so incurred just because the case is presented as one of undue influence.

[13] These points were canvassed with Mr Marten in the course of argument. I have to say that he was unable to dispel the doubts which I have entertained. Nevertheless I do not think it would be satisfactory to decide the issue on this basis. While I have thought it right to try to explain the problems which I have discerned, I propose to consider the meaning of ‘fraud’ in s 281(3) on the footing

a that none of these problems exist. The question is, therefore, whether an obligation to repay money obtained by the exertion of undue influence is an obligation incurred in respect of fraud to which the person exerting the undue influence was a party.

[14] In support of his argument that this question ought to be answered in the affirmative Mr Marten referred me to two passages in *Snell's Equity* (30th edn, 2000) pp 608 and 610. In the first passage there is a description of what is referred to as 'actual fraud', that is to say fraud in the sense explained in *Derry v Peek* (1889) 14 App Cas 337, [1886–90] All ER Rep 1. In the second passage (p 10, para 38-08) 'constructive fraud' is explained. The passage begins:

c 'In equity, the term "fraud" embraces not only actual fraud, in the sense just defined, but also certain other conduct which falls below the standards demanded by equity. Courts of equity did not even stop at "moral fraud in the ordinary sense" but took account of any "breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience."''

d The quotations in the second sentence are taken from the speech of Viscount Haldane LC in *Nocton v Lord Ashburton* [1914] AC 932 at 954, [1914–15] All ER Rep 45 at 53, to which Mr Marten referred me.

[15] Mr Marten did not suggest that presumed undue influence of the kind which the claimant relies upon in the present case amounted to actual fraud, but he said that it was a variety of constructive or equitable fraud. This I would accept.

e [16] Section 281(3) of the 1986 Act substantially repeats s 28(1)(b) of the Bankruptcy Act 1914, but there is no reported authority under either provision concerning the meaning of fraud. Section 281(3) was recently considered by the Court of Appeal in *Masters v Leaver* [2000] BPIR 284, but the fraud there was actual fraud and no question arose concerning the application of the subsection in cases of

f constructive fraud.

[17] Mr Marten submitted that assistance is to be found in two authorities on s 26 of the Limitation Act 1939, which extended the limitation period where (inter alia)—

g '(a) the action is based upon fraud of the defendant or his agent or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person as aforesaid ...'

[18] The two authorities on which Mr Marten relied were *Beaman v ARTS Ltd* [1949] 1 All ER 465, [1949] 1 KB 556 and *Bartlett v Barclays Bank Trust Co Ltd* [1980] 1 All ER 139, [1980] Ch 515. In my judgment neither of them assists Mr Marten.

h [19] In *Beaman's* case the plaintiff sued the defendant for damages for conversion of her goods. The action was commenced after the end of the normal six-year limitation period. The plaintiff sought the assistance of s 26, saying that the action was based on fraud or alternatively that her right of action had been concealed by the fraud of the defendant or its agents. The Court of Appeal held

j that the action was not based on fraud. Its reasoning shows clearly, in my view, that an action will only be regarded as based on fraud where there is what I have described as actual fraud. Although conversion includes fraudulent conversion, an action in respect of such conversion is not based on fraud. But it was held that the degree of moral turpitude shown by the facts of the case, although not such as to amount to actual fraud, was sufficient to establish that the cause of action had been concealed by fraud. In reaching this latter conclusion the Court of

Appeal construed in a wider sense the word 'fraud' as used in the limb of the section relating to concealment by fraud. Lord Greene MR said:

'It is not, I think, a right construction of the statute ... to confine fraudulent concealment to what counsel ... described as "fraud in the ordinary sense." This, as far as I understood him, meant fraud which in its nature is sufficient to give rise to an independent cause of action. This definition would exclude the wide range of conduct which before the statute was regarded in equity as so dishonest as to prevent the statute of limitations (or its analogous application in equity) from coming into operation.' (See [1949] 1 All ER 465 at 467-468, [1949] 1 KB 556 at 559.)

Somervell LJ ([1949] 1 All ER 465 at 470, [1949] 1 KB 556 at 567) referred to the Real Property Limitation Act 1833, under which a similarly wide construction appears to have been applied, and said:

'Where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject-matter, unless the context makes it clear that the word must have a different construction.'

[20] In my view the words in s 281(3) of the 1986 Act are closer to the reference to an 'action ... based upon fraud' in s 26(a) of the 1939 Act than to the reference to the right of action being 'concealed by fraud' in s 26(b) of that Act. On this view of the matter *Beaman's* case is against Mr Marten's argument rather than supportive of it.

[21] Mr Marten found encouragement in Somervell LJ's reference to the desirability of giving a word the same meaning as it has been held to have in a statute dealing with the same general subject matter. He submitted that s 26 of the 1939 Act deals with the same general subject matter as s 281 of the 1986 Act. Both provisions govern the circumstances in which an otherwise valid cause of action is rendered unenforceable. In the one case this is because of the passage of time; in the other it is because the debtor has become bankrupt and obtained his discharge. In my judgment this stretches the concept of 'the same general subject-matter' well beyond what is permissible. Bankruptcy is fundamentally different from limitation. Their consequences are different too. Where a time bar arises under the Limitation Act the cause of action remains but it becomes unenforceable. Where a bankrupt is discharged from bankruptcy he is discharged from all bankruptcy debts except so far as his liability is preserved under s 281(2) or (3).

[22] The part of the decision in *Bartlett v Barclays Bank Trust Co Ltd* [1980] 1 All ER 139, [1980] Ch 515 on which Mr Marten relied is a passage where Brightman J dealt with a defence under s 26(b) of the 1939 Act. He said:

"'Fraud', in the context of s 26(b), does not mean common law fraud or deceit. But it does seem to envisage conduct which, if not fraudulent in the more usual sense, is unconscionable having regard to the relationship between the parties ... "Fraud" is used in the equitable sense to denote conduct by the defendant or his agent such that it would be against conscience for him to avail himself of the lapse of time.' (See [1980] 1 All ER 139 at 154, [1980] Ch 515 at 537.)

[23] It is apparent that Brightman J took a similar view of s 26(b) to that taken in *Beaman's* case, which had been cited to him although he did not refer to it in

a his judgment. But the problem, so far as Mr Marten's argument is concerned, is that which I have already mentioned, namely that there is no true parallel between s 26(b) of the 1939 Act and s 281(3) of the 1986 Act.

[24] The situation is, I think, worsened so far as Mr Marten's argument is concerned when account is taken of the changes made when the 1939 Act was replaced by the Limitation Act 1980. The equivalent of s 26 of the 1939 Act is s 32 of the 1980 Act. Section 32(1)(a) is substantially the same as s 26(a) but s 32(1)(b), corresponding broadly to s 26(b), has been worded differently. In particular the reference to the plaintiff's right of action being 'fraudulently concealed' has been replaced by a reference to a fact relevant to the plaintiff's cause of action being 'deliberately concealed'. Thus the only reference to fraud in what is now s 32 comes in s 32(1)(a) where it must mean actual fraud, as did the equivalent provision of the 1939 Act. As the Limitation Act which was in force when the 1986 Act was passed was the 1980 Act, the superseded wording of the 1939 Act would at best offer only a feeble guide to the meaning of s 281(3) of the 1986 Act even if there were a closer parallel between the subject matter of the two sets of legislation.

d [25] In my judgment, therefore, s 281(3) must be construed in accordance with ordinary principles without assistance from authority concerning the construction of other statutes. Approaching it on that basis, I think that the natural meaning of the word 'fraud' is actual fraud in the *Derry v Peek* sense (see (1889) 14 App Cas 337, [1886–90] All ER Rep 1). I find it readily comprehensible that the legislature should consider that a bankrupt who has obtained his discharge should not be relieved of liability for his actual fraud committed before the bankruptcy. I find it much less comprehensible that he should remain liable for constructive fraud, which covers a wide range of conduct regarded by equity as unconscionable but not necessarily involving actual dishonesty. If the legislature had intended to preserve liability for such conduct I think that wider language than the one word 'fraud' would have been used. Somewhat wider language has indeed been used, because the full reference is to 'fraud or fraudulent breach of trust', but I think that this militates against Mr Marten's argument rather than in favour of it. '[F]raudulent breach of trust' does, of course, indicate an area which is the concern of equity. But the fact that it is referred to in conjunction with 'fraud' indicates that 'fraud' by itself is not enough to take one into such an area. It was not suggested that the acts of the defendant complained of in this case amount to fraudulent breach of trust.

[26] I therefore conclude that the preliminary issue which I set out earlier in this judgment must be determined in a negative sense. I will hear submissions as to the consequences of this determination on the action as a whole. My present impression is that it means that, even if the difficulties referred to earlier could be overcome, the action as a whole could not succeed.

Order accordingly.

Celia Fox Barrister.

Scottish Equitable plc v Derby

[2001] EWCA Civ 369

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, ROBERT WALKER AND KEENE LJJ

19, 20 FEBRUARY, 16 MARCH 2001

Restitution – Unjust enrichment – Defence – Change of position – Life assurance company mistakenly making overpayment to policyholder – Policyholder using bulk of overpayment to acquire other pension policy and reduce mortgage – Whether policyholder entitled to rely on defence of change of position.

The defendant, D, invested a sum of money in a single-premium pension policy with the claimant life assurance company. He subsequently exercised an option to take early retirement benefits, but that was not recorded in the company's computer records because of an administrative error. In 1995 the company sent D a print-out statement showing that his policy had a value of £201,938. That statement failed to take into account D's exercise of the option to take early retirement benefits. The fund actually stood at £29,486. In June 1995 D exercised a payment option under which he received approximately £51,333 in a tax-free lump sum, while the sum of £150,604 was reinvested in an individual pension provided by another pension company. Thus the amount of overpayment was £172,451. D used £41,671 to reduce the mortgage of the matrimonial home, while the balance of approximately £9,600 was spent on making modest improvements to his lifestyle. The company realised the mistake in October 1996 and eventually brought proceedings for restitution in respect of the overpayment. Subsequently, the other pension company agreed to unwind the policy, leaving D with the smaller annual pension which he would have received but for the overpayment. In the proceedings, D relied, *inter alia*, on the defence of change of position. The judge held that that defence applied only to the sum of £9,600, and gave judgment against D for the remainder. D appealed, contending that the judge had misapplied the principles relating to the defence of change of position. In particular, he contended that the judge had underestimated the devastating effect which the demand for payment had had on him and should have treated the payment-off of the mortgage as a change of position.

Held – The defence of change of position required some causal link between the mistaken receipt of the overpayment and the defendant's change of position, which made it inequitable for the recipient to be required to make restitution. Thus the fact that the recipient might have suffered some misfortune, such as a breakdown in his health or the loss of his job, was not a defence unless the misfortune was causally linked (at least on a 'but for' test) with the mistaken receipt. The defence was not limited to specific identifiable items of expenditure and it might be right for the court not to apply too demanding a standard of proof when an honest defendant stated that he had spent an overpayment by improving his lifestyle, but could not produce any detailed accounting. In the instant case, it was easy to accept that the company's demand for repayment had come as a bitter disappointment to D, but the court had to proceed on the basis of principle, not sympathy, in order that the defence of change of position should not disintegrate into a case-by-case discretionary analysis of the justice of

- a individual facts, far removed from principle. The payment-off of the mortgage was not a change of position. In general, it was not a detriment to pay off a debt which would have to be paid off sooner or later. Accordingly, the judge was correct to accept the defence of change of position only in relation to the sum of £9,600. The appeal would therefore be dismissed (see [30], [31], [33]–[35], [37], [49]–[51], below).
- b *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512 applied.
Decision of Harrison J [2000] 3 All ER 793 affirmed.

Notes

- c For the defence of change of position, see 9(1) *Halsbury's Laws* (4th edn reissue) paras 1163–1165.

Cases referred to in judgments

- Avon CC v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA.
- Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1979] 3 All ER 522, [1980] QB 677, [1980] 2 WLR 218.
- d *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, Aust HC.
- Crabb v Arun DC* [1975] 3 All ER 865, [1976] Ch 179, [1975] 3 WLR 847, CA.
- David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, Aust HC.
- Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Aust HC.
- e *Holt v Markham* [1923] 1 KB 504, [1922] All ER Rep 134, CA.
- Jones (R E) Ltd v Waring & Gillow Ltd* [1926] AC 670, [1926] All ER Rep 36, HL.
- Kelly v Solari* (1841) 9 M & W 54, [1835–42] All ER Rep 320, 152 ER 24.
- Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349, [1998] 3 WLR 1095, HL.
- f *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.
- Meeme Mutual Home Protective Fire Insurance Co v Lorfeld* (1927) 194 Wis 322, Wis SC.
- Philip Collins Ltd v Davis* [2000] 3 All ER 808.
- RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230, Nfld CA.
- g *Skyring v Greenwood* (1825) 4 B & C 281, [1824–34] All ER Rep 104, 107 ER 1064.
- Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

Cases also cited or referred to in skeleton arguments

- Brisbane v Dacres* (1813) 5 Taunt 143, 128 ER 641.
- h *Greenwood v Martins Bank Ltd* [1933] AC 51, [1932] All ER Rep 318, HL.
- Lloyds Bank Ltd v Brooks* (1950) 6 Legal Decisions Affecting Bankers 161.
- Westdeutsche Landesbank Girozentrale v Islington London BC, Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890, QBD and CA.

j Appeal

The defendant, Gordon Derby, appealed with permission of Otton LJ granted on 3 April 2000 from the decision of Harrison J on 30 September 1999 ([2000] 3 All ER 793) giving judgment for the claimant, Scottish Equitable plc, in the sum of £162,790 plus interest on its claim for restitution of the sum of £172,451 paid to Mr Derby under a mistake of fact. The facts are set out in the judgment of Robert Walker LJ.

Bernard Weatherill QC and Paul Emerson (instructed by Chivers Easton Brown, Tolworth) for Mr Derby. a
Stephen Moriarty QC and Richard Handyside (instructed by Addleshaw Booth, Leeds) for Scottish Equitable.

Cur adv vult

16 March 2001. The following judgments were delivered. b

ROBERT WALKER LJ (giving the first judgment at the invitation of Simon Brown LJ).

Introduction

[1] This is an appeal from an order of Harrison J made in the Queen's Bench Division on 1 October 1999. He gave judgment in favour of the claimant, Scottish Equitable plc, for a principal sum of a little over £162,000, and accrued interest, in its claim against the defendant, Mr Gordon Derby. The judge's judgment is reported at [2000] 3 All ER 793. The case raises questions of some general interest and importance as to claims for money paid under a mistake and the defences of change of position and estoppel. c d

The facts

[2] Neither the appellant's notice nor the respondent's notice attacks any of the judge's findings of primary fact. There is, however, some criticism of his characterisation of some of the facts (for instance, whether Scottish Equitable was guilty of mere carelessness or, as Mr Derby contends, gross and repeated negligence) and there is an issue as to how broad a view the judge should have taken on change of position. It is therefore necessary to set out the facts as found by the judge in some detail. Further detail can be found in the reported first instance judgment. e f

[3] At the beginning of 1988 Mr Derby was aged 57. He was a married man with two stepchildren at fee-paying schools. He and his wife lived in Kent in a house then worth about £90,000 subject to a mortgage of about £35,000. He was employed by a company called Baltic Sawmills. His wife (who is 15 years younger) had her own business, running two clothes shops, but the business was not prospering (and it was to get worse rather than better). g

[4] In the spring of 1988 Mr Derby was made redundant. On his redundancy he received a total sum of £125,000 of which £90,000 seems to have been a transfer payment under his occupational pension scheme. The transfer payment went into a single-premium pension policy with Scottish Equitable. As an alternative source of earned income Mr Derby went into partnership as a recruitment consultant to the timber trade but until 1998 (when the partnership came to an end) he never derived more than about £13,000 a year from it. In 1989 his wife's business difficulties increased and he and his wife were under pressure from their bank. h

[5] In these circumstances Mr Derby considered, and eventually decided on, exercising an option to take early retirement benefits under his policy with Scottish Equitable. What happened (and it helps to explain, although it does not excuse, the mistakes which were later made) was that in August 1989 Mr Derby asked for figures to be quoted for the option, decided to take it, and then changed his mind; and then in February 1990 he again asked for a quotation, decided to j

a take it, and this time did not change his mind. The option which he took was for a tax-free lump-sum payment of £36,588 and an immediate single-life pension of £4,655 a year, escalating at three per cent per annum. (I follow the judge in disregarding odd pence throughout.) In fact through another quite separate error the escalator was not applied for several years, but Mr Derby has been compensated for that and there is no issue on it. After exercising the option
b Mr Derby thought, correctly, that his remaining rights under the policy were worth about £50,000.

[6] Mrs Derby's retail business came to an end and in 1991 she took employment with the Kent Probation Service. She was still in that employment at the time of the trial although she had had nearly a year off with ill-health during 1993–1994.

c [7] In April 1995 Mr Derby was approaching his 65th birthday (1 May 1995) and he telephoned Scottish Equitable (at its customer services division in Edinburgh) to inquire what would happen to his pension when he became entitled to the state pension. On 22 May 1995 there was another more important telephone conversation which was recorded in a manuscript note made by an
d employee of Scottish Equitable (and subsequently annotated, it seems, by another employee). The judge's findings about this (at 795) were as follows:

'It would appear from the claimant's memorandum of that conversation that the defendant probably told the claimant that he was already receiving an annuity from them. The defendant cannot recall that conversation,
e although his telephone bills show that he made a call to the claimant on that day. Another entry on the memorandum contains an internal instruction that a quotation should be prepared. A subsequent annotation on the memorandum suggests that the defendant's records were checked, but that it was concluded, wrongly, that the defendant had not received early retirement benefit, because the person checking the records had only looked
f at the defendant's cancelled decision to take early retirement benefit in August 1989, without looking at the rest of the microfiche.'

[8] On 25 May 1995 Scottish Equitable sent Mr Derby a print-out statement showing that his policy had a value of £201,938. Mr Derby's evidence was that he was very pleasantly surprised by this (since the fund value appeared to have
g increased by a factor of four within five years) but that he was naive in pension matters. The judge said that he had initially been sceptical about Mr Derby's evidence, especially as he had engaged a financial consultant, Mr Colin Donald of Fairmount Trust plc, to advise him. But having seen and heard Mr Derby give evidence, the judge (at 800) accepted him as an honest witness:

h 'I find, on the balance of probabilities, that he did inform the claimant that he was already receiving a pension from them, and that he was nevertheless assured by them that the figures quoted in the statement of retirement benefits were correct. I am surprised that the mistake was not discovered by
j Mr Donald, his financial advisor, but I feel I must accept the defendant's evidence that Mr Donald did not tell him that a mistake had been made.'

[9] Mr Donald raised various queries with Scottish Equitable and on 9 June 1995 Scottish Equitable issued a further statement of retirement benefits with four options. These were permutations on the choice between taking part of the benefits in the form of a tax-free lump sum or taking them all in the form of a retirement pension and widow's pension, and the choice between taking the

benefits from Scottish Equitable or from some other provider. On 16 June Mr Derby, acting on Mr Donald's advice, chose option 3, which was to take a lump sum of £51,333 from Scottish Equitable and to have £150,604 (referred to as the 'balance open market option') paid to Norwich Union.

[10] On 20 June 1995 Scottish Equitable sent Mr Donald a cheque for £51,333 in favour of Mr Derby and a separate cheque for £150,604 in favour of Norwich Union. The fact that there were two separate payments is relied on in the respondent's notice. Norwich Union had quoted for a (non-escalated) pension of £13,521 for Mr Derby and a widow's pension of half that amount. So from June 1995 Mr Derby was receiving a pension at the annual rate of £4,655 from Scottish Equitable (the three per cent escalator having been overlooked) and a pension at the annual rate of £13,521 from Norwich Union.

[11] In quoting a fund value of £201,938 Scottish Equitable had made a serious error. It had not taken account of the early retirement benefits which Mr Derby had taken (after a false start) in 1990. Evidence about the mistake was given by Miss Phyllis Duncan, a project team manager in Scottish Equitable's data quality department in Edinburgh. The judge's findings (at 796-797) were as follows:

'... when the defendant was paid his early retirement benefits in February 1990 his computer records should have been amended to show that only his residual fund necessary to pay his guaranteed minimum pension remained. That residual fund should have been £29,486, producing the guaranteed minimum pension of £2,637. That had not been done, as a result of which the claimant mistakenly paid to the defendant the amount to which he would have been entitled had he not taken the early retirement benefits under the policy in February 1990. The mistake should have come to light in December 1992, when Miss Duncan was working as an assistant manager in the claims department on a project to check that the files were correct for the end of year valuation. When she was carrying out that exercise, she noticed that the records did not tally, in so far as the annuity payment system for the defendant in 1992 showed that an annuity had been set up, but the VPR record did not show that a tax-free lump sum had been paid. As a result, Miss Duncan sent a memorandum dated 11 December 1992 to Mr Clark, her section manager, requesting his department to alter the VPR records for the defendant's policy. If that had been done, the record would have been updated to show that the defendant had received early retirement benefit in 1990 and, therefore, show the true value of his remaining fund. Miss Duncan did not take any further action to check if the record had been corrected because she moved to another department. Mr Clark, in his evidence, said that he had no recollection of that memorandum, but it would have been his procedure to have passed such a memorandum to someone in his section to update the VPR records. However, for some reason, it was not allocated to a specific member of staff and he could not say why the instruction to update the records was not actioned.'

(No one in court was able to tell the judge what 'VPR' stood for, but it was part of the computerised system. Paper records were stored on microfiche.)

[12] It was common ground that the amount of the overpayment was £172,451 (being the difference between £201,938 and £29,486). It was also not in dispute that of the £51,333 received by Mr Derby himself, £41,671 was used to reduce (by about two-thirds) the mortgage on the matrimonial home. The disparity between the evidence as to the size of the mortgage in 1988 and 1995 is not fully

a explained either in the judgment or in the witness statements, but it appears that at some stage there was a further advance of £30,000 to Mrs Derby.

[13] In his witness statement Mr Derby stated that between June 1995 and October 1996 (when Scottish Equitable discovered its mistake) he omitted to take various steps which he would or might have taken, had he realised the true financial position. But (as the judge recorded (at 797)) his oral evidence was
b rather different:

‘... he agreed in evidence that the only thing he did differently after receiving the monies was to pay off the sum of £41,671 from the mortgage, and to use the remaining £9,662 from the tax-free sum of £51,333, together with the increased income under the Norwich Union policy, to live a little
c better by improving the lifestyle of himself and his family in very modest ways, which he agreed were not irreversible commitments. The defendant accepted that, without those payments, he would not have been in any position to save any money. He was on the breadline, he had no spare cash and he was borrowed up to the hilt. He also accepted that his age precluded
d him from obtaining useful employment. He said: “Once you are 65, it’s impossible to get employment.” When asked in re-examination what he could have done to improve his position, he said, “Not very much”, although he would have stayed in the recruitment business, but done less.’

[14] When Scottish Equitable discovered the mistake in October 1996 it asked
e Mr Derby to repay the overpayment, but he declined to repay it. It is clear that without the co-operation of Norwich Union he could not possibly have repaid it, but Norwich Union has accepted in open correspondence with Scottish Equitable (copied to Mr Derby’s solicitors) that in the wholly exceptional circumstances of this case it would unwind the pension policy which it had granted. It would do so either completely or to the extent necessary to reduce Mr Derby’s pension to
f the annual rate of £2,637. This was confirmed at trial by the evidence of Mr John Evans, an actuary with Norwich Union.

[15] Proceedings were commenced by Scottish Equitable on 13 March 1997. No repayment has been made by Mr Derby. It is unnecessary to comment on the course of the proceedings except to mention that on the last day before the
g hearing Mr Derby’s solicitors served a supplementary witness statement made by Mr Derby stating that he and his wife had decided to separate and to sell the matrimonial home, marketing it for £140,000. Mr Derby referred in the statement to his and his wife’s health problems. He also stated that the house belonged not to himself but to his wife, but the judge excluded that evidence (as being contrary to Mr Derby’s pleaded case, and impossible to investigate at that very late stage).

The issues

[16] Scottish Equitable conceded at trial that if the judge found that Mr Derby did not know of the mistake when he received the payment, it would not seek to recover the sum of £9,662 spent by Mr Derby on modest improvements to the
j family’s style of life. The judge made such a finding, on the balance of probability, and so the total claim was reduced by £9,662. But for the purposes of some of the arguments it is necessary to look at the sequence of events as a whole.

[17] In this court, as before the judge, the legal argument has been directed to three main issues. First, at what stage (if at all) does carelessness or recklessness on the part of the payer give the court a discretion to decline to order repayment? Second, how far does the defence of change of position (first unequivocally

recognised in English law by the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512, [1991] 2 AC 548) assist the payee in the circumstances of this case? Third, what part (if any) has estoppel to play, now that the defence of change of position has been recognised? a

[18] The judge resolved all these issues (except in relation to the sum of £9,662) in favour of Scottish Equitable. His detailed reasoning is examined below. Consequently he gave judgment against Mr Derby for £162,790 with interest from 12 October 1996 at one per cent over base rate. He refused permission to appeal but it was granted by Otton LJ in open court on 3 April 2000. b

Mere carelessness

[19] On this issue the argument (in this court, as below) started with the well-known decision of the Court of Exchequer in *Kelly v Solari* (1841) 9 M & W 54, [1835–42] All ER Rep 320, which Robert Goff J (in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1979] 3 All ER 522 at 528, [1980] QB 677 at 686) described as providing the basis of the modern law. It was a case of a mistaken payment by a life office, Argus, on a life policy for £200 effected in 1836, which had lapsed shortly before the death of the life assured in 1840. A director of the company had written ‘lapsed’ on the policy but this was overlooked. Argus paid £987 to his widow, the executrix, on the lapsed policy and two other policies (presumably for a total of £800) which had not lapsed. After discovering the error Argus claimed £187 from the executrix as money paid under a mistake of fact. c

[20] The issue was whether Lord Abinger CB (who was himself a member of the court) had been right in ruling at trial that if the directors of the life office had knowledge, or the means of knowledge, of the policy having lapsed, the claim must fail. Lord Abinger CB accepted that he had put the matter too broadly at trial by using the expression ‘means of knowledge’, which he described as a very vague expression. He expressed his considered view as follows: d

‘The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one,—where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment.’ (See (1841) 9 M & W 54 at 57–58, [1835–42] All ER Rep 320 at 322.) e

[21] Parke B agreed and set out his view in a much-quoted passage: f

‘If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have g

a been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.' (See (1841) 9 M & W 54 at 59, [1835–42] All ER Rep 320 at 322.)

[22] Gurney B and Rolfe B also agreed, the latter mentioning two views of the facts which the jury might possibly reach at a retrial:

b '... first, that the jury may possibly find that the directors had not in truth forgotten the fact; and secondly, they may also come to the conclusion, that they had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events.'

c [23] In his judgment the judge referred at some length to *Kelly v Solari* and he may be taken to have recognised that deliberate waiver of inquiry, where there are circumstances which put the payer on inquiry, will preclude recovery. Such cases are akin to cases of settlement of or deliberate submission to an honest claim (see Goff and Jones *The Law of Restitution* (5th edn, 1998) pp 53–55 and also the American cases mentioned at pp 198–199, including *Meeme Mutual Home*
d *Protection Fire Insurance Co v Lorfeld* (1927) 194 Wis 322). But deliberate waiver of inquiry or acceptance of risk is not to be equated with carelessness or negligence (even if it is termed gross negligence).

[24] It is reasonably clear that when the judge referred ([2000] 3 All ER 793 at 800) to the general rule that mere carelessness does not preclude recovery, he
e did not (by his use of the word 'mere') intend to make a contrast with some more heinous type of carelessness or negligence, since he had just quoted Parke B's words, 'however careless the party paying may have been', and Robert Goff J's comment (in the *Barclays Bank* case [1979] 3 All ER 522 at 528, [1980] QB 677 at 687) that that conclusion has stood ever since. (Some of the most important cases in which it has been followed are mentioned in the speech of Lord Shaw in
f *RE Jones Ltd v Waring & Gillow Ltd* [1926] AC 670 at 688–689, [1926] All ER Rep 36 at 42.) The judge was making a contrast between carelessness, however culpable, and the situation where the paying party is on inquiry but consciously decides to pay without making further inquiry. In this case Scottish Equitable did take steps to investigate the matter. Its investigation was inadequate, but there was no
g deliberate waiver of inquiry.

[25] The judge was therefore right to follow the observations of Lord Goff in *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578:

h 'But it does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court.'

Change of position

j [26] The facts of the *Lipkin Gorman* case, in which the House of Lords recognised the defence of change of position, are well known. The gaming club had received large sums of money misappropriated by a solicitor who was addicted to gambling, but it had changed its position by paying out on his winning bets. Lord Goff (with whose speech Lord Bridge of Harwich, Lord Griffiths and Lord Ackner agreed) noted that in the past, where change of position had been relied on by the defendant, it had been usual to treat the

problem as one of estoppel (as in, for instance, the *R E Jones Ltd* case and *Avon CC v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605). a

[27] There were two main objections to that sort of approach. First, estoppel required there to have been a representation made by one party on which the other had placed reliance and had acted to his detriment: but in many cases involving a dishonest third party (such as the *Lipkin Gorman* case itself) the true owner had done nothing that could possibly be regarded as the making of a representation. (The *R E Jones Ltd* case was another case involving a fraudster, a confidence man whose plan might have been frustrated by an unexpected contact between the two innocent parties; the House of Lords were divided as to whether that equivocal contact amounted to a representation.) Second, estoppel was (as this court had held in the *Avon CC* case, a case to which it will be necessary to return) an inflexible all-or-nothing defence. Lord Goff observed ([1992] 4 All ER 512 at 533, [1991] 2 AC 548 at 579): 'Considerations such as these provide a strong indication that, in many cases, estoppel is not an appropriate concept to deal with the problem.' b
c

[28] Lord Goff went on: d

'In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position.' e

He noted the general acceptance of the defence in other common law jurisdictions (his citations could now be supplemented by reference to the decision of the High Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353). f

[29] Lord Goff said:

'I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way ... At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress, however, that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions. In this connection I have particularly in mind the speech of Lord Simonds in *Ministry of Health v Simpson* [1950] 2 All ER 1137 at 1147, [1951] AC 251 at 276.' (See [1992] 4 All ER 512 at 534, [1991] 2 AC 548 at 580.) g
h
j

a [30] The judge noted the view, put forward by Andrew Burrows (*The Law of Restitution* (1993) pp 425–428) that there is a narrow and a wide version of the defence of change of position, and that the wide view is to be preferred. The narrow view treats the defence as ‘the same as estoppel minus the representation’ (so that detrimental reliance is still a necessary ingredient). The wide view looks to a change of position, causally linked to the mistaken receipt, which makes it inequitable for b the recipient to be required to make restitution. In many cases either test produces the same result, but the wide view extends protection to (for instance) an innocent recipient of a payment which is later stolen from him (see *Goff and Jones* p 822, also favouring the wide view).

c [31] In this court Mr Stephen Moriarty QC (appearing with Mr Richard Handyside for Scottish Equitable) did not argue against the correctness of the wide view, provided that the need for a sufficient causal link is clearly recognised. The fact that the recipient may have suffered some misfortune (such as a breakdown in his health, or the loss of his job) is not a defence unless the misfortune is causally linked (at least on a ‘but for’ test) with the mistaken receipt. d of the scope of the defence facilitates ‘a more generous approach ... to the recognition of the right to restitution’ (Lord Goff in the *Lipkin Gorman* case [1992] 4 All ER 512 at 534, [1991] 2 AC 548 at 581; and compare Lord Goff’s observations in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 at 541, [1999] 2 AC 349 at 385).

e [32] The criticisms of the judgment made by Mr Bernard Weatherill QC (appearing with Mr Paul Emerson for Mr Derby) were directed, not so much to the principles of law enunciated by the judge, as to the way in which he applied those principles to the facts as he found them. Before considering those criticisms in detail I think it may be useful to note that when a person receives a mistaken overpayment there are, even on the narrow view as to the scope of the defence, f a variety of conscious decisions which may be made by the recipient in reliance on the overpayment. Some are simply decisions about expenditure of the receipt: the payee may decide to spend it on an asset which maintains its value, or on luxury goods with little second-hand value, or on a world cruise. He may use it to pay off debts. He may give it away. Or he may make some decision which g involves no immediate expenditure, but is nevertheless causally linked to the receipt. Voluntarily giving up his job, at an age when it would not be easy to get new employment, is the most obvious example. Entering into a long-term financial commitment (such as taking a flat at a high rent on a ten-year lease which would not be easy to dispose of) would be another example. The wide view adds further possibilities which do not depend on deliberate choices by the h recipient.

[33] Mr Weatherill criticised the judge for looking simply at particular items of expenditure (the £9,662 which was conceded, the sum used to pay off the mortgage and the sum paid to the Norwich Union) and for paying insufficient attention to Mr Derby’s decision to slow down his work, and his omission to take j alternative steps to provide for the future of himself and his family. I would readily accept that the defence is not limited (as it is, apparently, in Canada and some states of the United States: see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385, noted in *Goff and Jones* p 819) to specific identifiable items of expenditure. I would also accept that it may be right for the court not to apply too demanding a standard of proof when an honest defendant says that he has spent an overpayment by improving his lifestyle, but cannot

produce any detailed accounting: see the observations of Jonathan Parker J in *Philip Collins Ltd v Davis* [2000] 3 All ER 808 at 827, with which I respectfully agree. The defendants in that case were professional musicians with a propensity to overspend their income, and Jonathan Parker J took a broad approach (at 830).

[34] In the present case, however, the judge made some clear findings of fact, set out in [13] above, to the effect that the improvements which Mr Derby was able to make in his family's lifestyle, between June 1995 and October 1996, were very modest and not irreversible, and that there was nothing that he could usefully have done to make provision for the future. Mr Weatherill has submitted that that seriously understates the devastating effect which the demand for repayment has had on Mr Derby, with his annual income after tax being reduced at a stroke from a sum of the order of £20,000 to a sum of the order of £12,000 (these figures do not include Mrs Derby's earned income). It is easy to accept that Scottish Equitable's demand for repayment must have come as a bitter disappointment to Mr Derby, and it is impossible not to feel sympathy for him, beset as he now is by financial problems, matrimonial problems and health problems. But the court must proceed on the basis of principle, not sympathy, in order that the defence of change of position should not (as *Burrows* puts it at p 426) 'disintegrate into a case by case discretionary analysis of the justice of individual facts, far removed from principle'. Mr Weatherill took the court to various passages in the transcript of Mr Derby's oral evidence but I am not persuaded that the judge erred in his findings of fact or that he failed to take advantage of seeing and hearing the witnesses.

[35] Mr Weatherill submitted that the payment-off of the mortgage was a change of position, but I cannot accept that submission. In general it is not a detriment to pay off a debt which will have to be paid off sooner or later: *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230. It might be if there were a long-term loan on advantageous terms, but it was not suggested that that was the case here; and as the judge said ([2000] 3 All ER 793 at 803) the evidence was that the house was to be sold in the near future.

[36] In relation to the Norwich Union policy it was argued below that Mrs Derby had certain rights or claims because of the impending divorce, and this argument is put forward again in para 16 of the grounds of appeal and in oral argument. I found this argument rather surprising since it appears from the terms of the policy that Mrs Derby is named as a payee in respect of a reversionary annuity of £6,760 a year but that her right to the annuity ceases on divorce (although Mrs Derby may be able to take advantage of the new pension-sharing arrangements introduced by the Welfare Reform and Pensions Act 1999). However, it was only by reference to the impending divorce that Mr Weatherill attacked the judge's conclusion (at 798) that Mrs Derby's rights were no impediment to the unwinding of the policy to which Norwich Union is prepared to agree. Her potential rights on divorce do not depend on her having a power to veto the unwinding of the policy, nor do they have the effect of conferring such a power on her. They do not in my view assist Mr Derby's argument on change of position.

[37] For these reasons the judge was in my view correct to accept the defence of change of position only in relation to the sum of £9,662.

Estoppel

[38] I have already quoted Lord Goff's observation in the *Lipkin Gorman* case [1992] 4 All ER 512 at 533, [1991] 2 AC 548 at 579) that estoppel is not an appropriate

- a concept to deal with the problem, partly because of its 'all or nothing' operation. The same view has been widely expressed, both by academic writers and in the courts. The Newfoundland Court of Appeal (in the *RBC Dominion Securities* case) has flatly rejected it. Jonathan Parker J (in *Philip Collins Ltd v Davis* [2000] 3 All ER 808 at 825–826) has described it as no longer apt. In doing so he referred to the judgment now under appeal, in which the judge avoided a general statement of principle but (on the facts of this case) distinguished the *Avon CC* case and said ([2000] 3 All ER 808 at 807):
- b

'In my judgment, the justice of the situation is met by the extent to which the defence of change of position has succeeded and it would be wholly unjust and inappropriate in those circumstances to allow estoppel to operate so as to provide a complete defence to the whole of the overpayment.'

c

- [39] In considering this part of the case the judge proceeded on the footing that Scottish Equitable had made to Mr Derby a representation that he really was entitled to the payment made to him in June 1995. It is not entirely clear whether the judge (at 804) made a positive finding to that effect, or simply set out counsel's submission and assumed for the purposes of argument that it was correct; but on any view there was ample evidential material to justify such a finding.
- d

- [40] The decision of this court in the *Avon CC* case was discussed at length both below and in this court and it calls for detailed mention. Mr Howlett was a schoolteacher who had an accident at work and was off work (but still employed) for more than a year and a half. After his employment had been terminated the county council, his employer, found that during his time off work it had paid him for eight months (rather than six months) at the full rate of pay and for a further eleven months (rather than six months) at half-rate. It claimed £1,007 from him as money paid under a mistake of fact. In his defence Mr Howlett pleaded that he had spent £460 on a suit and a second-hand car and that he had refrained from claiming social security benefit of £86. He pleaded that this detrimental reliance estopped the employer from recovering any part of the £1,007.
- e
- f

- [41] At trial Mr Howlett's evidence was that he had in fact spent all the money. But his counsel (who was instructed at a trade union's expense and wished to treat the matter as a test case) declined to apply for permission to amend his pleadings. Judgment was given against Mr Howlett for the balance sum of £460 (which was, by a confusing coincidence, the same sum as Mr Howlett had spent on the suit and the car). In this court Cumming-Bruce LJ took an adverse view of counsel's expedient. He was disinclined—
- g

- 'to give a judgment founded on estoppel on facts which exist only in the mind of the pleader. The law does not and should not develop by such a device, and the ratio of such a decision is liable to be seriously misleading. I do not consider that the decision of this court in the instant appeal is authority for the proposition that, where on the facts it would be clearly inequitable to allow a party to make a profit by pleading estoppel, the court will necessarily be powerless to prevent it.' (See [1983] 1 All ER 1073 at 1075–1076, [1983] 1 WLR 605 at 608.)
- h
- j

Cumming-Bruce LJ thought that the judge should have refused to decide the case on a basis which was neither pleaded (that is, that it would be inequitable to allow the defendant to retain part or all of the benefit) nor supported by evidence.

[42] Eveleigh LJ gave a fairly short judgment agreeing, with some hesitation, with Slade LJ. Slade LJ gave a fairly long judgment, approaching the matter by

the established legal principles governing estoppel. He emphasised that estoppel by representation is in origin a rule of evidence, and that that is what confers its 'all or nothing' character. He referred to some well-known cases including *Skyring v Greenwood* (1825) 4 B & C 281, [1824–34] All ER Rep 104 and *Holt v Markham* [1923] 1 KB 504, [1922] All ER Rep 134, commenting that if estoppel by representation could operate in a limited and proportionate way the courts which decided those cases ([1983] 1 All ER 1073 at 1088, [1983] 1 WLR 605 at 624):

'... would have been bound to conduct a much more exact process of quantification of the alteration of the financial position of the recipients which had occurred by reason of the representations.'

[43] However, Slade LJ also said ([1983] 1 All ER 1073 at 1089, [1983] 1 WLR 605 at 624–625):

'I recognise that in some circumstances the doctrine of estoppel could be said to give rise to injustice if it operated so as to defeat in its entirety an action which would otherwise lie for money had and received. This might be the case for example where the sums sought to be recovered were so large as to bear no relation to any detriment which the recipient could possibly have suffered.'

Eveleigh LJ had made similar observations ([1983] 1 All ER 1073 at 1078, [1983] 1 WLR 605 at 611), and I have already quoted the remarks of Cumming-Bruce LJ ([41] above). Harrison J ([2000] 3 All ER 793 at 807) treated the present case as—

'just the sort of situation that the Court of Appeal must have had in mind in *Avon CC v Howlett* when expressing reservations about the ambit of that decision.'

[44] I would be content to follow the judge in refraining from attempting any general statement of principle and treating this case as comfortably within the exception recognised by all three members of this court in the *Avon CC* case. We cannot overrule that case but we can note that it was not seen, even by the court which decided it, as a wholly satisfactory authority, because of its fictional element.

[45] I should record one further novel and ingenious argument addressed to us by Mr Moriarty (but generously attributed by him to his junior, Mr Handyside). That is that, since the *Lipkin Gorman* case, the defence of change of position pre-empts and disables the defence of estoppel by negating detriment. Detriment must, it was correctly submitted, be judged at the time when the representor seeks to go back on his representation, since—

'the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment.' (See Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674, quoted in Spencer Bower and Turner *The Law Relating to Estoppel by Representation* (3rd edn, 1977) pp 110–111.)

a [46] The argument can be simply explained by an illustration in the form of a dialogue. A pays £1000 to B, representing to him 'I have carefully checked all the figures and this is all yours'. B spends £250 on a party and puts £750 in the bank. A discovers that he has made a mistake and owed B nothing. He learns that B has spent £250 and he asks B to repay £750. B: 'You are estopped by your representation on which I have acted to my detriment.' A: 'You have not acted to your detriment. You have had a good party, and at my expense, because I cannot recover the £250 back from you.' The facts that B has spent £250 in an enjoyable way, and that A readily limits his claim to £750, put the argument in its most attractive form. But it seems to have some validity even if B had lost £250 on a bad investment, and A began by suing him for £1000.

c [47] I find this argument not only ingenious but also convincing. If I prefer to base my conclusion primarily on the grounds relied on by the judge it is partly because the argument is novel and appears not to have been considered by any of the distinguished commentators interested in this area of the law. But at present I do not see how the argument could be refuted.

d [48] Will estoppel by representation wither away as a defence to a claim for restitution of money paid under a mistake of fact? It can be predicted with some confidence that with the emergence of the defence of change of position, the court will no longer feel constrained to find that a representation has been made, in a borderline case, in order to avoid an unjust result. It can also be predicted, rather less confidently, that development of the law on a case by case basis will have the effect of enlarging rather than narrowing the exception recognised by this court in the *Avon CC* case. That process might be hastened (or simply overtaken) if the House of Lords were to move away from the evidential origin of estoppel by representation towards a more unified doctrine of estoppel, since proprietary estoppel is a highly flexible doctrine which, so far from operating as 'all or nothing', aims at 'the minimum equity to do justice' (*Crabb v Arun DC* [1975] 3 All ER 865 at 880, [1976] Ch 179 at 198). Paul Key has drawn attention ('Excising Estoppel by Representation as a Defence to Restitution' [1995] CLJ 525 at 533) to two decisions of the High Court of Australia (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394) which he describes as a fundamental attack on the traditional perception of estoppel as a complete defence.

g [49] The remarks in the last four paragraphs are no more than tentative observations on points which were not fully argued, as not being necessary for the determination of the appeal. For the reasons given earlier in this judgment—which are essentially the reasons given by the judge in his admirable judgment—I would dismiss this appeal.

h
KEENE LJ.

[50] I agree.

SIMON BROWN LJ.

j [51] I too would dismiss this appeal for the reasons given by Robert Walker LJ which, as he observes, are essentially those of the judge below.

[52] In doing so, however, I would not wish to be thought unsympathetic to Mr Derby's position. He is now beset by grave financial problems albeit, on the judge's findings, that would have been so even without the mistaken over-payment. He has suffered in addition the great disappointment of being called upon to repay the bulk of this money some 16 months after it was paid and

after he had begun to accustom himself to a standard of living and a level of security beyond his true means. During those 16 months not only was he spending the £9,662 now acknowledged to be irrecoverable, but also he was enjoying a pension from the Norwich Union at the rate of £10,884 pa more than it should have been (£13,521 pa instead of £2,637 pa) and having to service a mortgage debt which was £41,671 less than it should have been—short-term benefits of which, like the £9,662, it is not now sought to deprive him. These bald figures apart, one has here on the one hand an impoverished elderly man entering upon retirement who, having initially taken the trouble to question the extent of his entitlement, is then left for 16 months honestly believing in his good fortune, and on the other a rich and incompetent insurance company who, despite Mr Derby's 'protestations', carelessly pays out £172,451 too much and then takes 16 months to discover its mistake.

[53] Tempting though it is, however, to take these additional factors into account with a view to mitigating the hardship of Mr Derby's present plight, Mr Moriarty QC has satisfied me that strictly they fall to be ignored and that to give effect to them would simply involve what Scrutton LJ in *Holt v Markham* [1923] 1 KB 504 at 513, [1922] All ER Rep 134 at 141 called 'well-meaning sloppiness of thought'. As Lord Goff observed in *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578:

'A claim to recover money at common law is made as a matter of right; and, even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.'

[54] In my judgment there is no legal principle properly entitling the court to disallow recovery here by Scottish Equitable to the extent ordered below. That leaves Mr Derby with the benefit of an enhanced standard of living for the 16 months it took to notify him of the mistake—since to that extent he had changed his position by increased spending—but deprives him of any further benefit from the overpayment—since on the judge's findings, once he learned of the mistake, he would be no worse off having paid the amount ordered to be repaid than if the mistake had never been made.

Appeal dismissed. Permission to appeal to the House of Lords refused.

Dilys Tausz Barrister.

Callery v Gray

Russell v Pal Pak Corrugated Ltd

[2001] EWCA Civ 1117

a

b

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF CJ, LORD PHILLIPS OF WORTH MATRAVERS MR AND BROOKE LJ

5–7 JUNE, 17 JULY 2001

c

Costs – Order for costs – Jurisdiction – After-the-event (ATE) insurance premium – Costs-only proceedings – Claimant entering into conditional fee agreement with solicitors to pursue modest claim for personal injuries – Claimant paying premium for ATE insurance covering him against incurring liability for defendant's costs – Parties settling claim before issue of proceedings and defendant agreeing to pay claimant's reasonable costs – Parties disputing quantum of costs and claimant bringing costs-only proceedings – Whether ATE insurance premium recoverable in costs-only proceedings –

d

Access to Justice Act 1999, s 29 – CPR 44.12A.

e

Solicitor – Costs – Conditional fee agreement – Success fee uplift – After-the-event (ATE) insurance premium – Personal injury claims – Modest and straightforward claims for personal injuries arising from road traffic accidents – Whether in such cases success fee uplift and ATE insurance premium recoverable from defendant as reasonable costs if claimant entering into conditional fee agreement and paying premium at outset – Maximum reasonable success fee uplift in such cases.

f

In two conjoined appeals, the respondent claimants, C and R, instructed solicitors to pursue modest claims for personal injuries arising out of minor road traffic accidents. Before it was known whether the claims would be contested, both claimants entered into a conditional fee agreement (CFA), with a success fee uplift of 60% in C's case and 30% in R's case. C also paid a premium for after-the-event (ATE) insurance which covered him for any liability in respect of the defendant's costs. Both claims were settled without the need to issue proceedings, and the defendants agreed to pay the claimants' reasonable costs. In neither case, however,

g

were the parties able to agree the quantum of those costs. Accordingly, the claimants brought proceedings under CPR 44.12A^a which entitled a party to bring proceedings where the parties to a dispute had reached an agreement on all issues (including which party was to pay 'the costs'), but had failed to agree the amount of 'those costs', and no proceedings had been started. In C's case,

h

the district judge allowed a success fee uplift of 40%, and also permitted C to recover the ATE premium. His decision was affirmed on appeal by the circuit judge. In R's case, the circuit judge allowed an uplift of 20%. The defendants in both cases appealed to the Court of Appeal, contending that the cost of taking out an ATE insurance policy and the success fee uplift should be recoverable only

j

where sufficient information was available to form a reasonable prognosis of the risk that would be involved in a claim, that a claimant could not reasonably incur such liabilities until the reaction of the defendant was known and the merits of any defence raised had been considered, and that the permitted uplifts were, in any event, unreasonable. In C's case, the defendant also contended that a

^a Rule 44.12A is set out at [30], below

premium for ATE insurance could not be recovered in costs-only proceedings under CPR 44.12A. In particular, he contended that s 29^b of the Access to Justice Act 1999 rendered such a premium recoverable only under a costs order made in the proceedings in which the claimant had taken out the ATE policy, that the only proceedings C had commenced were the costs-only proceedings, that the ATE policy had not been taken out against the risk of incurring liability in those proceedings and that accordingly the costs order could not include the ATE insurance premium. Section 29, which had been introduced before r 44.12A, provided that where, in any 'proceedings', a costs order was made in favour of any party who had taken out an insurance policy against the risk of incurring a liability in those 'proceedings', the costs payable to him could include costs in respect of the premium of the policy.

Held – (1) In costs-only proceedings under CPR 44.12A, the award of costs could include the premium paid by the claimant for ATE insurance covering him against incurring liability for the other side's costs. When the 1999 Act had been enacted, the only circumstances in which a claimant could obtain a costs order from the court was by seeking such an order in the substantive action in relation to which the costs had been incurred. Where an action had been commenced and a costs order obtained, the costs awarded would include costs reasonably obtained before the action had started. Section 29 of the 1999 Act enabled the claimant to include in such costs the premium for an insurance policy against liability for costs in the substantive proceedings, even where that policy had been taken out in contemplation of those proceedings before they had been commenced. The 'proceedings' referred to in s 29 were therefore proceedings advancing a claim for substantive relief. CPR 44.12A was a new procedure introduced to enable pre-action costs to be recovered where an action had been settled without commencing substantive proceedings. One object of that rule was to facilitate the settlement of proceedings where there was agreement upon all issues save the assessment of the pre-action costs incurred. The meaning to be accorded to 'the costs' and 'those costs' in the rule was 'the costs which would have been recoverable in the proceedings had the proceedings been commenced'. By reason of s 29 of the 1999 Act, such costs could include the costs of an ATE insurance premium taken out in contemplation of the commencement of substantive proceedings. It followed that in C's case the court below did have jurisdiction to include the ATE insurance premium in the award of costs (see [54], [55], below).

(2) In modest and straightforward claims for compensation arising from road traffic accidents, it would normally be reasonable for a CFA to be concluded and ATE cover taken out on the occasion when the claimant first instructed his solicitor, and where those steps were taken at the outset, the costs of a reasonable uplift and reasonable premium would be recoverable from the defendant in the event that the claim succeeded or was settled on terms that the defendant paid the claimant's costs. In such cases, 20% was the maximum uplift that could reasonably be agreed in a CFA concluded at the outset, assuming that there was no special feature that raised the apprehension that the claim might not prove to be sound. Where there was such a feature, the appropriate uplift would be higher, but it might not be reasonable to attempt to assess that uplift until further information about the defendant's response was to hand. In C's case, the 40% uplift was too high, and the appeal would be allowed to the extent of reducing the

^b Section 29 is set out at [44], below

- a uplift to 20%. In R's case, however, the appeal would be dismissed (see [90], [91], [100], [104], [133], [139], below).

Per curiam. (1) The court's conclusion on the maximum reasonable uplift in modest personal injury claims arising from road traffic accidents is based on very limited data, and it will be desirable to review it once sufficient data is available to enable a fully-informed assessment of the position (see [105], below).

- b (2) It is open to a solicitor and client to agree at the outset a 'two-stage' success fee, which assumes that the case will not settle, at least until after the end of the pre-action protocol period, if at all, but which is subject to a rebate if it does settle before the end of that period. Thus, by way of example, the uplift may be agreed at 100%, subject to a reduction to 5% should the claim settle before the end of the protocol period (see [106], [107], below).

c

Notes

For recovery of insurance premiums by way of costs, see 41 *Halsbury's Laws* (4th edn reissue) para 922.

- d For the Access to Justice Act 1999, s 29, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1514.

Cases referred to in judgment

Awwad v Geraghty & Co (a firm) [2000] 1 All ER 608, [2000] 3 WLR 1041, CA.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

- e *R v Legal Aid Board, ex p Duncan* (2000) 150 NLJ 276, DC.

Appeals

Callery v Gray

- f The defendant, Charles Gray, appealed with permission of Hale LJ granted on 16 March 2001 from the decision of Judge Edwards at the Chester County Court on 29 January 2001 dismissing his appeal from the order of District Judge Wallace, made in costs-only proceedings under CPR 44.12A at Macclesfield County Court on 7 November 2000, whereby he allowed the claimant, Stephen Callery, to recover from the defendant as reasonable costs (i) a success fee uplift of 40% under a conditional fee agreement with his solicitors in respect of a personal injury claim against the defendant, and (ii) the premium paid by the claimant for after-the-event insurance covering him against incurring any liability for the defendant's costs.
- g The Association of Personal Injury Lawyers (APIL), the Forum of Insurance Lawyers (FOIL), the Association of British Insurers (ABI), the Law Society and the After Event Insurers' Group (the ATE Grouping) participated in the appeal as interested parties. Written representations were received from the Motor Accident Solicitors' Society (MASS). The facts are set out in the judgment of the court.

Russell v Pal Pak Corrugated Ltd

- j The defendant, Pal Pak Corrugated Ltd, appealed from the decision of Judge Marshall Evans QC, made in costs-only proceedings under CPR 44.12A at the Liverpool County Court on 25 January 2001, whereby he allowed the claimant, Gregory Charles Russell, to recover from the defendant as reasonable costs a success fee uplift of 20% under a conditional fee agreement with his solicitors in respect of a personal injury claim against the defendant. APIL, FOIL,

ABI, the Law Society and the ATE Grouping participated in the appeal as interested parties. Written representations were received from MASS. The facts are set out in the judgment of the court. a

Peter Birts QC and *David Holland* (instructed by *Beachcroft Wansbroughs*) for Mr Gray.

Geoffrey Nice QC and *Nicholas Bacon* (instructed by *Amelans*, Manchester) for Mr Callery. b

Timothy King QC and *Louis Browne* (instructed by *Davies Wallis Foyster*, Liverpool) for Pal Pak.

John Gruffydd (instructed by *E Rex Makin & Co*, Liverpool) for Mr Russell.

Allan Gore (instructed by *Pattinson & Brewer*) for APIL.

Anna Guggenheim QC (instructed by *A E Wyeth & Co*) for FOIL. c

John Leighton Williams QC (instructed by *Barlow, Lyde & Gilbert*) for ABI.

Richard Drabble QC (instructed by the *Solicitor for the Law Society*) for the Law Society.

Timothy Dutton QC (instructed by *Rowe Cohen*, Manchester) for the ATE Grouping.

Cur adv vult d

17 July 2001. The following judgment of the court, to which all its members contributed, was delivered.

INDEX

	Paragraphs	
(1) Background	[1]–[7]	
(2) Developments between 1988 and 2000 in outline	[8]–[13]	
(3) The early years of ATE insurance	[14]–[23]	
(4) The legislative framework	[24]–[40]	
(5) The three main issues	[41]	
(6) The jurisdiction issue	[42]–[56]	f
(7) The CFAs in these two cases	[57]–[59]	
(8) The development of success fees in CFAs	[60]–[64]	
(9) ATE insurance	[65]–[79]	
(10) The prematurity issue	[80]–[100]	
(11) The reasonableness issue	[101]–[117]	g
(12) The Callery appeal: (i) the facts	[118]–[124]	
(13) The Callery appeal: (ii) the judgment appealed	[125]–[130]	
(14) The Callery appeal: (iii) our conclusions	[131]–[133]	
(15) The Russell appeal: (i) the facts	[134]–[137]	
(16) The Russell appeal:		h
(ii) the decision of the judge and our conclusion	[138]–[139]	

LORD WOOLF CJ.

(1) *Background*

[1] The judgment relates to two appeals which are confined to issues of costs. The claimant in one appeal is Stephen Callery and we will refer to the appeal in his case as the 'Callery appeal'. The claimant in the other appeal is Gregory Charles Russell and we will refer to the appeal in his case as the 'Russell appeal'. Both appeals are by the defendants and arise out of modest claims for personal injuries due to minor traffic accidents. The amounts of costs in issue are small. However, the appeals are of j

a very considerable importance to those members of the public who are involved in civil disputes, the legal profession and the insurance industry.

[2] The appeals deal with two new powers of the courts. The first is the power to make an award of costs against a party to legal proceedings (the paying party) in favour of a party (the receiving party) which includes a sum paid by the receiving party for an insurance premium obtained to cover costs which the receiving party b would have been liable to pay had he lost. This type of insurance is called after-the-event insurance (ATE). The second is the power of the court to make a costs order against the paying party which includes the amount of a success fee payable by the receiving party under a conditional fee agreement (CFA).

[3] ATE is to be distinguished from 'before-the-event' (BTE) legal expenses insurance (often provided as part of a broad range of indemnity eg for house c owners) which is taken out prior to the event which gives rise to a possible claim.

[4] Because of the importance of the issues, we agreed to hear representations from a number of bodies who have a direct interest in the matters we consider in this judgment. We received written and oral submissions from the Law Society, the Association of Personal Injury Lawyers (APIL), the Association of British d Insurers (ABI), the Forum of Insurance Lawyers (FOIL) and a group (the ATE Grouping) which consists of a large number of firms, organisations and insurers engaged in ATE. We received written representations only from the Motor Accident Solicitors' Society (MASS). We were grateful for the assistance of these bodies. We also had the great advantage of having the Chief Costs Judge as our assessor. His advice was extremely helpful. Following the hearing, we received further written e representations from the parties, which we have taken into account in so far as it was appropriate to do so.

[5] Until Parliament intervened by legislation, it was always considered to be contrary to public policy, and therefore unlawful, in this jurisdiction for the financial reward which a lawyer received for his services in connection with litigation to f vary depending upon the outcome of the litigation. The historic position and its development is lucidly described by Schiemann LJ in his judgment in *Awwad v Geraghty & Co (a firm)* [2000] 1 All ER 608, [2000] 3 WLR 1041. Schiemann LJ ([2000] 1 All ER 608 at 610, [2000] 3 WLR 1041 at 1044) points out that there are three varieties of fee which a lawyer and his client may agree should be paid if, but only if, the claim succeeds: (i) a share of the recovery that the client makes in the litigation; (ii) the normal fee together with an uplift; (iii) the normal fee g without any uplift.

[6] The first type of fee is known as 'a contingency fee'. While it is common in the United States of America it is not lawful in this country and we are not concerned with it. It is now lawful to agree that the second and third types of fee shall be h payable conditional upon success, subject to compliance with the requirements of the relevant statutory instrument. Each type can, where such an agreement is made, be described as 'a conditional fee'. Under modern CPR nomenclature an agreement for the second type of fee (but not the third) may also be described as 'a funding arrangement' (see CPR 43.2(1)(k)(i)). These appeals are concerned with j this type of CFA.

[7] The introduction of the legislation which made conditional fees lawful was motivated primarily by two problems in relation to the provision of legal aid for civil litigation. The first was that progressively fewer members of the public were eligible for legal aid to bring civil proceedings. It was thought that the introduction of CFAs would have the effect of enabling those who could not afford to bring proceedings without the benefit of legal aid to do so. The second problem was

that the cost of providing legal aid was growing year on year. Accordingly the government decided to reduce the areas of litigation which were funded by legal aid. It was considered that this would not reduce access to justice since those affected could bring proceedings using CFAs. The reason for reducing the areas of litigation eligible for legal aid was not, it was said, to reduce expenditure overall but rather to use the funds saved thereby to meet the need for publicly-funded legal services to be provided in a different manner.

(2) *Developments between 1988 and 2000 in outline*

[8] It was in 1988 that the report of the Review Body on Civil Justice (*Civil Justice Review*, Cm 394) pp 68–69 (paras 384–389) opened up the desirability of re-examining the prohibition on what it described as ‘contingency fees and other forms of incentive scheme’. In 1990 Parliament legislated for the first time to permit CFAs in certain narrowly-prescribed circumstances. Section 58 of the Courts and Legal Services Act 1990 provided the enabling machinery. The Lord Chancellor’s new enabling powers were exercised for the first time with effect from 5 July 1995 when the Conditional Fee Agreements Regulations 1995, SI 1995/1675, and the Conditional Fee Agreements Order 1995, SI 1995/1674 (the 1995 order) both came into effect. The former prescribed the form which a CFA had to take if it was to be legally enforceable, whilst the latter limited its availability to the six types of proceedings mentioned in art 2(1) of the 1995 order. These included, by art 2(1)(a), personal injury proceedings. Article 3 of the 1995 order prescribed the maximum permitted percentage by which fees might be increased (in the event of success) to be 100%. Schedule 17 of the 1990 Act added a new sub-s 15(4A) to the Legal Aid Act 1988 to the effect that a person might not be refused representation under that Act for the purposes of any proceedings on the ground that it would be more appropriate for him to enter into a CFA.

[9] In 1998, a new Conditional Fee Agreements Order, SI 1998/1860 (the 1998 order) revoked the 1995 order. CFAs were now to be permissible in all proceedings (other than those specified in s 58(10) of the 1990 Act (see also s 58(1)(a)), including those concluded without the commencement of court proceedings. Article 4 of the new order retained 100% as the maximum permitted percentage increase.

[10] The Access to Justice Act 1999 introduced major changes to the funding of civil litigation. Part I of the Act created a new Legal Services Commission (in place of the Legal Aid Board) with power to determine which types of litigation should qualify for public funding. (The history of the many relevant changes introduced by the Legal Aid Board before the 1999 Act came into effect on 1 April 2000 was described by the Divisional Court in *R v Legal Aid Board, ex p Duncan* (2000) 150 NLJ 276.) For present purposes, it is only necessary to record that from 1 April 2000 onwards, what used to be described as legal aid was no longer to be available for personal injury cases (although clinical negligence cases were excluded from this blanket ban).

[11] The need to put alternative funding arrangements in place was recognised by Parliament in Pt II of the 1999 Act, entitled ‘Other Funding of Legal Services’. In this appeal, we are concerned only with the first five sections contained in this part (ss 27 to 31); the other three sections relate to legal aid in Scotland.

[12] Sections 27 and 28 of the 1999 Act are concerned with the circumstances in which CFAs, and what are described as ‘litigation funding agreements’, are to be enforceable. On this appeal we are not concerned directly with the latter, for which s 28 (which introduces a new s 58B into the 1990 Act) makes provision.

a So far as CFAs are concerned, the technique selected by Parliament was to substitute two new sections, 58 and 58A, in place of s 58 of the 1990 Act as originally enacted. We will refer to the detailed provisions of these sections later in this judgment.

[13] The next two sections, along with s 31, are headed 'Costs' and deal with different matters. Section 29 is headed 'Recovery of insurance premiums by way of costs' (for its text, see [44] below). Section 30 is headed 'Recovery where body undertakes to meet costs liabilities'. Their evident purpose is to enlarge the scope b of the items of costs which a successful party to proceedings (to use a neutral word) may recover from the paying party.

(3) *The early years of ATE insurance*

[14] In order to understand the purpose of s 29, it is necessary to consider its c historical development. We have been greatly assisted in this regard by the submissions we have received not only from the parties and the Law Society, but also from the lawyers' groups and insurance interests that made written and oral representations to us.

[15] The introduction of CFAs in 1995 still left a litigant at risk of having to pay d the other side's costs. The Law Society therefore developed the ATE policy, with the help of insurance brokers, as a new form of insurance cover. Since about that time there have also been forms of ATE insurance which provide cover against other risks, but we are not concerned with such cover, whatever form it takes, in this judgment.

[16] Written evidence was given by Mr Christopher Ward, the managing e director of the specialist legal expenses underwriting agency which has run the Law Society's Accident Line Protect conditional fee insurance scheme since its inception in 1995. During the last six years, this agency has issued over 85,000 ATE policies. The insurance was always issued in conjunction with personal injury claims conducted under a CFA.

[17] This agency is not itself the risk carrier in insurance terms. It manages the f insurance on behalf of the underwriter who carries the risk. For the first five years, this was an American company. The Law Society told us that the ATE premiums for this type of cover were originally very modest, because the success rate of personal injury litigation was thought to be so high. Adverse claims experience, however, drove the premium up sharply, and in 2000 the original underwriters g withdrew from the market after suffering major losses.

[18] We have been shown the different stages of the public consultation process h which took place between March 1998 and February 2000. This process started with the government professing its keenness to encourage the wider use of legal expenses insurance. Premiums for BTE cover were now being paid by over 17 million people at a trivial annual cost to themselves, and the government said it wished to encourage a varied market for insurance products which would enable people to go to law if the need arose.

[19] None of the respondents to its first consultation paper appears to have suggested that an ATE premium should be recoverable from the other side in the event of success, but the government eventually decided to introduce this j provision by primary legislation. The debates in each House of Parliament in the 1999 Access to Justice Bill on this proposal, which we have seen, do not assist us in the task we have before us.

[20] In September 1999 the government initiated a further round of public consultation to address some of the finer details of its proposals. We have read its response, published in February 2000 (and in particular paras 85 and 76(bis) of

that response) which shows that it was willing to monitor the development of the insurance market and the level of premiums for legal expenses insurance quite closely. In this response it evinced for the first time its approval of a practice whereby claimants entered into an ATE insurance policy at an early stage, before embarking on the procedures required by a pre-action protocol.

[21] On 3 July 2000, the Civil Procedure (Amendment No 3) Rules 2000, SI 2000/1371, came into force, supplemented by a new Practice Direction on costs. We will discuss the salient features of these two documents later in this judgment. It is sufficient for present purposes to note that the additional rules numbered 44.3A and 44.3B made new provision for costs orders relating to funding arrangements and the limits on recovery under funding arrangements.

[22] A novel procedure was introduced by a new CPR 44.12A (for its text, see [30] below). It provided for the initiation and scope of 'costs-only proceedings' in those cases in which the parties had made a written agreement settling all the issues in dispute between them, including the incidence of liability for costs, without the need to initiate court proceedings, and when all that remained in issue was the amount of those costs. The relevant Practice Direction made it clear that on an assessment of costs between the parties, the court had power to reduce any ATE premium it considered unreasonable. It also identified some of the factors it might take into account when determining what was reasonable in this context (CPR PD 44, para 11.10: see [33] below).

[23] This then, was the regulatory and legislative backcloth to the revival of the ATE market following the enactment of the 1999 Act.

4. *The legislative framework*

[24] We will now turn to consider in detail the new framework of primary and secondary legislation, buttressed by practice directions and protocols, which marked the advent last year of the new arrangements whose effect we have to consider on these appeals.

[25] The starting point is the effect of the changes the 1999 Act made to the conditions which must be fulfilled before entering into a CFA. The material changes are contained in: (i) s 27 of the 1999 Act, which inserted the substitute s 58 (referred to in (ii) and (iii)) and a new s 58A into the 1990 Act. (ii) Section 58(1), which requires a CFA to satisfy all the conditions of that section for it to be enforceable. (iii) Section 58(3) and (4), which set out the conditions applicable to every CFA with a success fee. These conditions require, among other things, that such a CFA must be in writing, must comply with any requirement prescribed by the Lord Chancellor and must specify the success fee. (iv) Section 58A(6), which states:

'A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.'

(v) Section 58A(7), which includes an express power for the rules of court to make provision for the assessment of any costs, including fees payable under a CFA.

[26] Next came the Conditional Fee Agreements Regulations 2000, SI 2000/692. They provide considerable protection for a litigant entering into a CFA, by prescribing additional requirements with which CFAs must comply and stating the consequences if they do not do so. Regulations 3 and 4 provide:

a '3.—(1) A conditional fee agreement which provides for a success fee—(a) must briefly specify the reasons for setting the percentage increase at the level stated in the agreement, and (b) must specify how much of the percentage increase, if any, relates to the cost to the legal representative of the postponement of the payment of his fees and expenses.

b (2) If the agreement relates to court proceedings, it must provide that where the percentage increase becomes payable as a result of those proceedings, then—(a) if—(i) any fees subject to the increase are assessed, and (ii) the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement, he may do so, (b) if—(i) any such fees are assessed, and (ii) any amount in respect of the percentage increase is disallowed on the assessment on the ground that the level at which the increase was set was unreasonable in view of facts which were or should have been known to the legal representative at the time it was set, that amount ceases to be payable under the agreement, unless the court is satisfied that it should continue to be so payable, and (c) if—(i) sub-paragraph (b) does not apply, and (ii) the legal representative agrees with any person liable as a result of the proceedings to pay fees subject to the percentage increase that a lower amount than the amount payable in accordance with the conditional fee agreement is to be paid instead, the amount payable under the conditional fee agreement in respect of those fees shall be reduced accordingly, unless the court is satisfied that the full amount should continue to be payable under it.

e (3) In this regulation "percentage increase" means the percentage by which the amount of the fees which would be payable if the agreement were not a conditional fee agreement is to be increased under the agreement ...

f 4.—(1) Before a conditional fee agreement is made the legal representative must—(a) inform the client about the following matters, and (b) if the client requires any further explanation, advice or other information about any of those matters, provide such further explanation, advice or other information about them as the client may reasonably require.

g (2) Those matters are—(a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement, (b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so, (c) whether the legal representative considers that the client's risk of incurring liability for costs in respect of the proceedings to which agreement relates is insured against under an existing contract of insurance, (d) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question, (e) whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract—(i) his reasons for doing so, and (ii) whether he has an interest in doing so.

j (3) Before a conditional fee agreement is made the legal representative must explain its effect to the client.'

[27] The CPR contain specific provisions as to success fees and premiums payable for ATE insurance. CPR 43.2 has the following relevant definitions which apply to Pts 44 to 48, 'unless the context otherwise requires':

'(a) "Costs" includes ... any additional liability incurred under a funding arrangement ... (k) "funding arrangement" means an arrangement where a person has—(i) entered into a conditional fee agreement ... which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990; (ii) taken out an insurance policy to which section 29 of the Access to Justice Act 1999 (recovery of insurance premiums by way of costs) applies; or ... (l) "percentage increase" means the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee; (m) "insurance premium" means a sum of money paid or payable for insurance against the risk of incurring a cost liability and the proceedings, taken out after the event that is the subject matter of the claim ... (o) "additional liability" means the percentage increase, the insurance premium, or ... , as the case may be.'

[28] Rule 44.3A contains provisions as to costs orders relating to funding arrangements. It requires the court not to assess any additional liability until the conclusion of the proceedings, or part of the proceedings, to which the funding arrangement relates, and gives the court power to make the appropriate order summarily or on a detailed assessment.

[29] Rule 44.3B places limits on what can be recovered under funding arrangements. Rule 44.3B(1) provides that a party may not recover the following as an additional liability (although this does not apply on an assessment of a solicitor's bill to his client):

'(a) any proportion of the percentage increase relating to the cost to the legal representative of the postponement of the payment of his fees and expenses ... (d) any percentage increase where a party has failed to comply with—(i) a requirement in the costs practice direction; or (ii) a court order, to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the conditional fee agreement.'

[30] Rule 44.12A introduces a new concept which we will call 'costs-only proceedings'. It is in these terms:

'(1) This rule sets out a procedure which may be followed where—(a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but (b) they have failed to agree the amount of those costs; and (c) no proceedings have been started.

(2) Either party to the agreement may start proceedings under this rule by issuing a claim form in accordance with Part 8.

(3) The claim form must contain or be accompanied by the agreement or confirmation.

(4) In proceedings to which this rule applies the court—(a) may (i) make an order for costs; or (ii) dismiss the claim; and (b) must dismiss the claim if it is opposed.'

[31] Rule 44.15 requires information as to funding arrangements to be provided. In particular, r 44.15(1) provides that a party seeking to recover an additional liability must provide to the court and to the other parties information about the funding arrangement, as required by a rule, practice direction or court order. If the information changes, then a notice of change has to be filed and served on the other parties.

a [32] There is a Practice Direction relating to funding arrangements. Section 9 of the direction supplements r 44.3A. It states categorically: '9.1 Under an order for payment of "costs" the costs payable will include an additional liability incurred under a funding arrangement.'

[33] Other relevant provisions of the Practice Direction are in these terms:

b '11.4 Where a party has entered into a funding arrangement the costs claim may, subject to rule 44.3B include an additional liability.

11.5 In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs ...

c 11.7 Subject to paragraph 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.

d 11.8(1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:—(a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur; (b) the legal representative's liability for any disbursements, (c) what other methods of financing the costs were available to the receiving party. (2) The court has the power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for differing periods during which costs were incurred.

e 11.9 A percentage increase will not be reduced simply on the grounds that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate.

f 11.10 In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include: (1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely costs of funding the case with a conditional fee agreement with a success fee and supporting insurance cover; (2) the level and extent of the cover provided; (3) the availability of any pre-existing insurance cover; (4) whether any part of the premium would be rebated in the event of early settlement; (5) the amount of commission payable to the receiving party or his legal representative or other agents.'

g [34] Subject to these provisions, the approach of the courts in relation to funding arrangements should be the same as on any other assessment of costs of proceedings.

h [35] We should finally refer to the relevant protocols and the conditions which can appear in CFAs. The parties are required to comply with the objectives and terms of relevant protocols. Whether or not they have done so will be relevant when the court makes costs orders. This is made clear by the Practice Direction—Protocols which sets out (at para 1.4) the objective of pre-action protocols as being: (a) to encourage the exchange of early and full information about the prospective legal claim; (b) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and (c) to support efficient management of proceedings where litigation cannot be avoided.

j [36] Paragraph 2.1 of the Practice Direction states that the compliance and non-compliance with an applicable protocol should be taken into account by the court when making orders for costs.

[37] Paragraph 2.2 of the Practice Direction states that the court will expect the parties to have complied in substance with the terms of an approved protocol. a

[38] Paragraph 4 of the Practice Direction provides that where there is no approved protocol, the parties are expected to act reasonably by exchanging information and documents and generally trying to avoid proceedings.

[39] The protocol which relates to personal injury claims ('Pre-action Protocol for Personal Injury Claims') applies to all claims which include a claim for personal injuries. It is primarily designed for those road traffic, tripping and slipping and accident at work cases allocated to the fast track which could include an element of personal injury with a value of less than £15,000. The protocol does, however, say that the approach advocated by the protocol is equally appropriate to some higher value claims. b

[40] The protocol is designed to enable the parties to settle a dispute without litigation or, failing settlement, to be in a position where they can dispose efficiently of any litigation which becomes necessary. The protocol gives a timetable for the exchange of information within three months. It is anticipated that as part of, or on completion of, the protocol process the parties will, if necessary, make formal offers to settle in order to benefit from the protection as to costs which such offers provide. c
d

(5) *The three main issues*

[41] We have identified three main issues on these appeals: (a) whether an ATE premium can be recovered in costs only proceedings ('the jurisdiction issue': see [42]–[55] below); (b) the stage of a dispute at which it is appropriate to enter into (a) a CFA and (b) an ATE policy ('the prematurity issue': see [80]–[100] below); (c) the reasonableness of the claimants' (a) percentage uplift and (b) ATE premium ('the reasonableness issue': see [101]–[116] below). e

(6) *The jurisdiction issue* f

[42] This issue (which only affects the Callery appeal) differs from the other issues as it involves a pure point of law. Due to the uncertainty created by this point, we announced our decision on this issue during the course of the hearing. This part of our judgment sets out our reasons for that decision.

[43] The Callery claim was settled on terms contained in a letter dated 7 August 2000 from Mr Callery's solicitor. The terms were that the appellant would pay £1,500 by way of damages, together with the respondent's 'reasonable costs and disbursements'. This left outstanding the issue of what was payable by way of 'reasonable costs and disbursements'. g

[44] On 12 September 2000 the respondent commenced costs-only proceedings pursuant to CPR 44.12A. No challenge is made by the appellant to the respondent's entitlement to make a claim for a costs order under that rule. It is submitted, however, that a claimant who avails himself of this procedure has no right to include the premium paid for ATE insurance in the costs claimed. This argument is based on the terms of s 29 of the 1999 Act headed 'Recovery of insurance premiums by way of costs'. The section states: h
j

'Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.'

a [45] The appellant's argument, as advanced by Mr Birts QC, can be summarised as follows: (i) prior to s 29 of the 1999 Act there was no right to recover by way of costs a premium paid for ATE insurance; (ii) it follows that unless a claimant can bring himself within the wording of s 29, he cannot recover the premium; (iii) s 29 only permits recovery of an ATE insurance premium where: (a) there are or have been proceedings in which a costs order has been made in the claimant's b favour and (b) those proceedings are proceedings in which the claimant has taken out an insurance policy against the risk of incurring liability for costs in those proceedings; (iv) the only proceedings that the claimant has commenced are the 'costs only proceedings'; (v) the claimant has not taken out an insurance policy c against the risk of incurring liability in those (ie the costs-only) proceedings; (vi) it follows that the costs order made by the court in the costs-only proceedings cannot include the ATE insurance premium.

[46] Mr Birts accepted that where proceedings for substantive relief have been commenced, a costs order in those proceedings can include a premium in respect of ATE insurance against the risk of incurring liability in those proceedings, albeit that such insurance was taken out before such proceedings were commenced. d He submitted, however, that the only way in which the ATE insurance premium can be recovered is by first commencing proceedings claiming substantive relief and then claiming costs in relation to those proceedings.

[47] This submission is unattractive on its face for, if it is correct, those who have taken out ATE insurance will be disinclined to settle their claims before substantive proceedings have been commenced. Mr Birts submitted, however, e that the wording of s 29 reflected a determination by Parliament to approach new funding arrangements cautiously and incrementally, and to discourage claimants from taking out insurance before it was plain that substantive proceedings would have to be commenced and that insurance cover was therefore really necessary.

[48] Mr Birts was not able to support this submission by reference to any f Parliamentary material admissible as an aid to interpretation under the principle in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593.

[49] Mr Nice QC advanced an argument on behalf of the respondent which required the introduction of a number of additional words into s 29 in order to provide clarity to a clause which he submitted was unsatisfactorily drafted. He submitted that s 29 should be read as follows: g

'Where in [respect of] any proceedings, [whether commenced or contemplated,] a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in [connection with] those proceedings, [whether commenced or contemplated], the costs payable to him may, h subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.'

[50] This suggested interpretation involves implying words into s 29 in order to alter its natural meaning. More significantly, in our view, it requires a degree of clairvoyance on the part of the draftsman. The section, as interpreted by j Mr Nice, contemplates a costs order being made in respect of 'proceedings' which were only contemplated. But when the 1999 Act was introduced, there was no procedure under which such an order could be made. A costs order could only be made in the action in which substantive relief was claimed. It was to meet this procedural shortcoming that CPR 44.12A was added to the rules on 14 July 2000, the purpose of which was to enable inevitable disputes as to the amount of costs to be resolved without interfering with the general settlement of a dispute.

[51] In addition, the wording of s 29 can be explained much more simply: Parliament was seeking to restrict the recovery of premiums to those relating to ATE, as opposed to BTE, insurance. The wording of the section achieves this end.

[52] For these reasons, we are unable to accept the interpretation of s 29 advanced by Mr Nice. Judge Edwards dealt with this issue of interpretation as follows:

'I must look at the 1999 Act itself and I think that what this section means is that when a costs order is made in favour of the party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, that must mean that if he has taken out an insurance policy against incurring a liability for costs of the other side, in due course should he be compelled actually to pursue the matter in that way, then when it comes to assessment of costs simply under Pt 8 that must be regarded as part and parcel of the contemplated proceedings against which the insurance policy was taken out, and that therefore such a premium is in fact recoverable under the wording of s 29. I think that gives a sensible purposive construction to the section, but I would not presume to try to give a purposive construction to a section if its plain meaning, to my mind, was to the contrary, but I do not believe that the plain meaning is to the contrary. It is clearly to be anticipated that insurance will be taken out before proceedings have started. It is always possible for the matter then to be compromised before the proceedings actually are started, and it would be quite wrong to interpret this section as shutting out a claimant from recovering that premium in such circumstances.'

[53] This analysis treats the Pt 8 costs-only proceedings as being included within the phrase 'in any proceedings' in s 29. It does not, however, provide a satisfactory answer to Mr Birts' point that the only proceedings before the court at that stage are the Pt 8 costs-only proceedings, and that the insurance premium claimed does not relate to an insurance policy taken out against the risk of liability in those costs proceedings.

[54] Our conclusions in respect of this issue of interpretation have been assisted by the argument advanced by Mr Drabble QC, on behalf of the Law Society. The conclusions are as follows. (i) When the 1999 Act was enacted the only circumstances in which a claimant could obtain a costs order from the court was by seeking such an order in the substantive action in relation to which the costs had been incurred. (ii) Where an action is commenced and a costs order is then obtained, the costs awarded will include costs reasonably incurred before the action started, such as costs incurred in complying with a pre-action protocol. (iii) Section 29 of the 1999 Act enables the claimant to include in such costs the premium for an insurance policy against liability for costs in the substantive proceedings, even where that policy was taken out in contemplation of those proceedings before they were commenced. (iv) The "proceedings" referred to in s 29 are therefore proceedings advancing a claim for substantive relief. (v) CPR 44.12A is a new procedure introduced to enable 'pre-action' costs to be recovered where an action has been settled before substantive proceedings have been commenced. One object of this rule is to facilitate the settlement of proceedings where there is agreement upon all issues save the assessment of the pre-action costs incurred. (vi) CPR 44.12A states that it sets out a procedure under which the Court can make a costs order where: '(a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but (b) they have failed to agree the

a amount of those costs ...' (vii) The meaning to be accorded to "the costs" and "those costs" in the rule is "the costs which would have been recoverable in the proceedings had the proceedings been commenced". There is no other meaning that can sensibly be given to these words. (viii) By reason of s 29 of the 1999 Act, such costs may include the costs of an ATE insurance premium taken out in contemplation of the commencement of substantive proceedings.

b [55] It follows that Judge Edwards had jurisdiction to include the ATE insurance premium in his award of costs by virtue of: (i) the agreement between the parties that the appellant would pay the respondent's reasonable costs and disbursements; (ii) s 29 of the 1999 Act which permits costs recoverable in proceedings to include an ATE insurance premium; (iii) CPR 44.12A which provides a simple procedure facilitating the assessment and recovery of the costs that would be recoverable if
c substantive proceedings were commenced, without the need to initiate such proceedings.

[56] Before turning to deal with the remaining issues we propose to refer to some of the evidence that we received.

d (7) *The CFAs in these two cases*

[57] In both the Callery and the Russell appeals, the claims were in fact settled during the protocol period, but after the CFA had been entered into and ATE insurance obtained. We refer to both CFAs as examples of the terms such agreements are likely to contain. In the Callery case, the CFA was dated 28 April 2000. In the Russell case, it was dated 11 August 2000. In both cases the CFAs referred
e to the Law Society conditions, and they also both covered claims for damages for personal injuries suffered on the respective dates, any appeal by an opponent, any appeal made against an interim order during the proceedings and any proceedings taken to enforce a judgment order or agreement. The CFAs did not cover counter-claims or an appeal made against a final judgment or order.

f [58] In the Callery case, the claimant had to pay disbursements 'whatever happens'. The Russell agreement provided that 'if you lose, you do not pay our charges, but we may require you to pay our disbursements'. Both CFAs provided that if the agreement was terminated before the claimant won or lost, the claimant would have to pay basic charges.

g [59] The Law Society conditions gave the claimants the right to end the agreement at any time. They also allowed the solicitors to terminate the CFA if they believed the claimant was unlikely to win, in which case only disbursements would be payable, or if the claimants rejected their opinion about settling with their opponent. In both cases there were some conflicts between the terms of the CFA and the Law Society conditions. These are not significant for present purposes.

h (8) *The development of success fees in CFAs*

[60] Before turning to the two main issues, we must first say something about the development of success fees in CFAs and ATE insurance policies in recent years. So far as success fees are concerned, the Law Society told us that following the
j enactment of s 58 of the 1990 Act, the then Lord Chancellor had originally proposed that the maximum permitted level of success fee should be 10% or 20%. He was in due course persuaded to change his mind, and in the 1995 order the maximum permitted fee was prescribed to be 100%.

[61] Apparently the Law Society successfully argued that, even if it was accepted that the public interest did not favour facilitating litigation where the prospects of success were less than 50%, it should surely be possible for litigation

to be conducted on a CFA when the prospects of success were 50% or a little better. This, it said, required provision for a maximum uplift of 100%, in order to enable lawyers to earn enough in successful cases to compensate for the fact that they would receive no fees at all in unsuccessful cases. The maximum permitted fee level of 100% was retained in both the 1998 order and in art 4 of the Conditional Fee Agreements Order 2000, SI 2000/823, which replaced the 1998 order with effect from 1 April 2000.

[62] The percentage by which the ordinary fee is enhanced to reflect the fact that payment is conditional upon success is commonly referred to as 'the uplift'. It has hitherto been generally understood that a CFA must provide for a single uplift that will be payable regardless of the circumstances in which the success is achieved. Thus, in the case of the type of claim with which these appeals are concerned, the uplift has to reflect the fact that, (i) it is likely that the claim will be settled swiftly without the need for litigation, but (ii) the possibility must exist that the claim will result in contested litigation with no certainty of a successful outcome.

[63] It was on this understanding of the need for a single all-purpose uplift that APIL provided a series of worked examples designed to demonstrate that uplifts should be set at a relatively high level from the outset. They took an imaginary cohort of 150 personal injury cases, and postulated that 50 of these would be rejected after the solicitor had devoted time on each which would ordinarily be chargeable at £150. Ninety-two of the remainder would be settled, two abandoned, and six fought out at trial. The tables show variations within this scenario (more of the six cases lost than won, and varying stages at which the claim was settled). It was suggested on these figures that if three of the contested cases in this scenario were won, the 'standard' success fee based on a 95% success rate would have to be 28.88% if the lawyer was to receive the same total fees for his work on all these cases as he would have received under the previous regime. If some of the 92 cases settled late, so that more work would be done on these successful cases, the level of success fee needed to 'break even' would be reduced to 22.64%. This illustration is necessarily stylised, and the figures do not allow any increment to cover the risk that the particular 'book' of the particular lawyer deviates from the overall statistical norm.

[64] We were also shown research studies whose authors had endeavoured to create a larger database of information about what is actually happening in the personal injuries market. It was common ground, however, that not enough is yet known about the likely effect of different levels of success fees. APIL, for instance, told us that they—

'have been concerned about the lack of hard research and knowledge as to success rates. Acquiring such knowledge has proved difficult and we are far from confident that the patterns of success achieved thus far are not distorted by: (1) research into the performance of CFAs run *alongside* publicly funded cases; (2) defendants and insurers' attitudes to personal injury litigation carried over from a publicly funded era; (3) an initial over-caution on the part of some and over-adventurousness on the part of other personal injury lawyers as they come to terms with CFAs as the dominant funding mechanism.'

(9) ATE insurance

- a [65] We have already observed (see [15] above) that ATE insurance can take a number of quite distinct forms. The major distinction is between the ATE insurers who provide litigation costs insurance cover for personal injury related claims directly through solicitors or through claims management companies and those who insure non-personal injury or commercial claims. There is also a distinction between ATE cover that is provided only in respect of the 'other side's costs' and that provided 'for both sides' costs'. ATE cover can also be provided for an individual claimant or in standard form by solicitors under delegated authority. As we stated at [15], the only form of ATE insurance to which this judgment relates is insurance providing cover against the other side's costs. We do not deal with the question whether ATE cover against other risks falls within s 29.

- c [66] Mr Ward (see [16] above) explained to us the problems his agency had faced in the past as a result of what it described as 'adverse selection'. It has always operated the Law Society's scheme on a delegated authority basis. This allows solicitors, within the limits of their authority, to decide whether to offer ATE cover to their clients and to run the personal injury case as they think fit, once they have agreed to take a case under a CFA. This is believed to be attractive to solicitors because it enables them to retain their independence of judgment. It also allows clients to know that the insurer is not controlling their litigation. In addition, delegated authority arrangements minimise cost in a volume market by avoiding individual risk assessment by the insurer, or by some third party on its behalf, in every case.

- d [67] It is hardly surprising that delegated authority arrangements will only work successfully if the solicitor does not 'cherry-pick' by taking out ATE insurance only in risky cases. It is a basic principle of insurance that the many pay for the few, and we can well understand academic comment to the effect that: 'For a firm to cherry-pick dead certs and run them without paying for insurance must alter the underwriting assumptions of the insurer and increase premiums.' (See Prof John Peysner 'Whose case is it anyway' *Litigation Funding* (issue 2, May 1999) (a Law Society publication).)

- e [68] In 2000 a Lloyd's syndicate took over the provision of cover under the Accident Line Protect scheme. We were told that this syndicate was only willing to participate in providing this cover because the recoverability of premiums permitted by s 29 of the 1999 Act obviated the incentive to indulge in adverse selection. Mr Ward explained to us how the situation had developed.

- f [69] In order to preserve the principle of the 'many paying for the few', his agency had made it obligatory from the outset for solicitors to issue an ATE policy at the same time as a client signed a CFA. In practice, many firms delayed taking either of these steps until after proceedings had been started and after their client had decided not to accept a payment made into court.

- g [70] As a consequence the benefits of Accident Protect cover was then restricted for the most part to those cases where proceedings had not been commenced when the insurance was taken out. Solicitors, however, still delayed taking out the cover until proceedings were about to be commenced. This limited the cover to the riskier cases, and the whole system of delegated authority was therefore put in jeopardy. For this reason the advent of the pre-action protocol was very welcome. It enabled a new principle to be adopted, whereby the ATE insurance had to be taken out in conjunction with a CFA before the letter of claim was despatched.

[71] All these changes were predicated by the insurers' desire to spread the risk as much as possible, so that the cost of the cover could be kept within reasonable limits. a

[72] We were also told that different insurance schemes offered different coverage, and that the coverage in a particular case might depend on the process by which an insurer selected the risks it was willing to cover. Mr Ward's experience, however, had led him to the belief that it was in everybody's interests that cover in appropriate cases should be taken out at the earliest opportunity if the level of premiums was to be affordable. The adoption of this approach has enabled cover to be offered to clients for pre-proceedings disbursements, such as the cost of medical and other expert reports, in the event that there are no subsequent proceedings and the claim has to be abandoned. b

[73] This evidence was supplemented by the evidence of Mr Christopher Wait, the underwriting director of another company which provides underwriting and claims management functions for certain Lloyd's syndicates in relation to both types of legal expenses insurance. They sell BTE insurance through insurance brokers and ATE insurance mainly through solicitors. Their two directors have a long history of experience in legal expenses underwriting and claims management. c

[74] Mr Wait told us that most of the ATE insurance schemes available on the market today can only provide insurance if cover is in place before the initial letter of claim is sent. Again, this practice follows the basic insurance principle that 'the many pay for the few'. He is of the clear opinion that if premiums are not recoverable from the losing party when cases are settled before proceedings are issued, the result will be that many individuals and businesses will find it difficult to seek a legal remedy with effective insurance cover in place, and that their access to justice will be frustrated. d

[75] Much of his evidence was devoted to explaining the problems that would arise if it were obligatory to delay taking out ATE insurance until after proceedings were issued. Mr Birts made it clear that it was not part of his clients' case to say that the inception of cover had to be delayed in this way: e

[76] We were provided with worked examples of the manner in which the premium was bound to rise in the event that recovery of the premium was only permissible in those cases in which proceedings were issued. We were told by representatives of claimants that liability insurers had raised what they accepted were legitimate concerns regarding the nature and price of some of the premiums charged for ATE insurance. APIL, a body of about 5,000 members whose interest in personal injury work is largely claimant-orientated, stated that it accepted that if premiums were inflated to include fees to claims managers disguised as commissions for the sale of insurance or to cover costs of advertising their services, they should be recoverable exclusive of such objectionable elements. f

[77] We also received submissions both orally and in writing from the ATE Grouping, which includes the companies whose directors had provided individual witness statements. These bodies are all involved with the provision of ATE insurance. They are currently involved in a negotiation process sponsored by the Law Society and the ABI in which the parties are seeking to reach an agreed industry standard as to the recoverability of ATE premiums and success fees in the new costs regime. g

[78] They told us that the ATE market was mainly divided between those who were in the business of providing litigation costs insurance cover for personal injury related claims through solicitors or claims managers and those who provided cover for non-personal injury or commercial claims. On this appeal we are h

a concerned only with the first of these categories. Similarly, we are concerned with ATE cover linked to a CFA, as opposed to such cover provided on a 'stand alone' basis. This grouping supported the points made by Mr Wait and Mr Ward in their witness statements.

[79] We now turn to deal with the remaining issues.

b (10) *The prematurity issue*

[80] The information placed before us shows that, in cases such as those with which these appeals are concerned, many solicitors adopt a similar approach to insurers when deciding on what terms to act for clients under CFAs. The uplift in their fees which they demand in respect of this category of business is set at a level designed to produce additional income on the cases which succeed which is adequate to compensate them for the cases which lose and thus earn them no fee. The cases which win have to subsidise the cases which lose. However, while this may be true of many, it is not clear how many. Lawyers are accustomed to assessing a risk without the need to carry out the actuarial calculations which insurers would consider appropriate.

d [81] A different approach was adopted in the submissions made by FOIL. FOIL did not consider that the need to provide a fund to compensate a claimant's lawyer for the cases he/she lost on a CFA should play any part in the process of setting a success fee in any given case. It robustly argued that:

e 'To be consistent with the public interest in reducing the cost of dispute resolution and with the objectives of the CPR, the level of success fee recoverable against the defendant in any particular case should be assessed by reference to the risks of losing that case.'

f [82] Different circumstances will call for different approaches. Insurers set premium rates designed to balance their books and achieve a reasonable profit. There are some classes of risk which are so remote that a uniform approach may be adopted to the assessment of premium, eg household insurance. In other classes, premiums may vary according to specific features of the risk, eg age of driver or power of car in the case of motor insurance, but again the premiums will reflect claims experience and be designed to produce a positive return overall. In some cases risks will have peculiar features which require individual assessment, but again the approach is the same: to achieve a balanced book and a reasonable return overall.

g [83] The solicitor carrying on litigation business on a large scale may have regard to similar considerations. He may seek to ensure that the uplifts agreed result in a reasonable return overall, having regard to his experience of the work done and the likelihood of success or failure of the particular class of litigation. This will not mean that he does not consider the merits of the particular case, where he is aware of facts which call for individual assessment. But there may be categories of claim that have, so far as he is aware, sufficient common characteristics to justify a standard approach to determining uplift.

j [84] We are in this case concerned with such a category of claim: claims for the consequences of a motor accident where, on the claimant's account of the accident, the solicitor reasonably concludes that the claim has every prospect of an early settlement as to both liability and quantum. At that stage the risk assessment that results in the determination of the uplift is likely to turn, not on peculiar features of the instant case, for there will be none, but on his experience

that in a small minority of such cases, when the claim is pursued some unforeseen circumstance results in the ultimate failure or abandonment of the claim. a

[85] These comments are not, of course, directed to solicitors who choose, as they reasonably may, to defer agreeing a CFA until they know more about the claim than they have learned from the claimant. Nor are they apposite in the case of a solicitor who does not specialise in litigation, but who on occasion conducts a piece of litigation for a client. Such a solicitor is likely to decide on the uplift by asking himself what reward he requires to induce him to take the risk that he may not recover his fees from the case in question. b

[86] The vital issue in relation to uplift that is raised on these appeals is whether the courts should allow recovery of uplift where this is agreed at the initial stage on the basis described above, or whether it should require all solicitors to defer agreeing uplift until the defendant's response to the claim is known, so that the risk of failure can be assessed on an individual basis. The latter approach would result in a high uplift being justified in a minority of cases, but a small, if any, uplift in the majority where those acting for defendants will make it plain that liability will not be contested. c

[87] It is the appellants' argument that the cost of (i) taking out an ATE insurance policy and (ii) the uplift of a success fee should only be recoverable where sufficient information is available to form a reasonable prognosis of what will be the risk involved in a claim. The appellants further argue that a claimant cannot reasonably incur these liabilities until the reaction of the defendant to a claim is known and the merits of any defence raised considered. At that point, so the appellants argue, it will be apparent whether there is a risk that the claim may fail which makes it reasonable to enter into a CFA and take out ATE insurance. d

[88] If it is reasonable to take these steps, the appellants argue that the claimant will then be in a position to do what the law requires, namely to assess the appropriate uplift and insurance premium having regard to an informed appraisal of the extent of the risk that the claim may fail. e

[89] Thus Mr Birts, on behalf of the appellant in the Callery appeal understandably urges that the time to enter into an ATE insurance policy is at the end of the protocol period, i.e. three months from the notification of the claim; and for his part Mr King QC, on behalf of the appellant in the Russell appeal, argues that no CFA should be entered into before that time. Entering into funding arrangements at this stage has obvious advantages for a defendant. It gives him the opportunity to settle the case without incurring liability for additional costs. This is a matter of importance, bearing in mind that over 90% of cases can be expected to settle and may well settle in the protocol period. In addition, the exchange of information which is central to the protocol will enable the claimants and their lawyers to assess the risk more accurately. f

[90] The respondents contend that, in cases such as those before the court, i.e. modest claims in respect of a road traffic accident, where liability is unlikely to be in issue and the question of damages is unlikely to create complexities, it is reasonable for a claimant to take out ATE insurance and enter into a CFA at the stage that the claimant first instructs a solicitor to pursue his claim. At that stage the claimant will be concerned that, by giving instructions to the solicitor, he is not exposing himself to liability for costs. The solicitor for his part will be anxious to offer the claimant services on terms that, whatever the outcome, he will not find himself liable for costs. g

[91] In these circumstances, we consider that, from the viewpoint of both the claimant and his solicitor, it will normally be reasonable for a CFA to be concluded h

a and ATE cover taken out on the occasion that the claimant first instructs his solicitors. What we have to decide is whether, having regard to the statutory provisions, (i) the cost of the success fee and (ii) the ATE premium, when incurred at that early stage, can be recovered.

[92] In considering this issue we think it right to bear in mind the purposes of the new regime. The first purpose is to facilitate access to justice on the part of those
b who cannot afford the costs of litigation. The second purpose is to reduce the burden of legal aid in relation to certain categories of case where it was previously available.

[93] Including success fees in recoverable costs has the general effect of shifting from the legal aid fund to defendants, or their insurers, the costs incurred
c by litigants whose claims fail. In the first instance the claimants' solicitors shoulder the risks in relation to these costs, in exchange for uplift. But the fact that the uplift in successful cases is transferred to the unsuccessful defendants results, if one takes a global view, in the burden of unsuccessful claimants' costs being born by unsuccessful defendants.

[94] Permitting ATE insurance premiums to be recovered as costs has the
d effect of shifting to unsuccessful defendants the costs which the insurers will have to pay to successful defendants. Under the old regime successful defendants would not normally recover their costs where claims were legally aided. Thus, in bearing the burden of meeting ATE insurance premiums, defendants in general are paying for cover that will ensure that their costs are paid if they succeed.

[95] When seeking to do justice between the parties we have to accept that it
e is an inevitable consequence of government policy that unsuccessful defendants should be subjected to an additional costs burden. We also have to bear in mind that the new regime tends to remove from claimants the incentive to control costs. The shelter afforded to the claimant by a CFA and by ATE cover means
f that he will not be overconcerned at the costs that are being incurred, or even at the size of the ATE premium. In these circumstances, the role of the court in administering the new regime is particularly important.

[96] The scheme of the legislation and the regulations contemplates that both the ATE insurance premium and the amount of uplift will reflect an assessment of the risk that the claim may fail, having regard to the circumstances that are
g known, or should reasonably be known, to the legal representative at the time that the relevant agreements are entered into. We do not consider, however, that this makes it mandatory for the claimant to delay entering into a CFA or taking out ATE insurance in order to enable his legal representative to acquire a greater knowledge of the circumstances of the case than that provided to him by the
h claimant.

[97] In the type of claim with which these appeals are concerned, the
i circumstances of the case will often lead the legal representative to assess the risk of failure, not only on the basis of particular features of the case, but on his general experience that claims which appear to have every prospect of success none the less occasionally founder as a result of matters which are unforeseen. We consider that this approach is in principle compatible with the legislative
j scheme.

[98] The appellants contend, however, that it is unjust to saddle defendants with the costs of the ATE insurance premiums and success fees without giving them a fair chance to identify those cases where liability and quantum is not disputed so that success is assured.

[99] We see the force of this submission, but we have concluded that, at least in the circumstances of the two appeals, the prejudice to defendants is not as clear as is suggested and that it is outweighed by the legislative policy and by a number of practical considerations. Thus: (i) if the new regime is to achieve its object, the legal costs of claimants whose claims fail should fall to be borne by unsuccessful defendants in the manner described at [93] above. On these appeals the court has to decide whether to permit liability for success fees to be apportioned in relatively small amounts among many unsuccessful defendants, or to insist on an approach under which they will be borne in much larger amounts by those unsuccessful defendants who persist in contesting liability. (ii) If the latter alternative is adopted, the defendants who contest liability will not share liability for costs in a manner which is equitable. Where there is a strong defence which it is reasonable to advance, a larger uplift will be appropriate than where a defendant unreasonably persists in contesting liability despite the fact that the defence is weak. Thus the more reasonable the conduct of the defendant, the larger the uplift that he will have to pay if his defence fails. (iii) In relation to claims arising out of road accidents, where defendants will be insured, the same insurers will often be sharing the costs involved, whether in the form of many uniform small uplifts or fewer large uplifts. (iv) So far as insurance premiums are concerned, these will produce cover which benefits the defendants, for they will ensure that costs are awarded against unsuccessful claimants and that such awards are satisfied. (v) Defendant interests, with the assistance of the court, should be able to restrict uplifts and insurance premiums to amounts which are reasonable having regard to overall requirements of the scheme. In saying this we are contemplating a position where there will be adequate data to enable informed judgment of the amount of uplift and the size of insurance premium that are reasonable in circumstances such as those before the court. We are well aware that that position has not yet been reached and that, on these appeals, we are faced with doing our best on very sketchy data. We have had particular regard to the fact that the representations and evidence submitted after the hearing have not been tested or analysed in the course of oral argument. (vi) Claimants naturally want to know at the outset that a satisfactory arrangement to cover the costs of litigation has been made which provides sufficient protection for them, no matter what the outcome. (vii) Claimants incur liabilities for costs to their legal advisers as soon as they give them instructions. Once a defendant starts to incur costs in complying with a protocol, the claimant will be exposed to liability for those costs if proceedings are commenced. (viii) Solicitors and claims managers are anxious to be able to offer legal services on terms that the claimant will not be required to pay costs in any circumstances. This will assist access to justice. (ix) There is the overwhelming evidence from those engaged in the provision of ATE insurance that unless the policy is taken out before it is known whether a defendant is going to contest liability, the premium is going to rise substantially. Indeed the evidence suggests that cover may not be available in such circumstances.

[100] For these reasons we have concluded that where, at the outset, a reasonable uplift is agreed and ATE insurance at a reasonable premium is taken out, the costs of each are recoverable from the defendant in the event that the claim succeeds, or is settled on terms that the defendant pay the claimant's costs.

(11) *The reasonableness issue*

[101] There has not yet been any authoritative guidance from the higher courts as to the level of success fee which would be considered reasonable on an

- a assessment of costs in litigation supported by a CFA. The editors of the current edition of *Cook on Costs* (4th edn, 2000) have endeavoured at pp 467–468 to give some help to the profession, based on the propositions that there will be a single success fee throughout the life of a CFA, and that a solicitor is entitled to cover his/her prospective losses in unsuccessful cases by the success fee income earned in successful cases. The claimant's solicitors in the Callery appeal, for their part,
- b created an in-house matrix, with points being awarded for different features of a case on a sliding scale. This matrix produced what seemed to us to be a surprisingly high success fee for a fairly straightforward passenger claim, but the matrix provides a useful illustration of what some claimants' solicitors are doing at the moment in the absence of guidance from the higher courts.

- c [102] It should be recognised that any general guidance that we provide is given in the context of the type of claims which are the subject of this appeal, that is to say, modest and straightforward claims for compensation for personal injuries resulting from traffic accidents (see also [84] above). However, even within this limited area, as APIL recognises:

- d '... the court is faced with a difficult balancing exercise in setting guidelines for a new regime where there is little experience or published data to rely upon. Allowing success fees to be set too high compared to the risk being run will lead to inflation of fees paid to lawyers by the public who pay insurance premiums. But allowing them to be fixed too low compared to the risk being run will lead to lawyers only being able to take on the most certain cases and
- e a denial of access to justice to some of the most vulnerable people in society.'

- [103] There is some statistical support for a success rate in respect of claims of the type with which we are concerned of up to 98%. However, at this stage of the court's experience of funding arrangements it is not possible to be precise as to what is the correct percentage. We do not consider that it can ever be said that a
- f case is without risk. In this category of litigation, the prospects of some success on liability is increased because of the ability of a court to make a reduced award on account of contributory negligence. It is, however, impossible to foresee all the circumstances in which a straightforward claim can become one with a material degree of risk. In the case of a claim by a passenger, for example, the risk will be small. However, the fact that a claimant contends that his or her
- g driving was perfect whilst that of the proposed defendant was atrocious provides no guarantee that, if the case is contested, this is what the judge will decide. In the circumstances we think that it is reasonable to proceed on the premise that at least 90% of such claims will settle without the need for proceedings, or will succeed after proceedings have been commenced.

- h [104] After careful consideration and having reflected on the reasoning in the judgments below in the two appeals, we have concluded that, where a CFA is agreed at the outset in such cases, 20% is the maximum uplift that can reasonably be agreed. In reaching this conclusion, we have been particularly assisted by the reasoning placed before us by APIL. We wish to emphasise two matters in
- j respect of this conclusion. The first is that it assumes that there is no special feature that raises apprehension that the claim may not prove to be sound. Where there is such a feature, the appropriate uplift will be higher, but it may not be reasonable to attempt to assess that uplift until further information about the defendant's response is to hand.

[105] The second matter is that our conclusion is based on very limited data. In particular, it is too early to see what effect the new costs regime is having on

the rate of settlements, and this judgment may itself affect that rate. It will be desirable to review our conclusion once sufficient data is available to enable a fully-informed assessment of the position. a

[106] In concluding this portion of our judgment, we wish to draw attention to an alternative type of success fee, which we consider that it is open to the solicitor and the client to agree at the outset of proceedings. We can describe this as a 'two-stage' success fee. b

[107] A success fee can be agreed which assumes the case will not settle, at least until after the end of the protocol period, if at all, but which is subject to a rebate if it does in fact settle before the end of that period. Thus, by way of example, the uplift might be agreed at 100%, subject to a reduction to 5% should the claim settle before the end of the protocol period. c

[108] The logic behind a two-stage success fee is that, in calculating the success fee, it can properly be assumed that if, notwithstanding the compliance with the protocol, the other party is not prepared to settle, or not prepared to settle upon reasonable terms, there is a serious defence. By the end of the protocol period, both parties should have decided upon their positions. If they are prepared to settle, they should make an offer setting out their position clearly and providing the level of costs protection which they determine is appropriate. d

[109] A further advantage of a two-stage success fee would be the knowledge that if a claim was not settled, the full success fee would be payable. This knowledge would encourage rigorous consideration of the merits of the claim during the protocol period and therefore accord with the intent of the CPR. e

[110] If a claim is settled before the end of the protocol period, it would be reasonable that there should still be a success fee payable since: (i) the lawyers are entitled to be compensated for accepting a retainer on a no-fee-no-win basis with the inevitable risk that this involves, however small this risk may appear in many cases; (ii) an appropriate success fee would contribute towards those cases where no fees are payable because they end unsuccessfully. f

[111] A two-stage success fee would have the advantage that the uplift would more nearly reflect the risks of the individual case, so that where a claimant's solicitor had to pursue legal proceedings, this would be in the knowledge that, although a significant risk of failure existed, the reward of success would be that much the greater. Where, on the other hand, the claim settled as a consequence of an offer by the defendant, he or his insurer would have the satisfaction of knowing that he had ensured that the success fee would be reduced to a modest proportion of the costs. g

[112] We have considered the risk that a two-stage success fee would encourage claimant's solicitors to take claims past the protocol stage in order to benefit from the higher uplift. Such conduct would, however, be prevented by a defendant who was prepared to settle by making a formal settlement offer, putting the claimant at risk as to costs. h

[113] In its second written representations the Law Society points out that it considered the possibility of providing for variations in success fees when first developing its standard letters. It decided not to do so, however, because of the complications that these would create for clients. j

[114] In the Callery appeal, the appellants provided useful submissions on this subject. They put forward a choice of models. They also dealt with the legality of two-stage success fees. We consider there is no need to consider the question of the legality of a two-stage success fee as we see no difficulty in having a single

- a success fee calculated by reference to an upper level and a reduced level in specified circumstances.

- [115] A two-stage success fee of the type we propose, agreed at the outset, would be likely to be agreed before the merits of the individual claim were apparent. Thus, the uplift would be unlikely to reflect precisely the likelihood of failure of any individual claim that did not settle. The determination of the
b reasonable figures for the full uplift and the rebated uplift would have to be based on overall claims experience, with the proportion of contested cases which succeed, and the costs earned from such cases, being particularly significant. While the exercise involved in determining a reasonable two-stage fee would be more complex, we suggest that, once the necessary data is available, consideration will need to be given to the question whether, where fees are agreed at the outset,
c the requirement to act reasonably mandates the agreement of a two-stage success fee.

- [116] Whilst as a result of the evidence put before us we have felt able to form an assessment as to the reasonableness of success fees, we do not feel able to form any conclusion as to the reasonableness of premiums charged for ATE
d insurance. For that reason, we have directed an enquiry before Master O'Hare, Costs Judge, and we will provide a separate judgment on this question when we have received his report.

[117] We now turn to the facts of the two appeals.

(12) *The Callery appeal: (i) the facts*

- e [118] On 29 January 2001, Judge Edwards at the Chester County Court dismissed an appeal by the defendant against an order of District Judge Wallace made in the Macclesfield County Court on 7 November 2000. The district judge gave his judgment in costs-only proceedings instituted by the claimant.

- [119] On the 2 April 2000, the claimant had been a passenger in a vehicle which
f was struck side-on by a vehicle driven by the defendant. He consulted Amelans and instructed them to claim damages under a conditional fee agreement. A success fee of 60% was agreed. Amelans deal with a large number of similar cases. In calculating the success fee, Amelans had included 20% for the delays which they were likely to incur in recovering their fees. This element was appropriately conceded before the district judge not to be recoverable (see CPR 44.3B(1), for
g which see [29] above).

- [120] On 4 May 2000, an ATE insurance premium of £350 plus insurance premium tax was paid. On the same day, Amelans sent a letter before action to the defendant personally, claiming damages and asking him to pass a copy of the letter to his insurers.

- h [121] On 19 May 2000, the CGU Insurance Co responded to Amelans in the following terms:

- 'We are able to admit liability as to negligence but not as to causation ...
please note that we would have no objection to yourselves instructing one of three proposed medical experts. We look forward to receiving confirmation
j as to whom has been appointed and request sight of the instruction letter sent to them.'

[122] A medical expert was agreed and a report obtained in July. On 12 July Amelans, on behalf of the claimant, made a formal offer of £3,010, together with costs and disbursements, in full and final settlement. On 24 July, a counter-offer of £1,200 was made by the defendant's insurers. On 7 August, the claimant's

solicitors wrote to the defendant's insurers confirming an agreed settlement of £1,500 plus payment of reasonable costs and disbursements. Subsequently there was a claim for costs of £4,709.35 (which included the 60% success fee and the insurance premium). The defendant's insurers suggested that the amount claimed was unreasonable and offered a total of £1,877.87. a

[123] Costs-only proceedings pursuant to CPR 44.12A were issued. The sum of £4,709.35 was claimed. b

[124] The district judge summarily assessed the costs at £1,008 plus VAT and the disbursements at £617.50, making a total of £1,940.83. He accepted that the insurance premium was payable and that a success fee of 40% was reasonable.

(13) *The Callery appeal: (ii) the judgment appealed*

[125] We have already seen (see [52] above) that on the appeal to Judge Edwards, the judge rejected the argument of the defendant under s 29 of the 1999 Act. The judge also considered that it was entirely reasonable to have taken out insurance at a very early stage and before it was known whether the matter would be contested because: (i) this would lead to substantial reduction in the costs of the insurance. (ii) There was a potential argument that there could have been a tacit agreement relating to the costs of the pre-action protocol itself. It was conceivable that insurance cover could be needed against these costs. As soon as the claimant needed to be covered he had to take out insurance and needed to notify the other side to ensure that the premium was recoverable. (iii) He could see nothing wrong with insurance being taken out before there was an exchange of letters. c
d
e

[126] The judge accepted that the appellant's insurers' letter of 19 May 2000 was a denial of liability, on the ground that a breach of duty alone is not sufficient to establish liability for negligence, and the consequences of sending out a letter that had not been checked by solicitors fell upon the insurers. In view of this finding, the judge felt the appellant could not complain. He regarded the letter of 19 May as validating the decision to make a funding arrangement. He did, however, suggest that in the future, it might be more prudent to wait for the result of the initial exchange of letters. If there was a denial of liability or no reply, then insurance ought to be taken out. f

[127] As to the reasonableness of the success fee, the judge noted that the statutory regime clearly envisaged a connection between the size of the fee and the risk of failure presented by a particular case. A further factor could be the need to incur substantial costs up front in an appropriate case, such as a medical negligence claim. He expressed substantial agreement with the analysis contained in *Cook on Costs*. His conclusions can be summarised as follows. (i) Assuming the chances of success in a given case are 50%, the solicitors will wish to ensure that they recover sufficient costs from a defendant in the event of success to fund another '50% case' which fails. (ii) Accordingly the statutory maximum 100% uplift was appropriate. It followed from this that a solicitor ought not to enter into conditional fee agreements where he considered that the prospect of success was less than 50%. (iii) He had reservations as to whether there could be a personal injury case where there was no risk at all. Even where there was an admission of liability at the outset, he thought that this could subsequently be revoked or put in a different context. There were also the procedural dangers in connection with a CPR Pt 36 offer. (iv) He accepted the claimant's contentions that there was no case which was entirely risk free and that a judge should only interfere with the assessment of a district judge if this was grossly out of place. g
h
j

a [128] The judge concluded that the claimant had a 75% chance of success. His reasoning for coming to that figure appears to be the underlying litigation risk of 10%, on top of which he made a small additional allowance. Using the *Cook* approach, the judge found he would have arrived at a success fee of 33.33% taking into account that the vast majority of costs would be incurred against the background of a denial of liability until a settlement was reached. Having regard to these conclusions, the district judge had not been manifestly wrong and the appeal failed.

b [129] The judge, in addition, made the following points which are worth repeating. (i) Parties should try to avoid litigating costs which require detailed assessment. Where a case was settled, claimants should limit their costs to a reasonable sum and defendants should not try to insist on unjustifiably low amounts. (ii) Claimants in these types of personal injury cases who claimed unreasonable costs placed a great strain on the resources of the courts as this led to a series of detailed assessments. In this connection, the judge noted that the court below had approximately halved the figure claimed by the claimant's solicitors already. (iii) As to insurance premiums, the judge noted that it would be wiser to await the results of the first round of correspondence in a matter before taking out a policy. As this was a discretionary area, the judge could not guarantee that the premium for every policy taken out prior to a denial of liability would be recoverable. (iv) The CFA was made at a time when the risk was first assessed. This should have an influence on what was recoverable at the end of the proceedings. The judge did, however, acknowledge that an alteration of the success fee might be warranted after certain stages of the proceedings.

e [130] In view of his conclusions, he dismissed the appeal, but he indicated that he would have given permission to appeal to the Court of Appeal if he had had power to do so.

f (14) *The Callery appeal: (iii) our conclusions*

g [131] We have already made it clear that we agree with the judge's conclusions as to the issue of jurisdiction. We also agree with a substantial amount of the judge's reasoning and his general remarks. In particular, we agree that on a costs assessment, the assessing judge has a broad discretion with which an appeal court should only interfere if it is satisfied that the judge is clearly wrong. However, we would make the following comments in relation to the judge's approach. (i) While the letter of 19 May is technically a denial of liability, whether this is the case is a red herring in relation to the present appeal. In view of that letter, the claimant's solicitors would not be justified in continuing to investigate and prepare the case on liability. Their sole concern after the letter was to establish the extent of the damages. Therefore all that was required of the claimant's solicitors was that they should proceed in accordance with the protocol to obtain a medical report and investigate the question of damages. From a practical point of view, this was, as Mr Birts contends on behalf of the appellant, a very, very low risk case. (ii) We note the judge's comment that it would be a wise precaution to await the first round of correspondence before taking out a policy or entering into a CFA. However, we would not categorise it as unreasonable not to do so for reasons we have explained. It is only necessary to look at the relationship between the overall costs in this case and the amount recovered to see what are the consequences of adopting the claimant's approach. Regrettable though this may be, if the uplift is reasonable, the scale of costs are a consequence of the present method of funding the costs of litigation. (iii) On an assessment,

the court is not concerned with the question of the effect on proportionality of the uplift and the insurance premium (para 11.9 of the Practice Direction on costs: see [33] above) nor can the assessment be made with the benefit of hindsight (para 11.7 of the Practice Direction). However, subject to this, the approach of the claimant must accord with the general principles set out in Pt 1 of the CPR. a

[132] On the information then available to the party, it must act reasonably. If a CFA in a very straightforward case is entered into at the outset, it is going to be, and should be, scrutinised critically by the court on an assessment if the uplift is other than modest. b

[133] For the reasons that we have given earlier in this judgment, we consider that a success fee involving a 40% uplift for a case of this type was too high. We would allow the appeal to the extent of reducing the uplift to 20%. The parties will have to calculate the exact amount. We note, however, that the costs of this claim, which was readily settled, will still exceed the agreed damages. c

(15) *The Russell appeal: (i) the facts*

[134] This appeal is an appeal against the decision of Judge Marshall Evans made on 25 January 2001 at the Liverpool County Court in costs-only proceedings. A success fee of 30% was claimed, and in the exercise of his discretion, the judge reduced it to 20%. The claimant was involved in a road traffic accident on 5 July 2000. His case was that the appellant's vehicle reversed into his car when it was stationary. d

[135] He consulted E Rex Makin & Co (Makin) in order to claim damages for personal injuries. That firm deals with a substantial number of personal injury claims arising out of road traffic accidents in the course of its practice. A letter of claim was sent on 20 July 2000. On 31 July 2000, the appellant's insurers, the Royal and Sun Alliance, replied stating that the matter had been referred to a claims handler who would be in contact shortly. It was the practice of these insurers to send a claims handler to visit this firm of solicitors to discuss cases. It was said that this led to cases settling swiftly and efficiently. e

[136] On 2 August 2000, notice was given to the insurers that the matter was proceeding by way of a CFA incorporating a success fee and that an insurance policy was pending. Contrary to the terms of that letter, the CFA was not in fact signed until 11 August 2000. The uplift was fixed at 30%. A medical report, dated 7 August 2000, was obtained by Makin which indicated that the claimant had suffered whiplash injuries typical of this type of accident. The report indicated that he was in good health apart from another whiplash injury he had suffered a year earlier. g

[137] On 7 September 2000, the meeting with the claims handler took place. An offer was made of £1,450 plus reasonable costs. This offer was subsequently accepted. Costs were quantified at £420 plus VAT, to which were added £70 in respect of the medical report, a 30% uplift and an insurance premium in the sum of £495. The costs were not paid. Costs-only proceedings were issued. The district judge referred the proceedings to the circuit judge for determination because of the importance of the issue it raised. The claim for the insurance premium was abandoned prior to the hearing before the judge. j

(16) *The Russell appeal: (ii) the decision of the judge and our conclusion*

[138] The argument before the judge on behalf of the appellant was similar to the argument that Mr King advanced before us, namely, that a CFA should not in the circumstances have been issued at the stage that it was. The judge found

- a* this a difficult question, but he concluded that it was not so obvious that a CFA was patently unnecessary. There were very few 'no-risk' cases in litigation. The judge decided that there was nothing objectionable to a CFA being entered into at the outset, with the uplift being fixed at that time. He rejected a submission that it was far too early to assess what success fee was appropriate. He concluded that as at 11 August, 20% was a more appropriate uplift.
- b* [139] In view of our earlier conclusions, this is an appeal which on the facts of the case cannot succeed unless it is established that, as a matter of principle, a CFA could not have been entered into when it was. In our judgment, as we have made clear, there is no such principle. It is also clear from what we said in relation to the previous appeal that we should not interfere with the figure of 20% which the judge decided was reasonable. We therefore dismiss this appeal.

c

The Callery appeal allowed in part. The Russell appeal dismissed. Permission to appeal to the House of Lords refused.

Kate O'Hanlon Barrister

Smith v White Knight Laundry Ltd

[2001] EWCA Civ 660

COURT OF APPEAL, CIVIL DIVISION

WALLER, LAWS AND JONATHAN PARKER LJJ

10 APRIL, 11 MAY 2001

Limitation of action – When time begins to run – Accrual of cause of action – Whether cause of action against dissolved company accruing only on order restoring company to register – Companies Act 1985, s 651(1).

Company – Restoration to register – Application – Applicant a claimant in action for damages against company – Deceased's widow wishing to bring action against dissolved company in respect of his death – Registrar restoring company to register and directing that period of dissolution be discounted for limitation purposes – Circumstances in which such a direction may be given – Limitation Act 1980, s 33 – Companies Act 1985, s 651(1).

The claimant, S, was the widow and personal representative of the deceased. She alleged that her husband had been employed by the defendant company from 1950 to 1956, that his work had brought him into contact with asbestos and that, as result, he had contracted mesothelioma from which he had died in February 1995. The company had been dissolved in 1963, and S could not commence proceedings against it so long as it remained dissolved. However, under s 651(1)^a of the Companies Act 1985, the court could, on an application by any interested person, make an order on such terms as it thought fit, declaring the dissolution of a company 'to have been void'. S therefore applied for such an order. In accordance with normal practice, that application was made without notice. In January 1998 the registrar granted the order sought, restored the company's name to the register and directed that the period from dissolution to the date of the order was to be discounted for limitation purposes (the limitation direction). In April 1999 S commenced an action against the company in respect of her husband's death, alleging that it had been caused by the company's negligence and breach of statutory duty. She sought damages both on behalf of the deceased's estate and under the Fatal Accidents Act 1976. Under the Limitation Act 1980, a claim for personal injury had to be brought within three years of the accrual of the cause of action or, if later, the date of the knowledge of the person injured. A claim under the 1976 Act had to be brought within three years of the date of death, but no such claim could be brought if the death had occurred when the deceased could no longer have maintained a personal injuries action. In its defence, the company alleged that the claim was statute-barred, either because it had not been brought within three years of the deceased's death, or because he had had the requisite knowledge about his condition more than three years before his death. It further contended that the court should not make a direction pursuant to s 33^b of

^a Section 651, so far as material, is set out at [20], below

^b Section 33, so far as material, provides: '(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—(a) the provisions of section 11 ... or 12 of this Act prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates ...'

- a the 1980 Act allowing the action to proceed notwithstanding that it would otherwise be statute-barred. The company therefore applied for the trial of a preliminary issue as to limitation. That application was granted by the master, and S's appeal was dismissed by the judge who also varied the restoration order by setting aside the limitation direction. On her appeal to the Court of Appeal, S contended that her husband had not suffered any damage giving rise to a cause of action before the
- b dissolution of the company, that no cause of action could have accrued while the company was in dissolution since there was then no entity to be sued, that accordingly the cause of action had arisen only on the making of the restoration order, that the limitation defence was therefore bound to fail and that there was thus no need for a preliminary issue. Alternatively, she contended that the judge should not
- c have set aside the limitation direction.

- Held** – Where a dissolved company had been restored to the register by an order under s 651(1) of the 1985 Act, a cause of action against the company accrued, by virtue of that order, on the date on which it would otherwise have accrued but for the
- d dissolution. That was a consequence of declaring, under s 651(1), the dissolution of the company 'to have been void'. The dissolution was void ab initio, and all the consequences which flowed from that dissolution were themselves avoided. There was a crucial distinction between the corporate existence of a company, which was restored from the date of dissolution, and the proceedings which had taken place during the period of dissolution. Although the purported acts of a dissolved, and
- e therefore non-existent, company were not validated by the subsequent avoidance of the dissolution, all that was needed, in the instant case, for the accrual of a cause of action against the company was corporate existence. No question of corporate activity arose. It followed that, in the absence of the limitation direction, S's claim was statute-barred since she had not commenced
- f proceedings within three years of her husband's death, while it might also be open to the company to argue that the claim was already statute-barred at the date of the death. In those circumstances, S would have to seek an order under s 33 of the 1980 Act. However, when the limitation direction was taken into
- g account, S was in precisely the same position as if she had already obtained relief under s 33. Viewing the direction in that light, justice required that it be set aside so that the company's insurers could have the opportunity of being heard on the issue of limitation and in opposition to S's application under s 33. Accordingly, the appeal would be dismissed (see [52]–[56], [58], [59], [62], below); *Morris v Harris* [1926] All ER Rep 15 and *Re C W Dixon Ltd* [1947] 1 All ER 279 applied.
- h Per curiam. Where a prospective claimant in a personal injuries action seeks a restoration order under s 651 of the 1985 Act, the court should not normally make a direction that the period from dissolution to the date of the order was to be discounted for limitation purposes unless (a) notice of the application has first been given to all parties who may be expected to oppose the making of such a
- j direction, including the company's insurers; and (b) the court is satisfied (i) that it has before it all the evidence that the parties would wish to adduce on an application by the prospective claimant under s 33 of the 1980 Act, and (ii) that an application under s 33 is bound to succeed. If those conditions are not met, the applicant should seek relief under s 33 (see [60], [61], below); *Re Workvale Ltd (No 2)* [1992] 2 All ER 627 approved.

Notes

For the power to declare the dissolution of a company void, see 7(3) *Halsbury's Laws* (4th edn reissue) para 2696.

For the Limitation Act 1980, s 33, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 736.

For the Companies Act 1985, s 651, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 511.

Cases referred to in judgment

Cartledge v E Jopling & Sons Ltd [1963] 1 All ER 341, [1963] AC 758, [1963] 2 WLR 210, HL.

Dixon (C W) Ltd, Re [1947] 1 All ER 279, [1947] Ch 251.

Morris v Harris [1927] AC 252, [1926] All ER Rep 15, HL.

Musurus Bey v Gadban [1894] 2 QB 352, [1891–4] All ER Rep 761.

Russo-Asiatic Bank, Re, Re Russian Bank for Foreign Trade [1934] Ch 720.

Thomson v Lord Clanmorris [1900] 1 Ch 718, [1900–3] All ER Rep 804, CA.

Workvale Ltd (No 2), Re [1992] 2 All ER 627, [1992] 1 WLR 416, CA.

Appeal

The claimant, Maria Smith, appealed with permission of Chadwick LJ granted on 31 January 2000 from the decision of Judge Pryor QC, sitting as a High Court judge on 22 October 1999, dismissing her appeal from the order of Master Ungley on 21 September 1999 directing a preliminary issue as to limitation in her action against the defendant, White Knight Laundry Ltd (the Company). The facts are set out in the judgment of the court.

Allan Gore (instructed by *Field Fisher Waterhouse*) for Mrs Smith.

Richard Methuen QC (instructed by *Davies Arnold Cooper*) for the Company.

Cur adv vult

11 May 2001. The following judgment of the court was delivered.

JONATHAN PARKER LJ.**INTRODUCTION**

[1] This is the judgment of the court.

[2] This is an appeal by Mrs Maria Smith, the claimant in a personal injuries action, against an order made by Judge Pryor QC (sitting as a High Court judge in the Queen's Bench Division) on 22 October 1999. The defendant in the action, White Knight Laundry Ltd (the Company), is the respondent to the appeal. The judge refused permission to appeal, but permission was granted by Chadwick LJ on 31 January 2000.

[3] Mrs Smith is the widow and personal representative of Thomas Albert Smith, who died on 6 February 1995, aged 68 (the deceased). Mrs Smith claims damages against the Company pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976, alleging the deceased's death was caused by negligence and breach of duty by the Company.

[4] The Company was dissolved on 21 October 1963, and (as is common ground) so long as it remained dissolved Mrs Smith could not commence proceedings against it. On 22 December 1997 Mrs Smith applied to the Companies

a Court for an order under s 651 of the Companies Act 1985 declaring the dissolution to have been void and restoring the name of the Company to the register of companies. In accordance with normal practice notice of Mrs Smith's application was served on the Registrar of Companies and on the Treasury Solicitor. No other party was served. On 23 January 1998 Mr Registrar Buckley made the order sought (the restoration order).

b [5] In addition to declaring the dissolution of the Company to have been void, the restoration order also directed, pursuant to s 651, that the period from dissolution to the date of the order should not count for limitation purposes. We will refer to such a direction hereafter as 'a s 651 direction'.

c [6] The restoration order was not served on the Company until May 1999, shortly after the commencement of this action.

d [7] The action was commenced by writ issued on 14 April 1999. By her statement of claim, Mrs Smith alleges that the deceased was employed by the Company from 1950 to 1956, and that his work brought him in contact with asbestos. She alleges that in consequence he contracted mesothelioma, from which he died. She alleges that his death was caused by negligence and breach of statutory duty on the part of the Company, and she claims damages for the deceased's estate (pursuant to the 1934 Act) and for herself as a dependant (pursuant to the 1976 Act).

e [8] By its defence, the Company alleges that the claim is statute-barred because the deceased had the requisite knowledge about his condition for the purposes of the Limitation Act 1980 more than three years before the date of his death (that is to say, prior to 5 February 1992); alternatively because Mrs Smith commenced the present action more than three years after the deceased's death (that is to say, after 5 February 1998); and that the court should not make a direction pursuant to s 33 of the 1980 Act allowing the action to proceed notwithstanding that the claim would otherwise be statute-barred, since it would not be equitable in all the circumstances so to direct.

f [9] By her reply, Mrs Smith admits that the action was commenced more than three years after the date of death but denies that the claim is statute-barred. She alleges that the deceased first had knowledge of his condition on 5 January 1993, that is to say less than three years before his death. The reply goes on to plead the dissolution of the Company and the restoration order, alleging that the Company was not available to be sued until the restoration order was made; alternatively, if the claim would otherwise be statute-barred, Mrs Smith seeks relief under s 33 of the 1980 Act on the grounds: (a) that she commenced proceedings within one year and three months of making of the restoration order; (b) that no prejudice would be caused to the Company by the grant of relief under s 33; and (c) that the claim does not depend upon witness recollection and that the evidence to be adduced has not been rendered less cogent by the passage of time.

g [10] The Company applied in the action for the trial of a preliminary issue as to limitation. The application was opposed by Mrs Smith on the basis that no cause of action arose until there was a defendant available to be sued, that is to say, until the making of the restoration order. In the alternative, Mrs Smith relied on the s 651 direction contained in the restoration order. It was accordingly contended on behalf of Mrs Smith that there was no issue as to limitation since the pleaded limitation defence was bound to fail. However, by order dated 21 September 1999 Master Ungley directed a preliminary issue as to limitation. Mrs Smith appealed against that order.

[11] Mrs Smith's appeal against Master Ungley's order was heard by Judge Pryor on 22 October 1999, when he made the order against which Mrs Smith now appeals to this court. a

[12] The judge not only dismissed Mrs Smith's appeal against Master Ungley's order; he also varied the restoration order by setting aside the s 651 direction. Thus, the effect of the judge's order is that so much of the restoration order as declared the dissolution of the Company to have been void still stands, as does Master Ungley's direction for the trial of a preliminary issue as to limitation; but that the period from the dissolution of the Company to the date of the restoration order counts for limitation purposes. Thus, if the judge's order stands, preliminary issues will arise in the action as to whether the claim is statute-barred, and if so, whether relief should be granted under s 33 of the 1980 Act and the action be allowed to proceed. b
c

[13] In this appeal, Mrs Smith essentially repeats the contentions which were made unsuccessfully on her behalf before Master Ungley and before the judge. She contends firstly that no cause of action accrued to the deceased prior to the dissolution of the Company on 21 October 1963, a contention which the Company is content to accept for the purposes of this appeal. Mrs Smith goes on to contend that no cause of action can have accrued to the deceased (or to her) during the period while the Company was in dissolution, since throughout that period there was no defendant available to be sued. It follows, so it is contended, that the cause of action arose only on the making of the restoration order, with the consequence that the claim is not statute-barred. Hence, so it is said, there is no need for a preliminary issue as to limitation since the limitation defence is bound to fail. That is Mrs Smith's primary basis for challenging the judge's order. It is to be noted that if Mrs Smith is right in her primary contention the s 651 direction was wholly unnecessary since it achieved nothing. d
e

[14] In the alternative, Mrs Smith relies on the s 651 direction. She contends firstly that the judge had no jurisdiction to set aside the s 651 direction since: (a) no application to that effect had been made by the Company either in this action or in the proceedings in the Companies Court in which the restoration order was made; and (b) no step had been taken by the Company to seek to appeal the restoration order out of time. Alternatively, she contends that even if the judge had power to set aside the s 651 direction, he ought not to have exercised that power in the circumstances of this case; and that his decision to do so was perverse and against the weight of the evidence. f
g

[15] We must now set this appeal in its statutory context, by referring to the relevant statutory provisions. h

THE RELEVANT STATUTORY PROVISIONS

The Limitation Act 1980

[16] Section 11 of the 1980 Act provides for a special time limit for personal injury actions. Section 11(2) provides that none of the time limits provided elsewhere in the 1980 Act applies to personal injury actions, and s 11(3) provides that the limitation period for personal injury actions is that which is applicable under subsections (4) and (5). Subsection (4) provides that (save where subsection (5) applies) the applicable limitation period is three years from the date on which the cause of action accrued or (if later) the date of knowledge of the person injured. Subsection (5) provides that if the person injured dies within that period, the j

a applicable limitation period in respect of the cause of action surviving for the benefit of his estate by reason of the 1934 Act is three years from the date of death or (if later) the date of the personal representative's knowledge.

[17] Section 12 of the 1980 Act provides for a special time limit for actions under the 1976 Act. Section 12(1) provides that an action under the 1976 Act shall not be brought if the death of the person injured occurred when that person could no longer maintain a personal injuries action (whether because the claim is statute-barred or for any other reason). Section 12(2) provides that the limitation period for an action under the 1976 Act is three years from whichever is the later of the date of death or the date of knowledge of the person for whose benefit the action is brought.

c [18] Section 14 of the 1980 Act defines what is meant by a person's date of knowledge for the purposes of the above provisions. The detailed provisions of s 14 are not material for present purposes.

[19] Section 33 gives the court a discretion to direct that ss 11 or 12 shall not apply to an action, if it considers that it would be equitable to allow the action to proceed having regard to the degree to which those sections prejudice the claimant or anyone whom the claimant represents and the degree to which a decision to disapply those sections would prejudice the defendant and anyone whom he represents. Section 33(3) provides that in acting under the section the court is to have regard to all the circumstances of the case, and in particular to a number of matters there specified including any delay on the part of the claimant and the conduct of the defendant after the cause of action arose.

The Companies Act 1985

[20] Section 651 of the 1985 Act (as amended by the Companies Act 1989) is in the following terms, so far as material:

f '(1) Where a company has been dissolved, the court may, on an application made for the purpose by the liquidator of the company or by any other person appearing to the court to be interested, make an order, on such terms as the court thinks fit, declaring the dissolution to have been void.

g (2) Thereupon such proceedings may be taken as might have been taken if the company had not been dissolved ...

(4) Subject to the following provisions, an application under this section may not be made after the end of the period of two years from the date of dissolution of the company.

h (5) An application for the purpose of bringing proceedings against the company—(a) for damages in respect of personal injuries ... or (b) for damages under [the 1976 Act] ... may be made at any time; but no order shall be made on such an application if it appears to the court that the proceedings would fail by virtue of any enactment as to the time within which proceedings must be brought.

j (6) Nothing in subsection (5) affects the power of the court on making an order under this section to direct that the period between the dissolution of the company and the making of the order shall not count for the purposes of any such enactment.

(7) In subsection 5(a) "personal injuries" includes any disease and any impairment of a person's physical or mental condition.'

THE JUDGMENT OF JUDGE PRYOR QC

[21] After summarising the factual background, the judge turned to the first submission made on behalf of Mrs Smith by Mr Allan Gore of counsel (who also appears for her on this appeal), namely that no issue arises as to limitation in the instant case since so long as the Company remained dissolved there was no entity capable of being sued and accordingly no cause of action accrued until the making of the restoration order. The judge referred to two authorities cited by Mr Gore in support of that submission, namely *Thomson v Lord Clanmorris* [1900] 1 Ch 718, [1900–3] All ER Rep 804 and *Re Russo-Asiatic Bank, Re Russian Bank for Foreign Trade* [1934] Ch 720 (a decision of Eve J), but stated that he did not find either authority of assistance in the instant case. The judge then recited the relevant provisions of s 651 of the 1985 Act, and continued:

‘It seems to me that this section is inconsistent with the notion that no question of limitation ever arises where the company was not in existence at the time when the cause of action arose. It seems to me that the law is the same, whether the cause of action arose before the dissolution of the company, or after. I take the point made by [counsel then appearing for the Company] that if that was not the case, it would mean that it would be open to a claimant in that situation to delay deliberately, to seek to take advantage of the situation which might arise simply because they were dealing with a dissolved company and no limitation period therefore applied. There might be an answer to that in the sense that that could be dealt with as an abuse of the process of the court, but I prefer the view that this is not a decisive factor in this case, as Mr Gore argues, and that it makes no difference whether the limitation period had started to run before the dissolution, that is to say the cause of action had arisen before the dissolution, or whether it arose afterwards. I am not persuaded by the cases he has put before me that that is right. I am not saying that my decision makes that unarguable at the hearing that I am suggesting is going to have to take place, but I am not persuaded that the matter is so clear that I should make an order here and now on this appeal, made a decision to the effect that the limitation period does not arise at all.’

[22] The judge then turned to the procedural situation, saying:

‘It seems to me right, and I think there is power to do it, to allow an application to be made (I know it is out of time) in respect of the decision of [Mr Registrar Buckley]. I think that must be right, because that was an application not made on notice, so there has never been an inter partes hearing before the registrar to consider whether the [1980 Act] applies or whether it does not, or whether it should be applied. So it seems to me that the matter must be open on an inter partes hearing to be argued. I do not think, on the information I have in front of me, that the matter is so clear that I can dispose of it.’

[23] The judge then referred to the Court of Appeal decision in *Re Workvale Ltd* (No 2) [1992] 2 All ER 627, [1992] 1 WLR 416 (as to which, see below), and continued:

‘That [that is to say, the decision of the Court of Appeal in *Re Workvale*] leads me to the view that what I should do now to progress this action is to direct that the direction of the registrar in relation to limitation should be set aside. I know that application is not before me, but I think that should be done, and I think that the master’s order should stand, that there should be

- a an issue as to limitation. I do not regard myself as having enough information before me to reach a conclusion, though I am bound to say that I would think that there is a strong probability on the evidence that I do have that such an application is likely to succeed, but I am not going to express myself any further than that ... So, the effect of it is that the master's order stands, but in order to clear the procedural ground I consider that the order of the registrar
- b disapplying the [1980 Act] should be set aside so that the matter can be dealt with fully without procedural complications by the judge who hears it. That is the conclusion I arrive at.'

RE WORKVALE LTD

- c [24] In *Re Workvale Ltd (No 2)* [1992] 2 All ER 627, [1992] 1 WLR 416 a prospective claimant against a dissolved company applied for an order under s 651(5) of the 1985 Act declaring the dissolution of the company to have been void and restoring the company to the register, in circumstances where the primary limitation period had expired (albeit after the date of dissolution). The company's insurers were made respondents to the application. They contended since the
- d primary limitation period had expired the action 'would fail' on grounds of limitation for the purposes of s 651(5), and that accordingly there was no jurisdiction to make an order under the section. In the course of his judgment Harman J, at first instance, said that before refusing to make an order on that ground he would have to be convinced 'to a very high degree' that an application under s 33 of the 1980 Act would not succeed, and that he was not so convinced. He concluded that
- e although in the event the court might refuse relief under s 33, the issue was not sufficiently plain to justify refusing to make an order under s 651. He accordingly made the order sought, but he did not include in it any s 651 direction. It was thus left to the applicant to apply for relief under s 33 of the 1980 Act. The insurers appealed. Their primary contention was that which they had advanced to the
- f judge, that is to say that in considering whether an action 'would fail' for the purposes of s 651(5) no account is to be taken of the possibility of relief being granted under s 33. In the alternative, they contended that in considering the prospects of relief being granted under s 33 Harman J had applied the wrong test, the right test being the balance of probabilities; and that on the balance of
- g probabilities an application for relief under s 33 would fail. In the further alternative the insurers contended that an application under s 33 would be bound to fail.

- [25] Scott LJ (who gave the leading judgment in the Court of Appeal, with which Sir Stephen Brown P and Stocker LJ agreed) rejected the insurers' primary contention. He concluded that in considering whether an action 'would fail' on
- h limitation grounds, for the purposes of s 651(5), account had to be taken of the possibility of relief being granted under s 33. As to the insurers' alternative contention as to the test to be applied in considering the possibility of relief being granted under s 33, Scott LJ held that where the primary limitation period had expired the judge should ask himself the question whether the applicant had an
- j arguable case for relief under s 33; and that if there was an arguable case for such relief it could not be predicated that the claim 'would fail'. As to the insurers' further contention that on the facts of that case an application under that section was bound to fail, Scott LJ noted that Harman J had not decided that point but had preferred to leave it to be decided by a Queen's Bench judge. However, Scott LJ then went on to conclude that the applicant's case for relief was 'well

arguable'. Accordingly he held that Harman J was right to make an order under s 651(5), and on that basis the insurers' appeal was dismissed. a

[26] However, Scott LJ then went on to make some general observations as to the procedural practice in relation to the making of orders under s 651, saying:

'There is, however, an additional matter of procedural practice that I want to mention. As the case now stands, there will have to be an application in the Queen's Bench Division or in the county court, as the case may be, for a s 33 order. The material put before the court will be the same material as is now before us. There is, as I understand it, nothing extra that either side will want to adduce for the purpose of the s 33 application. So there is no point in putting the parties to the extra expense and continued delay that the further application will inevitably entail. It was, in my opinion, open to Harman J, if satisfied that a s 33 application would succeed, to exercise the power conferred on the court by s 651(6) and [to make a s 651 direction] ... In a case in which the primary limitation period had expired before the dissolution of the company it would not be possible to avoid the necessity of a s 33 application be making [a s 651 direction]. But this is not such a case. In a case in which the insurers of the proposed defendant, or the persons interested in defending the proposed action, were not the respondents to the s 651(5) application, it would not be proper to make a [s 651 direction]. To do so might prejudice the rights of absent parties. But in the present case the insurers are respondents. In a case in which either party desired to adduce evidence on the s 33 application which was not before the court on the s 651(5) application, it might not be possible for the court hearing the s 651(5) application to conclude that the s 33 application would succeed. But in the present case, as I understand the position, all the evidence is before the court. Finally, the judge who hears the s 651(5) application may, having regard to the particular issues which will be debated on the s 33 application, conclude that those issues ought to be dealt with in the courts, Queen's Bench Division or county court as the case might be, more accustomed to dealing with such applications. It may be that this is a view which, if he had been asked to address his mind to the matter, Harman J would have adopted in the present case. However, in a case in which all the requisite evidence is before the court on the s 651(5) application and in which the judge is able to be satisfied that a s 33 application would succeed and that the right parties are represented, the judge can, in my opinion, make an appropriate [s 651 direction] and thereby avoid an unnecessary s 33 application.' (See [1992] 2 All ER 627 at 636, [1992] 1 WLR 416 at 424-425.) b
c
d
e
f
g

THE ARGUMENTS ON THIS APPEAL h

[27] We can now turn to the arguments on this appeal.

[28] In support of his primary submission that the cause of action did not accrue until the making of the Companies Court order, Mr Gore's starting point is the uncontroversial proposition that a cause of action in tort does not arise until damage which is more than de minimis has been suffered (see *Cartledge v E Jopling & Sons Ltd* [1963] 1 All ER 341, [1963] AC 758). In the instant case, he submits, no such damage had been suffered by the deceased by the date on which the Company was dissolved, so that as at that date the cause of action had not accrued. As we indicated earlier, that is conceded by the Company for the purposes of this appeal. j

a [29] Mr Gore goes on to submit that no cause of action could accrue while the Company was in dissolution, since, as Vaughan Williams LJ said in *Thomson v Lord Clanmorris* [1900] 1 Ch 718 at 728–729, [1900–3] All ER Rep 804 at 809: ‘A Statute of Limitations cannot begin to run unless there are two things present—a party capable of suing and a party liable to be sued.’

b [30] He also relies on the decision of the Court of Appeal *Musurus Bey v Gadban* [1894] 2 QB 352 at 358, [1891–4] All ER Rep 761 at 765. In that case the Court of Appeal held that no cause of action could accrue against a debtor during such period as he enjoyed diplomatic immunity.

[31] Mr Gore further submits that the instant case is on all fours with *Re Russo-Asiatic Bank, Re Russian Bank for Foreign Trade* [1934] Ch 720. In that case,

c the Russo-Asiatic Bank, based in Petrograd, had in 1915 drawn sterling bills for acceptance by banks and accepting houses in the City of London. By a decree issued by the Soviet government in December 1917, all private banks in Russia (including the Russo-Asiatic Bank) were abolished and their assets expropriated.

In January 1918, shortly before the bills matured, all acceptances were assigned to the Bank of England in exchange for an issue of exchequer bonds to the face value

d of the bills. In 1926 the London branch of the Russo-Asiatic Bank, which had been established since 1908, was wound up by the Companies Court, and the Bank of England (on behalf of the Crown) lodged a proof of debt in the liquidation in respect of the proceeds of the bills. The liquidator rejected the proof on the ground that the Bank of England’s claim was statute-barred. The Crown applied

e for a review of the liquidator’s rejection of the proof, seeking to have the proof allowed in full. The Crown argued, among other things, that the claim was not statute-barred because there must be some debtor in existence against whom an action could be brought, and that the effect of the Soviet government’s decree was

that there was no debtor who could be sued. The liquidator, on the other hand, argued that whatever might be the effect of the decree under Russian law, the

f bank still continued to exist in England following the making of the decree, so that it could not be said that there was no debtor who could be sued. Expert evidence was called on both sides as to the effect of the Soviet government’s decree. In the result, Eve J preferred the expert evidence called by the Crown and held that the corporate existence of the bank ceased on the making of the decree

and that in consequence the Statute of Limitations had no application and the

g proof should be admitted in the liquidation.

[32] Mr Gore submits that in the instant case there was no defendant available to be sued until the making of the restoration order, and that, by analogy with *Re Russo-Asiatic Bank*, the cause of action cannot have accrued at any earlier date.

h Thus, he submits, the claim cannot be statute-barred and there is no need for any preliminary issue as to limitation.

[33] Mr Gore also seeks to distinguish the decision in *Re Workvale Ltd* on the ground that in that case the cause of action had accrued prior to the dissolution of the company. He submits that the position is entirely different where as at the date of dissolution no cause of action has as yet accrued. Indeed, he accepts that

j the effect of his primary contention, if correct, is that a prospective claimant against a company which was dissolved before the accrual of the cause of action is not subject to any period of limitation, but can (as the judge pointed out) delay indefinitely before applying for an order under s 651 of the 1985 Act.

[34] Mr Gore also places strong reliance on the House of Lords case of *Morris v Harris* [1927] AC 252, [1926] All ER Rep 15. The detailed facts of that case are not

recited in the report, but the central issue in the case was whether the effect of declaring the dissolution of a company to have been void, pursuant to the then statutory equivalent of s 651, was to validate arbitration proceedings taken after the dissolution. The relevant statutory provision was s 223 of the Companies (Consolidation) Act 1908, sub-s (1) of which was in the following terms:

'Where a company has been dissolved, the court may at any time within two years of the date of dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.'

[35] Their Lordships held by a majority (Viscount Dunedin, Lord Sumner and Lord Blanesburgh; Lord Shaw of Dunfermline and Lord Wrenbury dissenting) that the order did not have the effect of validating the arbitration proceedings. Lord Sumner (with whom Viscount Dunedin agreed), after referring to the terms of the section, continued, in a passage on which Mr Gore relies:

"The words "to have been void," in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support the respondent's argument [that the arbitration proceedings were validated]. On the other hand, the remaining words, which define the order, point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings, taken since the dissolution through ignorance or disregard of it and consequently invalid. The remaining words, "and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved," seem to me to point conclusively in the same direction.' (See [1927] AC 252 at 257, [1926] All ER Rep 15 at 18.)

[36] Mr Gore also relies on a passage from the speech of Lord Blanesburgh, where he said:

'... I cannot myself doubt that both the words of s. 223 empowering the Court to make an order "declaring the dissolution to have been void," and the following words expository of the result, "and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved," were in each case designedly chosen to produce the precise result which my noble and learned friend [Lord Sumner] has attributed to them. It is true that a declaratory order under the section unqualified in terms does ... have the effect of restoring to the revived company its corporate existence as from the very moment of dissolution thereby declared "to have been void." But the expository words which follow carefully and, as I think, advisedly refrain from adding that such an order is to have the effect of restoring to the company from the same moment, not its corporate existence only, but its corporate activity also. On the contrary, those expository words import, as I think, that it is only after the order has been made—it is "thereupon" but not before—that any active consequences are to ensue. I think, my Lords, that the terms in which these consequences are described are exhaustive and emphatic. They are intended to show that an order under the section made, it may be, as long as two years after a dissolution which up to that moment was completely effective, is not at once and as of course to ratify acts done

a during the interval, which, if done at all, must necessarily have been acts of
mere usurpation, by a liquidator or other pretended agent with no office
knowingly done on behalf of a company which had no existence. On
consideration, it appears, I think, clear that automatically to validate such acts
as being the acts of a duly constituted officer on behalf of a duly incorporated
company might involve consequences too disastrous to be even envisaged.
b These are avoided by the terms of the section. The company is restored to life
as from the moment of dissolution but, continuing a convenient metaphor, it
remains buried, unconscious, asleep and powerless until the order is made
which declares the dissolution to have been void. Then, and only then, is the
company restored to activity ... In my judgment, accordingly, the arbitration
proceedings which abated on the dissolution of the ... company thereby became
c abortive and have in no sense been reconstituted as a result of [the judge's]
order.' (See [1927] AC 252 at 268–269, [1926] All ER Rep 15 at 23–24.)

[37] Mr Gore submits that these passages from the speeches of Lord Sumner
and Lord Blanesburgh in *Morris v Harris* support his primary proposition that the
restoration order does not have the effect of creating a cause of action retrospectively,
d in the sense that once the dissolution has been declared to have been void the
1980 Act applies (subject to any s 651 direction) as if a cause of action had accrued
during the period of dissolution.

[38] If Mr Gore is right in his primary submission, it is (as noted earlier)
unnecessary to consider whether the judge was right to set aside the s 651 direction,
e since on Mr Gore's argument time did not run during that period. However, in
the alternative to his primary submission he submits that the judge ought not to
have set aside the s 651 direction. He does not press the contention (which is
raised in Mrs Smith's grounds of appeal) that the judge had no power to set the
s 651 direction aside; rather, he submits that in all the circumstances it was unjust
f to do so, given that at no stage did the Company seek to appeal that part of the
restoration order, nor did it expressly invite the judge to set the s 651 direction
aside.

[39] Further Mr Gore submits that the judge's order setting aside the s 651
direction was unjust in that it deprived Mrs Smith retrospectively of the benefit
of that direction. He submits that had the restoration order not contained such a
g direction, Mrs Smith might well have been in a position to commence proceedings
earlier, thus putting her in a stronger position to obtain relief under s 33 of the
1980 Act.

[40] Mr Gore submits that in the instant case the court can conclude, on the
evidence presently before it, that an application by Mrs Smith for relief under s 33
would be bound to succeed; and that on that footing the s 651 direction ought to
h remain in place, thereby avoiding the need for a further application by Mrs Smith.

[41] For the Company, Mr Methuen QC accepts (at least for the purposes of
this appeal) that no cause of action can accrue against a company which has been
dissolved, unless and until an order is made under s 651 declaring the dissolution
to have been void. He submits, however, that the effect of such a declaration is to
j restore the company's corporate existence retrospectively, as if it had never been
dissolved. It follows, he submits, that for limitation purposes, and looking at the
matter as at the date when the action was commenced, the cause of action
accrued on the date when the deceased had the requisite knowledge of damage
(whenever that might be) notwithstanding that as at that date the Company was
in dissolution.

[42] In support of that submission, Mr Methuen relies on the decision of Vaisey J in *Re C W Dixon Ltd* [1947] 1 All ER 279, [1947] Ch 251. The issue in that case was whether a restoration order under s 294 of the Companies Act 1929 had the effect of automatically re-vesting in the company property which had vested in the Crown on dissolution as bona vacantia, without the need for a vesting order. Vaisey J held that the effect of declaring the dissolution 'to have been void' was to avoid the dissolution ab initio, and that accordingly there was no need for an order re-vesting the property in the company. In reaching his decision, Vaisey J relied on *Morris v Harris*. a
b

[43] Mr Methuen submits that, far from providing support for Mr Gore's primary submission, *Morris v Harris* (properly understood) supports his own submission, and that Vaisey J was right to cite it in support of his decision in *Re C W Dixon*. c

[44] Mr Methuen submits that the judge had power to set aside the s 651 direction, and that he was right to exercise that power in the circumstances of the instant case. Mr Methuen submits that, procedurally, the order which the judge made was wholly in accordance with the overriding objective of the CPR, and that it was not necessary that the Company should have expressly applied for such an order. The s 651 direction was originally made without notice to the Company's insurers, and, as the judge pointed out, the insurers had never been heard on that application. Nor has disclosure yet been made of the evidence which was before Mr Registrar Buckley when he made the restoration order. d

[45] Mr Methuen submits that it may be arguable that the deceased's date of knowledge was more than three years before his death, with the consequence that by the time of his death the primary limitation period had expired; and that the Company ought not to be deprived of the opportunity of taking that point if it is one that can be taken on the facts. Mr Methuen points out that within days after being served with the restoration order the solicitors for the insurers wrote to Mrs Smith's solicitors saying that the claim was statute-barred and that they considered that the issue of limitation would have to be dealt with as a preliminary issue, so there can be no prejudice to Mrs Smith by reason of the Company's failure to apply in the Companies Court to set the s 651 direction aside. e
f

[46] Mr Methuen suggests that had such an application been made in May 1999 it is quite likely that it would not have been heard before the end of September 1999, when Master Ungley made his order directing a preliminary issue as to limitation. Equally, he submits, it is quite likely that it would have been remitted to a Queen's Bench master for further directions. In the circumstances, to have required the Company to apply to the Companies Court would have simply been to waste time and costs. g

[47] Mr Methuen submits that an application for a restoration order by a prospective claimant in a personal injuries action should normally be made on notice to the company's insurers and to any other defendants in the proposed action, and (on the authority of *Re Workvale Ltd*) that unless the court hearing the application is satisfied (a) that all the right parties are before it, (b) that no additional evidence would be adduced on an application for relief under s 33 of the 1980 Act, and (c) that such an application would be bound to succeed, the correct course for the court to adopt, assuming that an application under section 33 would be arguable, is that which was adopted by Harman J in *Re Workvale Ltd*: that is to say to make no s 651 direction but to leave it to the applicant to seek relief under s 33. h
j

a [48] In the instant case, Mr Methuen submits, an application by Mrs Smith under s 33, though plainly arguable, cannot be said to be bound to succeed. In those circumstances, he submits, the judge was plainly right to set aside the s 651 direction and to allow the preliminary issue as to limitation to proceed.

CONCLUSIONS

b [49] The starting point is s 651 of the 1985 Act itself. Subsection (1) enables the court to declare the dissolution of a company to have been void 'on such terms as [it] thinks fit'. In the exercise of this jurisdiction the court can adjust the limitation consequences of the declaration so as to produce a just result in the circumstances of the particular case. In our judgment the power to make a s 651 direction is to be found in sub-s (1), not in sub-s (6). This is consistent with the terms of sub-s (6),
c which does not in terms confer such a power but merely provides that nothing in sub-s (5) shall affect that power.

[50] Thus in the exercise of the jurisdiction conferred by sub-s (1) the court can, in an appropriate case, make a s 651 direction. It is, however, to be borne in mind that in a case where an applicant for a restoration order is a prospective claimant
d in a personal injuries action in circumstances where the claim would otherwise have been statute-barred, the effect of making a s 651 direction will be the same as granting the applicant relief under s 33 of the 1980 Act.

[51] We can now turn to Mr Gore's primary submission, to the effect that there was no defendant available to sue until the restoration order was made, and that it follows that the cause of action cannot have accrued until the restoration order was made. In our judgment, that simply begs the question as to the effect
e of declaring the dissolution to have been void.

[52] In our judgment, the effect of a declaration under s 651(1) declaring the dissolution of a company 'to have been void' is as described by Vaisey J in *Re C W Dixon*. The section with which Vaisey J was concerned was s 294 of the Companies
f Act 1929 (which was in all material respects in the same terms as s 651(1)). Vaisey J said:

'Anyone can declare a dissolution to be void as a mere matter of utterance, but when the court is given power to declare that something has happened, I apprehend that the legislature must inevitably intend to give the court
g power to make a declaration which is effective. In other words, if the court makes a declaration to the effect that the dissolution is void, the declaration is not that that the dissolution is void at the date of the order, or that it is to be deemed to be so void, or that it is to become void, or anything of that kind. The declaration is that the dissolution was void at the time when
h the company was supposed to have been dissolved. In my judgment, if I declare, as I intend to declare, the dissolution of C. W. Dixon, Ltd. ... to have been void, the result is that it was void *ab initio*, and all the consequences under the statute [ie the 1929 Act] or otherwise which flow from that arrest themselves and are avoided ... In my view, the avoidance of dissolution has the effect which one would have expected, and I propose, therefore, to give
j the applicants no more than an order following the precise words of the relevant section.' (See [1947] 1 All ER 279 at 281, [1947] Ch 251 at 255.)

[53] As mentioned earlier, Vaisey J cited *Morris v Harris* as providing support for his decision. In our judgment he was right to do so. In the passages from the speeches of Lord Sumner and Lord Blanesburgh on which Mr Gore relies (quoted

earlier in this judgment) a crucial distinction is made between on the one hand the corporate existence of the company, which is restored as from the date of the dissolution, and on the other hand proceedings which had taken place during the period of dissolution (referred by Lord Blanesburgh as 'corporate activity'). In *Morris v Harris* the House of Lords decided that purported acts of a dissolved, and hence non-existent, company were not validated by the subsequent avoidance of the dissolution. But that it not the instant case. In the instant case, all that is needed for the accrual of a cause of action against the Company is corporate existence, no question of 'corporate activity', in the sense in which Lord Blanesburgh used that expression, arises.

[54] We conclude, therefore, that by virtue of the restoration order Mrs Smith's cause of action against the Company accrued on the date on which it would have accrued but for the dissolution.

[55] On that basis, therefore, and leaving the s 651 direction out of account for the moment, the position following the making of the restoration order is that Mrs Smith's claim is statute-barred since she did not commence proceedings within three years of the death of the deceased (that being the applicable limitation period: see s 12(2) of the 1980 Act). Absent the s 651 direction, therefore, Mrs Smith has to seek an order under s 33 of the 1980 Act disapplying s 12(2). Further, as noted earlier, it may also be open to the Company to argue that the claim was already statute-barred at the date of the deceased's death, on the basis that the deceased acquired the requisite knowledge more than three years before his death: see s 12(1) of the 1980 Act.

[56] However, when one takes the s 651 direction into account, the consequence is that (as pointed out earlier) Mrs Smith is in precisely the same position as if she had obtained relief under s 33. Viewing the s 651 direction in that light, one can readily see why justice requires that it be set aside so that the Company's insurers may have an opportunity of being heard on the issue of limitation and in opposition to Mrs Smith's application under s 33.

[57] Nor, in our judgment, is this a case like *Re Workvale Ltd* in which the court can see at this stage that an application by Mrs Smith under s 33 is bound to succeed. The judge was in our judgment clearly right not to reach a concluded view as to that. In any event, that is a matter which would fall for consideration at first instance (rather than in the Court of Appeal), in the context of a hearing at which the Company's insurers have the opportunity of being present and where all the evidence on which the parties would wish to rely in an application under s 33 is before the court.

[58] In our judgment, therefore, the decision of the judge to set aside the s 651 direction, far from being perverse, was entirely in accordance with the overriding objective of doing justice in the case. The judge having, as he put it, cleared the procedural ground, the parties can litigate the limitation issues as preliminary issues in the action, as directed by Master Ungley.

[59] We accordingly conclude that the judge took the right procedural course for the right reasons.

[60] Finally, as a matter of general practice it seems to us that where a restoration order is sought in the Companies Court by a prospective claimant in a personal injuries action a s 651 direction should not normally be made unless (a) notice of the application has first been given to all those parties who may be expected to oppose the making of such a direction, including the company's insurers, and (b) (following the decision of this court in *Re Workvale Ltd*) the court is satisfied:

a (i) that it has before it all the evidence which the parties would wish to adduce on an application by the prospective claimant under s 33; and (ii) that an application under s 33 would be bound to succeed.

[61] If the above conditions are not met, the applicant should normally be left to seek relief under s 33: in other words, the court should take the course which Harman J took in *Re Workvale Ltd*.

b [62] For the reasons which we have given, however, we would dismiss this appeal.

Appeal dismissed.

Melanie Martyn Barrister

DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy and others

[2001] EWCA Civ 79

COURT OF APPEAL, CIVIL DIVISION

ALDOUS AND ROBERT WALKER LJJ

19, 30 JANUARY 2001

Legal aid – Order for costs – Variation – Whether court having jurisdiction to vary costs order against assisted person whose legal aid certificate was subsequently revoked – Civil Legal Aid (General) Regulations 1989, regs 74(2), 130(b).

In February 1997, during the course of proceedings between the claimant and the defendants, the first defendant, K, was granted an emergency legal aid certificate. In February 1998 the judge handed down a draft judgment, dismissing two applications made by the defendants in those proceedings. He was disposed to make an order against the defendants for costs to be taxed and paid forthwith. In March 1998 he made such an order against the second defendant, but the order in respect of K provided that no costs attributable to the period after the grant of the emergency legal aid certificate were to be recoverable from him until the court had determined the amount of his liability in accordance with s 17(1) of the Legal Aid Act 1988. In September 1998 the Legal Aid Board revoked the emergency legal aid certificate on the ground that K's financial resources made him ineligible. Under reg 74(2)^a of the Civil Legal Aid (General) Regulations 1989, a person whose certificate had been revoked was deemed never to have been an assisted person in relation to those proceedings. The claimant subsequently applied to another judge for a variation of the costs order against K to take account of the retrospective effect of the revocation of the certificate. It relied primarily on reg 130(b)^b of the 1989 regulations, which made provision for such a variation where there had been a change in the 'assisted person's circumstances' since the date of the order. The judge held that he had no power to vary the costs order, either under the statutory scheme created by the 1988 Act and the 1989 regulations, or under the inherent jurisdiction of the court. In particular, he held that reg 130(b) had no application since the effect of reg 74(2) was that K was not then, and never had been, an assisted person. The claimant appealed, both against the original order for costs made by the first judge, and against the refusal by the second judge of the application for a variation. In seeking to uphold the second judge's conclusion, K submitted that 'circumstances' in reg 130(b) was confined to financial circumstances.

Held – A costs order against an assisted person whose legal aid certificate was subsequently revoked could be varied under reg 130(b) of the 1989 regulations notwithstanding the deeming provision in reg 74(2). The legislative purpose of the statutory fiction created by that provision was to withdraw protection from the person whose certificate had been revoked. The achievement of that purpose

^a Regulation 74 is set out at [11], below

^b Regulation 130 is set out at [13], below

- a neither required nor permitted the fiction to be applied indiscriminately to every reference to an assisted person. Moreover, there was no reason to restrict 'circumstances' in reg 130(b) to financial circumstances, although they were no doubt included. The fact that an assisted party had lost his legal aid with retrospective effect was arguably the most significant change of circumstances which could happen to him. Accordingly, the appeal against the decision of the second judge would be
- b allowed, and the order would be varied so as to direct that K should pay the costs of both applications before the first judge, on the basis that they had been a discrete and substantial part of the litigation, and had wholly failed. In those circumstances, the appeal against the original order would be dismissed as having proved unnecessary (see [17], [20], [22], [25], [26], below).

c **Notes**

For the variation of orders for costs against assisted persons, see 27(2) *Halsbury's Laws* (4th edn reissue) para 2005.

Subject to transitional and saving provisions, the Civil Legal Aid (General) Regulations 1989 have lapsed on the repeal of enabling powers by the Access to Justice Act 1999, s 106, Sch 15, Pt I.

d **Cases referred to in judgments**

Hill v East and West India Dock Co (1884) 9 App Cas 448, HL.

Jordan v Norfolk CC [1994] 4 All ER 218, [1994] 1 WLR 1353.

Leitch v Emmott (Inspector of Taxes) [1929] 2 KB 236, [1929] All ER Rep 638, CA.

- e *Levy, Re, ex p Walton* (1881) 17 Ch D 746, [1881–5] All ER Rep 548, CA.

Murphy v Ingram (Inspector of Taxes) [1974] 2 All ER 187, [1974] Ch 363, [1974] 2 WLR 782, CA.

Appeals

- f The claimant, DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH (DEG), appealed (i) with permission of Chadwick LJ granted on 15 June 2000 from the order of Harman J on 20 March 1998 requiring the first defendant, Thomas Koshy, to pay the costs of two interlocutory applications, but providing that no costs attributable to the period after 27 February 1997 were to be recoverable from Mr Koshy until the court had determined the amount of his liability in accordance with s 17(1) of the Legal Aid Act 1988; and (ii) with permission of
- g Rimer J from his decision on 17 February 2000 dismissing, for want of jurisdiction, an application by DEG to vary Harman J's order. The second defendant, Lummus Agricultural Services Co Ltd (in liquidation) played no part in the appeal or the application before Rimer J. The facts are set out in the judgment of Robert Walker LJ.

- h *Andrew Thompson* (instructed by CMS Cameron McKenna) for DEG.
Hugo Page (instructed by Landau & Scanlan) for Mr Koshy.

Cur adv vult

- j 30 January 2001. The following judgments were delivered.

ROBERT WALKER LJ (giving the first judgment at the invitation of Aldous LJ).

Introduction

[1] This court has heard two appeals from orders made in the same proceedings by two judges of the Chancery Division. One appeal (brought with the permission

of Chadwick LJ given on 15 June 2000 on an application made out of time) is from an order as to costs made by Harman J on 20 March 1998 when he dismissed a strike-out application made by Mr Thomas Koshy and a company called Lummus Agricultural Services Co Ltd, now in liquidation (Lasco). Mr Koshy and Lasco are the first and second defendants in an action commenced by DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH (DEG). The other appeal (brought with the permission of the judge) is from an order of Rimer J made on 17 February 2000 dismissing (on the ground of lack of jurisdiction) an application to vary Harman J's order of 20 March 1998. It was Rimer J's dismissal of that application which led to the late application for permission to appeal from the original order.

[2] This matter has a long, complex and contentious history but for present purposes it is not necessary to set out the background at length. Indeed it is better to say little about the background because these appeals are concerned only with technical points (although they are points of some general importance) on an order relating to the costs of two interlocutory applications, and the trial of the action has still to take place. It is due to begin at the end of next April with an estimated duration of six weeks.

[3] Mr Koshy was the managing director of a Zambian company called Gwembe Valley Development Co (GVDC) which was involved in agricultural development in Zambia. Lasco, an English company controlled by Mr Koshy, was also involved in the project. DEG is a German company owned by the German government which provides finance for private sector projects in the Third World. It lent money to GVDC.

[4] DEG's case is that Mr Koshy and Lasco have been guilty of fraud and are liable to it in damages. DEG launched proceedings in England on 8 November 1996 and on the same day obtained from Harman J a worldwide freezing order against Mr Koshy and Lasco. On 18 December 1996 those defendants (who already had a pending application to discharge the freezing order) applied to strike out the action.

[5] On 27 or 28 February 1997 an emergency legal aid certificate was granted to Mr Koshy. During March and April 1997 there were several interlocutory hearings relating to the applications. During August 1997 (with the applications still not determined) correspondence began between Mr Koshy's solicitors and the Legal Aid Board as to his eligibility for legal aid. That led, eventually, to the Legal Aid Board's decision (on 16 September 1998) to revoke the emergency legal aid certificate on the ground that Mr Koshy's financial resources made him ineligible. It is of central importance to note that revocation of a legal aid certificate is a more drastic step than discharge of a certificate, since (under statutory provisions set out in the next section of this judgment) it has retrospective effect. Mr Koshy has challenged the revocation in judicial review proceedings but his challenge has not so far been successful.

[6] In the meantime Harman J had on 6 February 1998 handed down a draft judgment in relation to the two applications which he had heard in 1997. He dismissed both applications (the strike-out had by then already been abandoned). Neither of the counsel who appeared in this court had appeared before Harman J, and it has been impossible to piece together exactly what happened between 20 March (when there was a hearing to determine the terms of the order to give effect to Harman J's handed down judgment) and 31 March (when the order was entered in Chancery Chambers). However there is a transcript of what was said in court on 20 March, and counsel appearing in this court (Mr Andrew Thompson

a for DEG, and Mr Hugo Page for Mr Koshy) have sensibly tried to limit the area of disagreement.

[7] It appears from the transcript that Harman J was disposed to make an order against both defendants for costs to be taxed (on the standard basis) and paid forthwith, and an order in those terms was made against Lasco, as appears from the perfected order. The transcript shortly states Harman J's reasons for making such an order. But in relation to Mr Koshy (who had the benefit of the emergency legal aid certificate) junior counsel for DEG became aware, shortly after the hearing on 20 March, of RSC Ord 62, r 8(3), which provided that the court should not make an order for immediate taxation 'in a case where the person against whom the order for costs is made is an assisted person'.

c [8] For that reason the form of order signed by both junior counsel provided for Mr Koshy to pay the costs on the standard basis of both applications, 'save that no costs attributable to the period after 27 February 1997 be recoverable from [Mr Koshy] until the court has determined the amount of his liability in accordance with s 17(1) of the Legal Aid Act 1988'. The form of order also provided for Mr Koshy to attend on a date to be fixed for oral examination as to his means and other relevant matters, and for determination of his liability to be postponed until after the examination. Harman J appears to have initialled the draft signed by counsel, but there is uncertainty as to whether, and how far, this aspect of the matter was explained to him.

e [9] After the revocation of Mr Koshy's emergency legal aid certificate DEG's advisers wished to apply for a variation of Harman J's order so as to take account of the retrospective effect of the revocation. Harman J was no longer available and the application came before Rimer J, who held that he had no power to make the order sought, either under the statutory scheme of the 1988 Act and regulations made under it, or under the court's inherent jurisdiction. Before examining his reasons it is necessary to refer to some provisions of the 1988 Act and the Civil Legal Aid (General) Regulations 1989, SI 1989/339.

The statutory provisions

g [10] Many of the relevant provisions have been repealed by the Access to Justice Act 1999 but they continue to be applicable to this matter by reason of the Access to Justice Act 1999 (Commencement No 3, Transitional Provisions and Savings) Order 2000, SI 2000/774, para 5. Section 17(1) of the 1988 Act laid down the basic rule that the liability of an assisted party for costs ordered against him—

h 'shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the financial resources of all the parties and their conduct in connection with the dispute.'

Section 17(2) required regulations to make provision for the determination of the amount 'and the extent to which any determination of that amount is to be final'. Section 18 of the 1988 Act provided for the circumstances in which the Legal Aid Board was to be liable for the costs of a successful unassisted party.

j [11] Part X of the regulations deals with the revocation and discharge of legal aid certificates. Regulation 74 is in the following terms:

'(1) An Area Director may terminate a certificate by revoking or discharging it under this Part of these Regulations.

(2) Subject to this Part of these Regulations, a person whose certificate is revoked shall be deemed never to have been an assisted person in relation to

those proceedings except for the purposes of section 18 of the Act; and a person whose certificate is discharged shall, from the date of the discharge, cease to be an assisted person in the proceedings to which the certificate related.' a

The deeming provision in reg 74(2) is of central importance to the appeal from Rimer J and it has been the subject of various submissions from counsel.

[12] Regulation 75 requires an area director to revoke an emergency legal aid certificate (granted under Pt III of the regulations) where it appears that an assisted person's disposable income makes him ineligible for legal aid, or his disposable capital exceeds the amount mentioned in reg 75(2). Regulation 85 preserves the statutory charge (under s 16 of the 1988 Act) after revocation or discharge of a certificate, and reg 86(1) makes an assisted person whose certificate is revoked liable to the Legal Aid Board for costs incurred on behalf of that person (for which the board remains liable under reg 84(b)). The effect of regs 84, 85 and 86 is anticipated by the opening words 'Subject to this Part of these Regulations' in reg 74(2). b c

[13] Part XIII of the regulations deals with costs awarded against an assisted person. Regulation 130 (headed 'Variation of order for costs') is another provision which is of central importance to the appeal from Rimer J. It is in the following terms: d

'The party in whose favour an order for costs is made may, within six years from the date on which it was made, apply to the court for the order to be varied on the ground that—(a) material additional information as to the assisted person's means, being information which could not have been obtained by that party with reasonable diligence at the time the order was made, is available; or (b) there has been a change in the assisted person's circumstances since the date of the order; and on any such application the order may be varied as the court thinks fit; but save as aforesaid the determination of the court shall be final.' e f

The appeal from Rimer J

[14] It is appropriate to consider first the appeal from Rimer J, since if a judge of the Chancery Division had power to vary the order of Harman J there was no necessity for the Court of Appeal to have to hear an appeal from that order.

[15] Rimer J heard DEG's application together with an application of a quite different sort made by Mr Koshy in a related action in which GVDC was the claimant. Rimer J's ruling on DEG's application occupies the last few pages of a long reserved judgment mainly concerned with a disputed appointment of receivers. Rimer J recorded that DEG's counsel relied mainly on reg 130, and in particular in a change of circumstances within para (b) of that regulation. The judge decided, with regret, that reg 130 was not in point, for two main reasons. He expressed the first as follows: g h

'The first, and immediate, difficulty is that it is directed to variations of costs orders which have been made against an "assisted person". But the effect of reg 74(2) is that Mr Koshy is not now, and is deemed never to have been, an assisted person; and although it provides for certain express exceptions to the width of its deeming effect, it does not include an exception enabling DEG to invoke reg 130 in the way it seeks to do.' j

Rimer J's second (and to my mind related) reason was that Pt XIII of the regulations is concerned exclusively with the assessment of costs against legally aided parties, and associated matters. The judge concluded that Pt XIII (including reg 130) had

a nothing to do with the liability for costs of persons such as Mr Koshy who are deemed never to have had legal aid.

[16] Mr Thompson criticised the judge's reasoning as having overlooked the need, in applying a deeming provision (and especially one which amounts to a statutory fiction) to have regard to the legislative purpose underlying the provision. Outside the scope of that legislative purpose, there may be no reason to prefer fiction to the truth. Mr Thompson referred to the principle stated in *Bennion on Statutory Interpretation* (3rd edn, 1997) p 736. In addition to the authorities cited in that passage there is the well-known decision of this court in *Murphy v Ingram (Inspector of Taxes)* [1974] 2 All ER 187, [1974] Ch 363, in which Russell LJ said:

c 'It has been remarked on high authority that in considering "deeming" provisions in statutes it is important to have in mind what appears to be the purpose of their enactment: see, for example, *Hill v East and West India Dock Co* ((1884) 9 App Cas 448 at 454–456), and the passage quoted from James LJ in another case (*Re Levy, ex p Walton* (1881) 17 Ch D 746 at 756, [1881–5] All ER Rep 548 at 553) in *Leitch v Emmott (Leitch v Emmott (Inspector of Taxes))* [1929] 2 KB 236 at 248, [1929] All ER Rep 638 at 642, 643).’ (See [1974] 2 All ER 187 at 190, [1974] Ch 363 at 370.)

Bennion summarises the effect of the authorities as being that the statutory hypothesis is to be carried as far as is necessary to achieve the legislative purpose, but no further.

[17] Building on this foundation of principle, Mr Thompson submitted that the legislative purpose of reg 74(2) was to ensure that where a legal aid certificate was revoked (as a mark of disapprobation of the veracity or conduct of the person whose certificate was revoked) that person should lose the protection of s 17(1) of the 1988 Act, not only for the future, but also for the period during which the certificate was in force. The judge's interpretation of reg 130 frustrates that legislative purpose by preserving the protection afforded to Mr Koshy by Harman J's order.

f Rimer J's approach was too mechanical in applying the statutory fiction to the reference to 'the assisted person' in reg 130 (where the reference is, as Aldous LJ suggested, no more than an identification).

[18] Mr Thompson also submitted that although Pt XIII of the regulations is primarily concerned with the assessment of the contribution to costs to be made by a legally aided person, there is no reason to limit it to that exclusive purpose. In particular, reg 130 is in terms dealing with an order for costs (that is, the main order for costs referred to in s 17(1) of the 1988 Act) rather than simply with the process of determining liability. Moreover the reference to the assisted person's 'circumstances' in reg 130(b) is a wider expression than 'means' (used in reg 130(a) and also, for instance, in regs 125(1) and 128(1)).

g [19] Mr Page, on behalf of Mr Koshy, supported and relied on the reasoning of Rimer J. In particular, he submitted that 'circumstances' in reg 130(b) means financial circumstances, and that Pt XIII as a whole is concerned solely with the determination of the liability of assisted persons. He said that DEG's problem arose from its having obtained an order in a form which it now found disadvantageous, and that that was no reason to strain the language of reg 130.

j [20] The point has been fully and skilfully argued but it is in the end quite a short point. I accept the submissions put forward by Mr Thompson on behalf of DEG. The legislative purpose of the statutory fiction is to withdraw protection from the person whose certificate is revoked (as is emphasised by regs 85 and 86) and the achievement of that purpose does not require (or permit) the fiction to be applied indiscriminately to every reference to an assisted person (such as the

references in regs 81 and 82, where it would produce absurdity). There is no reason to restrict 'circumstances' in reg 130(b) to financial circumstances, although they are no doubt included. The fact that an assisted party has lost his legal aid with retrospective effect is arguably the most significant change of circumstances which could happen to him. So far from regarding that as a strained construction I think that it would require considerable mental contortions to exclude it.

[21] I understand that Aldous LJ concurs in this conclusion and it is not therefore necessary for this court to express any definite view on the issue of inherent jurisdiction. It is common ground that there is no general power for the court to vary an order after it has been passed and entered. Rimer J identified four real or apparent exceptions: first, the correction of obvious errors under the slip rule; second, supplementing (rather than varying) an order; third, cases where the order itself provides for its variation; and fourth, where there is a statutory right of review by a court of co-ordinate jurisdiction (for instance under s 375 of the Insolvency Act 1986). The judge did not suggest that his list was exhaustive and there appears to be a further exception where an order requires to be worked out, and a material change of circumstances occurs before it has been worked (see *Jordan v Norfolk CC* [1994] 4 All ER 218 at 223–224, [1994] 1 WLR 1353 at 1358–1359). If reg 130 did not apply here there would be fairly strong arguments for inherent jurisdiction either to make a supplemental order or to take account of the change of circumstances in working out the order. But it is better not to express any final view.

[22] I would therefore allow the appeal against Rimer J's decision that he had no jurisdiction to vary the order of Harman J. Exercising a discretion which Rimer J thought that he lacked, I would vary the order so as to direct that Mr Koshy should pay the costs of the two applications, to be the subject of immediate detailed assessment on the standard basis and to be paid as soon as they have been assessed. I would make this order for the same reasons as would have led Harman J to make that order if it had been open to him to do so: that is, that the applications were a discrete (and, I would add, substantial) part of the litigation and that the applications had wholly failed. The fact that the lengthy affidavits used on the applications have now been ordered to stand as witness statements does not affect that conclusion. Nor does the fact that the start of the trial is now relatively close, as there may be no decision before next October.

The appeal from Harman J

[23] Had Rimer J acceded to the application to vary Harman J's order, there would have been no need for DEG to embark on an appeal from Harman J's order. Our decision on the appeal from Rimer J makes the appeal from Harman J unnecessary, but it was a reasonable precaution for DEG to take, as Chadwick LJ went some way to recognising when he granted permission to appeal out of time.

[24] It is unnecessary for this court to express any final view about the points which have been argued on this appeal. But I think it right to say that I am extremely sceptical about Mr Page's wide submission as to the effect of CPR 52.11(3). This provides as follows:

'The appeal court will allow an appeal where the decision of the lower court was—(a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.'

Mr Page submitted that the use of the word 'wrong' implies that the Court of Appeal no longer has power to allow an appeal in any case where the lower

- a* court's decision was correct on the law and evidence as they stood before the lower court even though a change in the law, or fresh evidence, or supervening events, show it (with hindsight) to have been wrong. I am not persuaded that any such change was intended.

Conclusion

- b* [25] I would therefore allow the appeal from Rimer J, substituting an order on the lines which I have mentioned. I would dismiss the appeal from Harman J as having proved unnecessary.

ALDOUS LJ.

[26] I agree.

Appeal from the order of Rimer J allowed. Appeal from the order of Harman J dismissed.

Kate O'Hanlon Barrister.

Patten (t/a Anthony Patten & Co) v Lord Chancellor a

QUEEN'S BENCH DIVISION

LEVESON J b

11, 22 MAY 2001

Legal aid – Taxation of costs – Criminal proceedings – Appeal from decision of costs judge – Certification of principle of general importance – Whether High Court judge having power on appeal from costs judge to permit solicitor to make new claims – Whether appeal from decision of costs judge restricted to principle of general importance certified – Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, regs 15, 16. c

P, a solicitor, was dissatisfied with the decision made by a costs judge on his appeal, under reg 15^a of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, against a redetermination of his costs by the determining authority. On such an appeal, the costs judge was only entitled to consider grounds of objection which had been raised on the redetermination, unless he directed otherwise. Regulation 16(3)^b gave a solicitor a right of appeal to the High Court against 'the decision' of the costs judge on an appeal under reg 15 if that judge certified a point of principle of general public importance. The Lord Chancellor, who was the respondent to such an appeal, had an unlimited right of appeal under reg 16(5) if he was dissatisfied with the decision of the costs judge and no appeal was brought by the solicitor pursuant to reg 16(3). Under reg 16(8), the High Court judge had the same powers as the determining authority and costs judge under the regulations, and could reverse, affirm or amend the decision d appealed against or make such other order as he thought fit. P obtained a certificate from the costs judge under reg 16(3), but his notice of appeal was not limited to the point of principle certified. Instead, it made claims for payment ranging far beyond the certificate, including items or rates which had either never been sought or pursued on taxation, or which had initially been claimed but had not been the subject of appeal to the costs judge. On the hearing of a preliminary issue to determine the true scope and ambit of his appeal, P contended that the court could reopen the entire taxation since reg 16(8) gave the High Court judge the same powers as the determining authority and the costs judge. He further contended that if a costs judge had provided a certificate for an appeal under reg 16(3), the solicitor could argue any matter which had been advanced before the costs judge irrespective of the terms of the certificate. In support of that contention, he relied on an authority which had held that, since the Lord Chancellor had an unfettered right of appeal under reg 16(5), his grounds of appeal as a respondent cross-appellant to a para (3) appeal were necessarily also unrestricted, and that in those circumstances it would be unfair to restrict a solicitor to the certified point on a para (3) appeal. e f g h j

Held – (1) Regulation 16(8) of the 1989 regulations did not give a High Court judge the power to permit a solicitor to make, on an appeal under reg 16(3), new

a Regulation 15, so far as material, is set out at [8], below

b Regulation 16, so far as material, is set out at [10], below

a claims which had never previously been pursued. A conclusion to the contrary would run entirely counter to the general practice that appellate courts, particularly at the second appellate tier, were not concerned with original fact finding, but only with the most important or significant of the issues distilled by the lower tribunals. It would also mean that the appeal before the High Court judge would lead to an investigation far wider than that required of the costs judge from whom the appeal was mounted (see [17], [18], below).

b (2) An appeal by a solicitor under reg 16(3) of the 1989 regulations was limited to the principle of general importance certified by the costs judge. When that provision referred to the pre-condition that a costs judge had to certify a point of principle and permitted an appeal to the High Court against 'the decision' of that judge on an appeal under reg 15, the phrase 'the decision' in that context referred back to the decision in respect of which a point had been certified. It did not refer to each individual issue, whether related to the point of principle or not, which had fallen to be decided by the costs judge. On that construction, reg 16 fell completely into place. Where an appeal had been mounted following a certificate, there was power to reverse, affirm or amend the decision. Accordingly, there was c
d
e
f
g
h
no need to permit the Lord Chancellor the right of appeal: he could seek to achieve a different result in relation to the point certified on the back of the appeal to which he responded. Where on any aspect of the decision there was no certificate or no appeal following a certificate, reg 16(5) permitted the Lord Chancellor to appeal if he was dissatisfied with it. If he did, the respondent solicitor had the right to seek to reverse, affirm or amend that decision in the same way that the Lord Chancellor had such a right in relation to the solicitor's appeal under reg 16(3). Such a construction was reinforced by a consideration of the terms of the certificate which had to be sought. If it had been intended that any aspect of the decision of the costs judge could be appealed, it would have been perfectly straightforward to permit an appeal subject only to the general grant of leave or permission: there would be no need to require the elucidation of a point of principle of general importance or a certificate to that effect. Nor was it unfair that the Lord Chancellor had an unlimited right of appeal while others could appeal only with a certificate. The Lord Chancellor was the minister of the Crown whose department was ultimately responsible for the public funds used to defray the costs. It was perfectly legitimate to approach the issue on the basis that he ought to be able to decide whether an issue was of sufficient importance to proceed to appeal rather than having to rely on the costs judge. The position was not the same for the individual solicitor concerned in a specific case. It followed that in the instant case the scope and ambit of P's appeal would be limited to the issues contained within the certificate issued by the costs judge, subject only to the resolution of one outstanding issue (see [21]–[24], [32], below); *Harold v Lord Chancellor* [1999] 1 Costs LR 14 not followed.

Notes

j For appeals by a solicitor to the High Court from the decision of the taxing master, see 27(2) *Halsbury's Laws* (4th edn reissue) para 2062.

For the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, regs 15, 16, see 11 *Halsbury's Statutory Instruments* (2000 issue) 9.

Cases referred to in judgment

Harold v Lord Chancellor [1999] 1 Costs LR 14.

R v Supreme Court Taxing Office, ex p Singh [1997] 1 Costs LR 49, CA.

Cases also cited or referred to in skeleton arguments

A-G for Northern Ireland v Gallagher [1961] 3 All ER 299, [1963] AC 349, [1961] 3 WLR 619, HL. a

Cooke v Secretary of State for Social Security [2001] EWCA Civ 734.

R v Secretary of State for the Home Dept, ex p Launder [1997] 3 All ER 961, [1997] 1 WLR 839, AC. b

Preliminary issue

The court was required to determine, as a preliminary issue, the scope and ambit of an appeal brought pursuant to reg 16 of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 by the appellant solicitor, Anthony Patten (t/a Anthony Patten & Co), from the decision of a costs judge on Mr Patten's appeal pursuant to reg 15 of the 1989 regulations from a redetermination of his costs by the determining authority. The facts are set out in the judgment. c

Matthew Caswell (instructed by *Anthony Patten & Co*) for Mr Patten.

Jeremy Morgan (instructed by the *Treasury Solicitor*) for the Lord Chancellor. d

Cur adv vult

22 May 2001. The following judgment was delivered.

LEVESON J. e

[1] The taxation of costs in criminal cases is governed by the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, SI 1989/343 as amended. These prescribe a procedure for the determination of costs, together with redetermination and potential appeal to the taxing master with the prospect of a further appeal to the Queen's Bench Division if the taxing master certifies that a point of principle of general importance has been involved in his decision. Having conducted a lengthy criminal trial on behalf of a legally-aided defendant, the appellant Mr Anthony Patten has obtained such a certificate (albeit covering very restricted issues) and, relying upon it, has mounted an appeal. f

[2] The notice of appeal is not, however, limited to the point of principle. Rather, it raises extensive challenges to the taxation and makes claims for payment ranging far beyond the certificate. Thus, in addition to items dealt with by the costs judge but not included within the certificate, it also seeks to recover items or rates which had either never been sought or pursued on taxation or which had been claimed initially but had not been the subject of appeal to the taxing master. Mr Patten does so relying on an observation of Bell J in *Harold v Lord Chancellor* [1999] 1 Costs LR 14 at 18 to the effect that— g

‘once an applicant brings an appeal pursuant to the grant of the taxing master's certificate, the whole question of costs is at large and we, as judge and assessors, can make such order in relation to those costs as we think fit.’ h

[3] As a preliminary issue in this appeal, I have been asked to determine the true scope and ambit of this appeal to the Queen's Bench Division pursuant to reg 16(7) of the 1989 regulations as amended, to resolve other matters which can usefully be clarified at a preliminary hearing and to give appropriate directions for its further determination. I do so with the benefit of detailed submissions from Mr Caswell on behalf of Mr Patten and Mr Morgan on behalf of the Lord Chancellor. i

a [4] Before embarking upon an analysis of the categories of claim pursued in this appeal, or a detailed consideration of the decision in *Harold's* case, it is appropriate to describe the regime set out within the regulations in some detail. First, no claim by a solicitor for costs in respect of work done under a legal aid order can be entertained unless the solicitor submits it within three months of the conclusion of the proceedings to which the legal aid order relates (see reg 5(1) of the 1989 regulations) although that time limit can be extended for good reason (see reg 17(1)).
b The claim must summarise the work done, when it was done, the fee earner concerned and provide other details; furthermore, if the appropriate authority requires, the solicitor must supply 'further particulars, information and documents' (see regs 5(3)–(6) of the 1989 regulations). In the context of this claim, the appropriate authority was the determining officer: he then considers the claim, any
c further particulars, information or documents submitted by the solicitor and any other relevant information whereupon he makes a determination of the costs to be allowed having regard to the appropriate criteria (see reg 6(2) ff).

d [5] The second stage occurs in the event that a solicitor is dissatisfied with the costs allowed. He may then apply back to the appropriate authority (the same determining officer) to reconsider the costs to be allowed in the light of his objections. It is worthwhile setting out the relevant part of this provision in full. Thus, reg 14 provides:

e '(1) Where—(a) a solicitor ... is dissatisfied with the costs ... determined under these Regulations by an appropriate authority ... he may apply to the appropriate authority to redetermine those costs or to review that decision as the case may be.

f (2) Subject to regulation 17 [which permits an extension of time], the application shall be made within 21 days of the receipt of notification of the costs payable under regulation 10(1), by giving notice in writing to the appropriate authority specifying the matters in respect of which the application is made and the grounds of objection and shall be made in such form and manner as the appropriate authority shall direct.

g (3) The notice of application shall be accompanied by—(a) in the case of a solicitor, the particulars, information and documents supplied under regulation 5 ...

(5) The solicitor ... shall supply such further particulars, information and documents as the appropriate authority may require.'

h The appropriate authority is then required to redetermine the costs (whether by way of increase or decrease) in the light of the objections made and, if requested, shall give reasons in writing for its decision (see reg 14(6) and (7)). I ought to add that this and the following provisions covers counsel as well: for ease of reference, I will only refer to the solicitor.

i [6] If dissatisfied with the redetermination of the appropriate authority, the solicitor is then able to pursue an appeal against the decision on the redetermination to a costs judge (whose former title was that of taxing master). The notice of appeal must be accompanied by a copy of the written representations given under reg 14(2), the appropriate authority's reasons for its decision given under reg 14(7) and the particulars, information and documents supplied to the appropriate authority under reg 14 (see reg 15(4)). In that regard, reg 15(5) goes on:

'The notice of appeal shall—(a) be in such form as the Senior Costs Judge may direct, (b) specify separately each item appealed against, showing

(where appropriate) the amount claimed for the item, the amount determined and the grounds of objection to the determination, and (c) state whether the appellant wishes to appear or to be represented or whether he will accept a decision given in his absence.' a

[7] The process having moved from what might be described as an inquisitorial investigation into an appeal (albeit a hybrid between a rehearing and a review: see *R v Supreme Court Taxing Office, ex p Singh* [1997] 1 Costs LR 49), the 1989 regulations make provision for notice to be sent to the Lord Chancellor who '[w]ith a view to ensuring that the public interest is taken into account' may arrange for written or oral representation to be made on his behalf (see reg 15(7)). b

[8] The manner in which the costs judge proceeds upon the appeal and his power is then defined by the same reg 15 as follows: c

'(11) The costs judge may consult the trial judge, the appropriate authority or the determining officer and may require the appellant to provide any further information which he requires for the purpose of the appeal and, unless the costs judge otherwise directs, no further evidence shall be received on the hearing of the appeal and no ground of objection shall be valid which was not raised under regulation 14. d

(12) The costs judge shall have the same powers as the appropriate authority under these Regulations and, in the exercise of such powers, may—(a) alter the redetermination of the appropriate authority in respect of any sum allowed, whether by increase or decrease as he thinks fit ...' e

[9] I have set out these regulations in some detail in order to emphasise the nature of the scheme up to the moment of appeal to the High Court. Thus, when making his claim, the solicitor may provide such evidence as he wishes (in the form of further particulars, information or documents) but thereafter, for the purposes of redetermination, and on appeal, he can only supplement that information to such extent as the appropriate authority or the costs judge respectively require: in other words, at the very lowest, there is a discretion as to whether new material should be permitted. Secondly, in relation to the costs judge, unless he otherwise directs, no ground of objection can be taken unless it had previously been taken on the redetermination under reg 14. This follows what might be considered the general approach (subject to the requirements of the officer or judge and, thus, the exercise of discretion) of permitting an appeal only on the same material originally before the determining authority and on points previously argued. Against that background, I come to consider the 1989 regulations governing appeal to the High Court. f

[10] First, where a solicitor is dissatisfied with a decision of a costs judge, he may apply for that judge to certify a point of principle of general importance (reg 16(1)). In the light of the decision in *Harold v Lord Chancellor* [1999] 1 Costs LR 14, I set out the relevant provisions of the remainder of reg 16: g

'(3) Where a costs judge certifies a point of principle of general importance, the solicitor ... may appeal to the High Court against the decision of a costs judge on appeal under regulation 15, and the Lord Chancellor shall be a respondent to such an appeal ... h

(5) Where the Lord Chancellor is dissatisfied with the decision of a costs judge on an appeal under regulation 15, he may, if no appeal has been made by the solicitor ... under paragraph (3), appeal to the High Court against that decision, and the solicitor ... shall be a respondent to the appeal ... i

a (7) An appeal under paragraphs (3) and (5) shall be brought in the Queen's Bench Division, follow the procedure set out in Part 8 of the Civil Procedure Rules 1998, and shall be heard and determined by a single judge whose decision shall be final.

b (8) The judge shall have the same powers as the appropriate authority and a costs judge under these Regulations and may reverse, affirm or amend the decision appealed against or make such other order as he thinks fit.'

c [11] Mr Caswell, relying on *Harold's* case for the proper construction of the regulations, argues that the fact that the judge has the same powers as the appropriate authority and the costs judge means that on this final appeal, the court can go back to the very beginning and reopen the entire taxation. Furthermore, he submits that not only is this conclusion part of the ratio of the case and correct, but it is, in fact, the construction for which the Lord Chancellor then contended. Mr Morgan argued that the observations in *Harold's* case went further than was necessary in that case and should not be followed.

d [12] It is thus appropriate to analyse *Harold's* case in some detail. It concerned an appeal by a private prosecutor who had been awarded prosecution costs out of public funds. She had instructed leading counsel to prosecute but the original determining officer had concluded that for a trial of the type undertaken, the expense of leading counsel 'could not reasonably be borne by the public purse' (see [1999] 1 Costs LR 14 at 16). On appeal, the taxing master allowed the cost of leading counsel but reduced the rate payable for the daily refresher. The private prosecutor then sought to appeal the rate of refresher; to that end she obtained a certificate from the taxing master framed in the following terms:

f 'Whether in relation to a private prosecution the private prosecutor should be paid out of Central Funds refresher fees on the basis that the fees were negotiated at arm's length between the private prosecutor's solicitor and the barrister's clerk.' (See [1999] 1 Costs LR 14 at 16.)

g The Lord Chancellor, on the other hand, was himself dissatisfied with another aspect of the decision. He sought to appeal that part of the taxing master's decision which concluded that it was appropriate to allow, at least in part, the costs of leading counsel. The problem with that was that, on the face of it, the identical provision to reg 16(5) set out above (reg 11(5) of the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335) only appeared to allow the Lord Chancellor to appeal when the relevant applicant did not appeal.

h [13] Bell J (at 17) summarised the argument of counsel for the Lord Chancellor in this way:

j 'Mr Sales ... argues that once the gateway for an appeal, that is, certification by the taxing master, has been gone through, the entire matter is at large before us as judge in chambers and assessors, and we have the same powers as the determining officer had and the taxing master had, and we may reverse, affirm or amend the decision of the taxing master appealed against and make any order which we consider to be fit on the question of Mrs Harold's proper costs. So we can look again at whether any fees for leading counsel should be allowed.'

[14] Bell J then set out the relevant regulations and (at 18) gave his view as to the submission:

'In our judgment Mr Sales' argument on this first point of principle is well-founded and, once an applicant brings an appeal pursuant to the grant of the taxing master's certificate, the whole question of costs is at large and we, as judge and assessors, can make such order in relation to those costs as we think fit ... There is no express wording either there or in paragraph (3) which restricts the scope of an appeal pursuant to paragraph (3) to the point of principle of general importance certified by the taxing master, and we do not believe that such a restriction is a matter of necessary implication from the wording of paragraph (3).'

[15] Pausing there, I do not accept that Bell J intended to express the conclusion (as Mr Caswell has submitted) that an appellant could mount an appeal seeking any sum on taxation whether or not it had been claimed initially and whether or not it had been the subject of an appeal to the taxing master. This part of his judgment requires the implication that the 'whole question of costs' concerns a point which is properly the subject of appeal. To deal with the rest of his submission, however, it is necessary to consider what may be appealed at each stage of the process.

[16] An initial claim for costs is, obviously, at large: the applicant can claim whatever sums that the regulations permit. An application for redetermination under reg 14(1), however, is more limited. It is of 'those costs' ie 'the costs ... determined under these Regulations' (see reg 14(1)(a)). Further, reg 14(2) requires the applicant to specify the 'matters in respect of which the application is made and the grounds of objection': this must be limited to a decision of the determining officer.

[17] Similarly in relation to the appeal to a costs judge and from a costs judge to the High Court. As to the first, the determining officer must give written reasons for his decision (which can only be in relation to a claim which has been made), the relevant solicitor must be dissatisfied with that decision and the notice of appeal must specify the item appealed against (see regs 14(7), 15(1) and 15(5)). As to an appeal from the costs judge, again, there must be written reasons and, quite apart from the certificate of a point of principle of general importance, the appellant must be 'dissatisfied' with the 'decision' of the costs judge (see regs 15(13) and 16(1)). The fact that reg 16(8) gives the High Court the same powers as the determining officer and the costs judge and permits the High Court judge to 'reverse, affirm or amend the decision appealed against or make such other order as he thinks fit' does not give the judge the power to permit new claims to be made never previously pursued.

[18] I have no misgivings about this construction for another reason. If Mr Caswell is right, these regulations would run entirely counter to general practice that appellate courts (particularly at the second appellate tier) are not concerned with original fact finding but rather only with the most important or significant of the issues distilled by the lower tribunals. Furthermore, it would have the result that the appeal before the High Court judge would lead to an investigation far wider than that required of the costs judge from whom the appeal was mounted: as I have said, subject to his direction otherwise (thereby providing a discretion), by reg 15(11) he is only entitled to consider grounds of objection raised under reg 14.

[19] The next limb of Mr Caswell's submission is to the effect that if a certificate identifying a point of principle of general importance has been provided, it is open to the appellant to argue any matter which was advanced before the costs judge

a irrespective of the terms of the certificate. He argued that this right was subject only to the discretion of the court to prevent some point being taken on the grounds that do so would constitute an abuse of process. To deal with that argument, I must continue with the judgment in *Harold's* case [1999] 1 Costs LR 14 upon which he strongly relied. Immediately following the quotation set out above, Bell J (at 18–19) went on:

b 'It is clear from paragraph (5) that if an applicant does not bring an appeal
under paragraph (3), the Lord Chancellor may bring his own appeal under
c paragraph (5) which contains no restriction on the points which he may raise. The Lord Chancellor must be able to press a cross-appeal of his own if the
applicant appeals under paragraph (3); otherwise he would have no right of
d appeal at all if the applicant appeals under paragraph (3), while having an
unrestricted right of appeal under paragraph (5) if the applicant did not
e appeal under paragraph (3). That would be absurd. If there is no restriction on the Lord Chancellor's grounds of appeal if he appeals under paragraph (5), it is impossible to see why his grounds of appeal should be restricted when
responding and cross-appealing to a paragraph (3) appeal. If his grounds of
f appeal as a respondent cross appellant to a paragraph (3) appeal are unrestricted, it would, in our view, be unfair to restrict the applicant appellant to the
certified point, and we do not believe that the regulations could have been
g meant to achieve such a result. If, as we believe, the proper construction of
paragraph (3) means that the Lord Chancellor can cross-appeal as "respondent"
on any grounds, we believe that an applicant must be entitled to cross-appeal on
any grounds as "respondent" to an appeal under paragraph (5), although that
question does not fall for decision on this appeal.'

[20] This analysis was driven by the absurdity of the proposition that the Lord Chancellor's unfettered right of appeal to the High Court would be lost if
f the solicitor obtained a certificate on one aspect of the costs judge decision and pursued an appeal without thereby opening up the entirety of the decision to challenge. I entirely agree that it would be absurd if the Lord Chancellor's unfettered right to appeal on a different aspect of the costs decision was lost for that reason. With great respect to Bell J, however, in my judgment that is not the
consequence of a proper construction of these regulations.

g [21] In any appeal to the costs judge, various entirely unrelated issues might fall to be determined: each will lead to a decision which, taken together, will
compendiously be referred to as *the* decision. In order to appeal to the High Court, a successful application must be made to the costs judge for a certificate that
h a point of principle of general importance is raised by the decision albeit that the point of principle may only bite on one of the issues that was determined. When
reg 16(3) refers to the pre-condition that a costs judge does certify a point of principle and permits an appeal to the High Court 'against the decision of a costs
judge on an appeal under regulation 15', in my view, the phrase 'the decision' in
j that context refers back to the decision in respect of which a point has been certified. It is not referring to each individual issue (whether related to the point
of principle or not) which fell to be decided by the costs judge.

[22] If that is right, the regulation falls completely into place. There is no question of an absurdity. Where an appeal has been mounted following a certificate, there is power to reverse, affirm or amend the decision, so there is no need to permit the Lord Chancellor the right of appeal: he can seek to achieve a different result in relation to the point certified on the back of the appeal to which he

responds. Where on any aspect of the decision there is no certificate or no appeal following a certificate, reg 16(5) permits the Lord Chancellor to appeal if dissatisfied with it; if he does, the respondent to his appeal (the solicitor) has the right to seek to reverse, affirm or amend that decision in the same way that the Lord Chancellor had in relation to his appeal. a

[23] I am reinforced in this view by considering the terms of the certificate which has to be sought. If it had been intended that once the gateway had been passed, any aspect of the decision of the costs judge could be appealed, it would have been perfectly straightforward to permit an appeal subject only to the general grant of leave or permission: there would be no need to require the elucidation of a point of principle of general importance or a certificate to that effect. b

[24] Further, turning to the imbalance in the right of appeal, it is quite clear that the 1989 regulations did discriminate between the circumstances in which the Lord Chancellor may appeal (unlimited) and the circumstances in which others might (only with a certificate). Although on the face of it unfair, on examination, I do not believe that this criticism can be sustained. After all, the Lord Chancellor is the minister of the Crown whose department is ultimately responsible for the public funds used to defray these costs. It is perfectly legitimate to approach this issue on the basis that he ought to be able to decide whether an issue is of sufficient importance to proceed to appeal rather than have to rely on the costs judge. The same is not so for the individual solicitor concerned in a specific case. Furthermore, the solicitor is not deprived of all remedy if a certificate is refused: in rare circumstances where it is believed that a failure to certify represents a real injustice, it is open to him to apply to the High Court under its inherent jurisdiction (see *R v Supreme Court Taxing Office, ex p Singh* [1997] 1 Costs LR 49 at 51). c

[25] I accept that the upshot of this construction is a very much more limited right of appeal than Bell J envisaged in *Harold v Lord Chancellor* [1999] 1 Costs LR 14 but, in my judgment, it does less violence to the language of the regulation (requiring far less to be implied) and, as I have indicated, appears more logical in the sense that it preserves the usual structure of an appellate system which further filters and refines the issues which fall to be determined as higher levels of appeal come into play. In fairness to Bell J, I ought to add that the effect of my view would not change the actual decision in *Harold's* case albeit that I respectfully disagree with its reasoning. d

[26] In the light of these principles, I must now turn to consider the scope of the certified questions and, in addition, whether it would be appropriate to exercise the inherent jurisdiction of the court to which I have referred above either in relation to a fourth question which the costs judge refused to certify or the other matters which Mr Patten seeks to advance on this appeal. e

[27] I start with the scope of the appeal as certified. The signed certificate is in the following form: f

I hereby certify that the following Points of Principle of General Importance arise in this matter and I hereby grant a Certificate in relation to them to enable the Appellant to proceed under ... Regulation [16(1) of the 1989 regulations]: g

1. Whether a solicitor is entitled to be paid an indemnity basis (sic) in a serious fraud case when the case is transferred to a venue 125 miles distant when the Defendant is willing to have the case heard locally. h

2. Whether the court can refuse to pay travelling expenses on a proper mileage basis if, in view of the impoverished and bankrupt state of the Defendant, the solicitor has to transport the Defendant to court, thus avoiding i

a the Prison Service having to accommodate and deal with the Defendant at public expense.

3. Whether the court is entitled to require a method of travelling by train (which is subject to cancellation or delay) in circumstances where the Defendant is unable to afford the train fare and the solicitor cannot reclaim the Defendant's train fare in circumstances where the trial has been transferred by direction of the court with the consent of the Prosecution where the Defendant wished to have the case heard in a local Crown Court.'

b

[28] The form of the questions was drafted by Mr Patten and although the second and third are clear, the first is somewhat opaque. On the basis of the reference to the transfer of the trial, I conclude that this paragraph essentially identifies the general issue (namely the basis on which travelling expenses should be paid) in the light of the circumstances more specifically set out in the remaining paragraphs: the assessment of travelling expenses was a ground of appeal with which the costs judge dealt. I ought to add that although another ground of appeal concerned the appropriate rate at which Mr Patten should be remunerated, that issue concerned the claim that while transporting the defendant, he was conferring with him about the case and so deserved a higher uplift than was awarded: usually, there would be no such uplift but the determining officer allowed 50% which the costs judge considered generous. Suffice to say that I do not consider that the certified points cover this issue.

c

d

[29] I must now deal with the other possible grounds under the inherent jurisdiction. The costs judge refused to certify as a point of principle of general public importance 'whether a solicitor who is incapacitated and hospitalized and is unable to attend a taxation review is estopped from making representations when his health is restored'. It was because of the solicitor's medical condition that the costs judge granted an extension in the order of two years in relation to the application for a certificate but I entirely agree that the point goes no further.

e

f

g

In fact, the notice of appeal from the determining officer was lodged after Mr Patten was admitted to hospital and is clear, carefully drawn and cogently argued. It was signed in his firm name and identified that the appellant did not wish to attend the hearing of the appeal. If he had asked for an adjournment, that could have been considered: it is not open to a dissatisfied solicitor long after an appeal has been determined to seek to resile on his willingness to have the matter determined in his absence. There is no basis for arguing that the refusal of a certificate on this issue represented any injustice.

[30] I deal with the other points which the solicitor now seeks to argue very shortly. Most represent claims which were not before the costs judge (and, in some cases not pursued in the original taxation). None identify a point of principle of any sort let alone a point of principle of general public importance. Thus, none fall within the class of issues which fall to be determined by the High Court.

h

[31] There is one exception. The solicitor appealed to the costs judge on the issue of attendance by Mr Patten at court. When giving reasons for his redetermination (in a letter dated 13 November 1997) the determining officer observed that this claim was not in dispute: it had been claimed at legal aid rates plus 100% and allowed in that sum. The notice of appeal made it clear that contrary to this observation, the item was in dispute and related to Mr Patten's attendance at the trial when prosecution witnesses were giving evidence. The costs judge decided:

i

'[T]here seems to be some argument between the determining officer and the solicitor as to whether this was allowed or not. The former thinking it was,

and the latter thinking it was not. If it was not, then I think it was properly claimed and should be paid, that is no doubt something that could be sorted out between the parties.' a

It has not been resolved. It thus falls to be dealt with by the costs judge who is, of course, at liberty pursuant to reg 15(11) to consult the determining officer and require the solicitor to provide such further information as he requires in order to do so. All I need to do is to direct that this appeal should not come on for hearing until that exercise has been completed so that in the extremely unlikely event that it generates any point of principle of public importance, that point can be determined with the balance of the appeal without an unnecessary additional hearing. b

[32] In the circumstances and subject only to the resolution of the outstanding issue of payment for attendance in court, I determine that the scope and ambit of this appeal is limited to the issues concerning travelling expenses contained within the certificate issued by the costs judge. I further direct that this appeal should not be brought on until the earliest of the following events: (a) the remaining issue has been resolved by agreement; (b) the time has expired for seeking a certificate following a further decision of the costs judge without such a certificate being sought; (c) the costs judge has made a decision to refuse such a certificate; or (d) an appeal has been lodged against his decision with the benefit of a certificate. c
d

[33] In order to avoid the attendance of the parties when this judgment is handed down, I reserve the question of costs of the preliminary issue to the judge hearing the appeal. I add only this: notwithstanding that the Lord Chancellor has succeeded on the main question of construction, bearing in mind that this appeal was brought in large part relying on concessions by counsel acting on his behalf in *Harold's* case (and of which Mr Patten was not aware until the decision was brought to his attention by the Treasury Solicitor), he may consider it appropriate not to seek his costs of this hearing. e

Order accordingly. f

Dilys Tausz Barrister.

a

R v K

[2001] UKHL 41

HOUSE OF LORDS

b LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOBHOUSE OF WOODBOROUGH AND LORD MILLETT
11, 25 JULY 2001

c *Criminal law – Indecent assault – Assault by man on girl under 16 – Mental element – Defendant being charged with indecent assault on 14-year old girl – Defendant alleging that girl consented and that he believed her to be 16 – Whether prosecution having to prove absence of genuine belief that girl was 16 or over – Sexual Offences Act 1956, s 14.*

d K, a 26-year old man of good character, was indicted on a single count of indecent assault on a 14-year old girl contrary to s 14(1)^a of the Sexual Offences Act 1956. Under s 14(2) of that Act, a girl under the age of 16 could not in law give any consent which would prevent an act being an assault for the purposes of s 14. K's defence, however, was to be that the sexual activity between him and the girl had been consensual, that she had told him that she was 16 and that he had had no reason to disbelieve her. On the determination of a preliminary issue before the trial, the judge ruled that, in order to establish K's guilt under s 14(1), the prosecution had to prove that at the time of the incident he had not honestly believed that the girl was 16 or over. His decision was reversed by the Court of Appeal, and K
e appealed to the House of Lords.

f **Held** – Where a defendant was charged with an indecent assault on a girl under the age of 16 contrary to s 14(1) of the 1956 Act, but the girl had in fact (although not in law) consented to the alleged assault, the prosecution was required to prove that the defendant had not honestly believed at the time of the incident that the girl was aged 16 or over. Such a conclusion was consistent with the constitutional principle that guilty knowledge was an essential ingredient of a statutory offence
g unless it was shown to be excluded by express words or necessary implication. Neither in s 14 nor elsewhere in the 1956 Act was there any express exclusion of the need to prove absence of genuine belief on the part of a defendant as to the age of an underage victim. Furthermore, there was nothing in the language of the statute which justified, as a matter of necessary implication, the conclusion
h that Parliament had to have intended to exclude that ingredient of mens rea. If, however, it was shown that an underage victim had not in fact consented, and that the defendant had not genuinely believed that she had consented, any belief held by the defendant concerning her age was irrelevant, since the victim's age was only relevant to her capacity to consent. Moreover, while a defendant's belief
j need not be reasonable provided that it was honest and genuine, the reasonableness or unreasonableness of the belief was by no means irrelevant. The more unreasonable the belief, the less likely it was to be accepted as genuine. In the instant case, the judge had reached the right conclusion on the preliminary issue,

a Section 14 is set out at [2], below

and accordingly the appeal would be allowed (see [17], [20]–[23], [26]–[28], [32], [33], [35], [36]–[40], below).

B (a minor) v DPP [2000] 1 All ER 833 applied.

Notes

For indecent assault on a woman, see 11(1) *Halsbury's Laws* (4th edn reissue) para 522.

For the Sexual Offences Act 1956, s 14, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 239.

Cases referred to in opinions

B (a minor) v DPP [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.

Brend v Wood (1946) 62 TLR 462, DC.

DPP v Rogers [1953] 2 All ER 644, [1953] 1 WLR 1017, DC.

Fairclough v Whipp [1951] 2 All ER 834, DC.

Gammon (Hong Kong) Ltd v A-G of Hong Kong [1984] 2 All ER 503, [1985] AC 1, [1984] 3 WLR 437, PC.

McCartan Turkington Breen (a firm) v Times Newspapers Ltd [2000] 4 All ER 913, [2000] 3 WLR 1670, HL.

R v Donovan [1934] 2 KB 498, [1934] All ER Rep 207, CCA.

R v Forde [1923] 2 KB 400, [1923] All ER Rep 477, CA.

R v Ireland, R v Burstow [1997] 4 All ER 225, [1998] AC 147, [1997] 3 WLR 534, HL.

R v Keech (1929) 21 Cr App Rep 125, CCA.

R v Kimber [1983] 3 All ER 316, [1983] 1 WLR 1118, CA.

R v Laws (1928) 21 Cr App Rep 45, CCA.

R v Maughan (1934) 24 Cr App Rep 130, CCA.

R v May [1912] 3 KB 572, CCA.

R v Prince (1875) LR 2 CCR 154, [1874–80] All ER Rep 881, CCR.

R v Tolson (1889) 23 QBD 168, [1886–90] All ER Rep 26.

R v Venna [1975] 3 All ER 788, [1976] QB 421, [1975] 3 WLR 737, CA.

R v Williams (Gladstone) [1987] 3 All ER 411, CA.

Sherras v De Rutzen [1895] 1 QB 918, [1895–9] All ER Rep 1167, DC.

Sweet v Parsley [1969] 1 All ER 347, [1970] AC 132, [1969] 2 WLR 470, HL.

Warner v Metropolitan Police Comr [1968] 2 All ER 356, [1969] 2 AC 256, [1968] 2 WLR 1303, HL.

Appeal

The defendant, K, appealed with leave of the Appeal Committee of the House of Lords given on 22 February 2001 from the decision of the Court of Appeal (Roch LJ, Rougier and Gray JJ) on 31 October 2000 allowing an appeal by the Crown from the ruling of Judge Thorpe in the Crown Court at Chichester on 23 June 2000 that, in the case of an allegation of indecent assault against a girl under 16, the prosecution had to prove that the accused had not genuinely believed that the victim was 16 or over. The Court of Appeal certified that two points of law of general public importance, set out at [1], below, were involved in its decision. The facts are set out in the opinion of Lord Bingham of Cornhill.

- a David Fisher QC and Irena Ray-Crosby (instructed by Marsh Ferriman & Cheale, Worthing) for K.
Anthony Scrivener QC and Anthony Heaton-Armstrong (instructed by the Crown Prosecution Service) for the Crown.

Their Lordships took time for consideration.

- b
25 July 2001. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

- c [1] My Lords, the appellant K was indicted on a single count of indecent assault committed against a girl C who at the time was aged 14, contrary to s 14(1) of the Sexual Offences Act 1956. His defence was to be that the sexual activity between him and C was consensual, that she had told him she was 16 and that he had had no reason to disbelieve her. He is a man of good character, aged 26 at the date of the offence charged against him. Before the trial a preliminary issue was raised on behalf of K: whether, to establish K's guilt under the section, the prosecution had to prove that at the time of the incident K did not honestly believe that C was 16 or over. Argument on this issue was heard by Judge Thorpe at the Crown Court at Chichester. He ruled, in favour of K, that the prosecution did have to prove an absence of genuine belief on the part of the accused that the victim was aged 16 or over. In so ruling the judge relied on the recent decision of the House of Lords in *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428. The prosecution appealed against that ruling under s 35 of the Criminal Procedure and Investigations Act 1996. The Court of Appeal (Criminal Division) (Roch LJ, Rougier and Gray JJ) allowed the appeal and held that such absence of genuine belief did not have to be proved (see *CPS v K* (2000) Times, 7 November). The court certified the following point of law of general public importance:
- d
e
f

'(a) Is a defendant entitled to be acquitted of the offence of indecent assault on a complainant under the age of 16 years, contrary to s 14(1) of the 1956 Act, if he may hold an honest belief that the complainant in question was aged 16 years or over? (b) If yes, must the belief be held on reasonable grounds?'

- g Leave to appeal was refused by the Court of Appeal but granted by the House.

[2] Section 14 of the 1956 Act is in these terms:

- '(1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.
- h (2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
- (3) Where a marriage is invalid under section two of the Marriage Act, 1949, or section one of the Age of Marriage Act, 1929 (the wife being a girl under the age of sixteen), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief.
- j (4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that

incapacity to consent, if that person knew or had reason to suspect her to be a defective.’ a

This section is matched by a parallel section, s 15, which makes it an offence for a person to make an indecent assault on a man. Subsections (2) and (3) of s 15 are to the same effect, in relation to men, as sub-ss (2) and (4) in relation to women.

[3] If the provisions of s 14 were part of a single, coherent legislative scheme and were read without reference to any overriding presumption of statutory interpretation, there would be great force in the simple submission which Mr Scrivener, resisting this appeal on behalf of the Crown, based upon them: sub-ss (3) and (4) define circumstances in which a defendant’s belief, knowledge or suspicion exonerate a defendant from liability for what would otherwise be an indecent assault; if it had been intended to exonerate a defendant who believed a complainant to be 16 or over, this ground of exoneration would have been expressed in sub-s (2); the omission of such a provision makes plain that no such ground of exoneration was intended. b c

[4] It is, however, plain that s 14 was not part of a single, coherent legislative scheme. The 1956 Act was a consolidation Act. Its provisions derived from diverse sources. The rag-bag nature of the 1956 Act and its predecessor statutes has been the subject of repeated comment: see, for example, the observations of the draftsman of the Offences Against the Person Act 1861 Act quoted in *B (a minor) v DPP* [2000] 1 All ER 833 at 848, [2000] 2 AC 428 at 473; the criticisms of Lord Nicholls of Birkenhead in the same case (see [2000] 1 All ER 833 at 841, [2000] 2 AC 428 at 465); the description of the Act by Professor Lacey as ‘a patchwork of pre-existing offences’ in ‘Beset by Boundaries: The Home Office Review of Sex Offences’ [2001] Crim LR 3; the recognition of the Home Office in ‘Setting the Boundaries: Reforming the law on sex offences’ Vol 1, p 35, para 3.2.3 (July 2000) that the present legislation ‘does not form a coherent code’. d e

[5] Section 14(1) derives from s 52 of the 1861 Act. At common law there was no offence of indecent assault. Section 52 of the 1861 Act criminalised ‘any indecent Assault upon any Female’. The maximum penalty was two years’ imprisonment. Since conduct is not generally an assault in law if done with the consent of the alleged victim, it seems clear that the consent of the victim, whatever her age, defeated a charge under this section as originally enacted. f

[6] Plainly this provision gave inadequate protection to children, whose inherent immaturity was understandably regarded as impairing any consent they might give. There was legitimate public concern when a defendant accused of indecently assaulting a child of six years relied successfully on the consent of the child. There could have been no belief on the defendant’s part that the child was over the age of consent, so that issue did not arise. In the Criminal Law Amendment Act 1880 it was provided that it should be no defence to a charge of indecent assault on a young person under the age of 13 to prove that he or she consented to the act of indecency. This provision was re-enacted in s 1 of the Criminal Law Amendment Act 1922 (with an increase of the age to 16). It is the source of s 14(2). g h

[7] Until 1929 England and Wales adhered to the old canon law rule that boys could be married at 14 and girls at 12. The Age of Marriage Act of that year provided that a marriage between persons either of whom was under the age of 16 should be void. This enactment was subject to a proviso that in any proceedings against a person charged under s 5(1) of the Criminal Law Amendment Act 1885 or with indecent assault it should be a sufficient defence to prove that at the time when the offence was alleged to have been committed he had reason to believe j

a that the alleged victim was his wife. This proviso was repealed by the Marriage Act 1949 (which re-enacted the age limit) but the repeal was itself repealed in 1953. Section 14(3) thus derives from sources quite different from the other provisions of the 1956 Act with which the House is concerned.

[8] Section 14(4) derives from s 56(3) of the Mental Deficiency Act 1913 which provided that no consent should be any defence in any proceedings for an indecent assault upon any defective, if the accused knew or had reason to suspect that the person in respect of whom the offence was committed was a defective.

[9] Since the 1956 Act was a consolidation Act, with corrections and improvements to the expression but not to the substance of existing provisions (see generally 44(1) *Halsbury's Laws* (4th edn reissue) para 1247), it is not surprising that the terms of s 14 reflected their miscellaneous origins. But that section cannot properly be considered in isolation. Section 50 of the 1861 Act made unlawful carnal knowledge of a girl under the age of ten a felony punishable by penal servitude for life. Section 51 made unlawful carnal knowledge of a girl aged ten or eleven a misdemeanour punishable by up to three years' penal servitude. It was these sections to which Blackburn J, with the concurrence of nine other judges, referred in the course of his ruling in *R v Prince* (1875) LR 2 CCR 154 at 171–172, [1874–80] All ER Rep 881 at 886 that for purposes of s 55 of the 1861 Act it was no defence for a defendant charged with taking an unmarried girl under the age of 16 out of the possession of her father to establish a reasonable belief that she was over 16:

e 'It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age.'

[10] But the law did not rest there. By s 5 of the 1885 Act it was provided that:

h 'Any person who—(1.) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; or ... shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with ... Provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.'

A similar provision based on reasonable belief that a girl was of or above the age of 16 was included in s 6 of this Act. Thus, despite the view of the strong majority

in *R v Prince*, a potential defence based upon belief as to age was expressly introduced. This defence was significantly modified by s 2 of the 1922 Act, which provided:

'Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under sections five or six of the Criminal Law Amendment Act, 1885 ... Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section.'

Thus was introduced what came to be known as the statutory or young man's defence. The slipshod drafting of the section is evident from its closing words since s 2 created no offence with which any defendant could ever be charged. But the section gave rise to a much more fundamental anomaly. If a defendant was charged under s 5(1) with the very serious offence of having unlawful carnal knowledge of a girl aged between 13 and 16, the statutory defence was potentially open to a man of 23 or under charged for the first time. If, however, the man was charged with the lesser offence of indecently assaulting a child or young person under the age of 16 (an offence inevitably committed if he had intercourse with her), there was no express provision enabling the defendant to rely on an honest belief that the child or young person was over the age of 16.

[11] It was not long before this anomaly became apparent. In *R v Forde* [1923] 2 KB 400, [1923] All ER Rep 477 a young man, under the age of 23, had intercourse with a 15 year-old girl. He was charged with offences against s 5(1) of the 1885 Act and s 52 of the 1861 Act, both offences relating to the same act of intercourse. He pleaded not guilty to the first (more serious) offence but guilty to the second and was bound over. It was found as a fact that he had had reasonable cause to believe that the girl was over 16 and the charge under s 5 was not proceeded with. He appealed by leave of the trial judge, and it was argued that, to avoid absurdity, the statutory defence should be available in relation to the indecent assault charge as well as the carnal knowledge charge, where the indecent assault was the act of carnal knowledge. Counsel for the Crown did not contend that the result of the statute was not absurd but said the law was clear. The Court of Criminal Appeal upheld the conviction. Giving the judgment of the court Avory J said:

'The words of the statute cannot be construed, contrary to their meaning, as embracing cases merely because no good reason appears why those cases should be excluded. It is not the duty of the Court to make the law reasonable, but to expound it as it stands, according to the real sense of the words. Applying that principle, we can find no justification for reading the proviso to s.2 of the Act, which in terms is limited to charges of offences under that section, as applicable to a charge of indecent assault, which is separately dealt with in s.1. It is only by a benevolent construction that any effect can be given to this proviso, seeing that no offence is created by s.2, but if it be assumed to apply to charges under ss.5 or 6 of the Criminal Law Amendment Act, 1885, which are referred to in the earlier part of the section, there is no canon of construction which would justify the Court in applying it to s.1, bearing in mind the various forms of indecent assault which do not amount to carnal knowledge.' (See [1923] 2 KB 400 at 404, [1923] All ER Rep 477 at 479.)

a [12] In *R v Laws* (1928) 21 Cr App Rep 45 the defendant had intercourse with a girl aged 15 years and 9 months. He was about a year older. He could rely on the statutory defence to a charge laid against him under s 5 of the 1885 Act, but pleaded guilty to a count of indecent assault arising out of the same incident. Lord Hewart CJ (at 46) described it as 'a grotesque state of affairs that the law offers a defence upon the major charge, but excludes that defence if the minor charge is preferred'. But the conviction was upheld. The defendant's sentence of four months' imprisonment was reduced to a nominal sentence of one day.

b [13] The defendant in *R v Keech* (1929) 21 Cr App Rep 125 was aged 21 at the relevant time. He had intercourse with a girl under the age of 16 and faced counts of unlawful carnal knowledge and indecent assault, the facts relied on in relation to both sets of counts being the same. The mother of the victim gave evidence c that at the time of the relevant events the girl looked 18, and but for the recent increase in the minimum age of marriage the two would have been married. The defendant was acquitted on the carnal knowledge count, no doubt in reliance on the statutory defence, but was convicted on the indecent assault count. The 1922 Act was again described (at 128) as 'grotesque' and the legislation was described d by Lord Hewart CJ (at 131) as 'amazing'. But the conviction was upheld and the sentence of one month's imprisonment reduced to one day, which permitted the immediate discharge of the defendant.

e [14] *R v Maughan* (1934) 24 Cr App Rep 130 repeated the story. The defendant was aged 22, the child between 13 and 16. There were six counts, three of carnal knowledge, three of indecent assault, arising from the same facts. He was acquitted on the carnal knowledge counts, plainly because he made good the statutory defence. He was convicted on the three counts of indecent assault. On appeal, with the certificate of the trial judge, it was argued that the defendant could rely on a defence of mistaken fact based on the child's age. Despite the 'apparent absurdity resulting from this state of legislation' the appeal was dismissed f (see (1934) 24 Cr App Rep 130 at 133). But the trial judge had passed a nominal sentence of two days' imprisonment to run from the first day of the assizes and this resulted in the immediate discharge of the defendant.

g [15] Since the 1956 Act was a consolidation Act, there was no opportunity to correct this apparent absurdity. Section 5 of this Act again made it a felony to have unlawful sexual intercourse with a girl under the age of 13. Section 6 as enacted again made it an offence, subject to the exceptions in the section, for a man to have unlawful sexual intercourse with a girl not under the age of 13 but under the age of 16. One of the exceptions, in sub-s (2), corresponded to the invalid marriage exception in s 14(3). The second exception, in sub-s (3), reproduced the statutory or young man's defence. Thus the anomaly highlighted by the cases cited above h was perpetuated. Asked to suggest any reason why it could rationally have been intended to provide the statutory defence where full intercourse took place and no defence based on belief as to the child's age when intercourse was charged as indecent assault, leading counsel for the Crown in the present appeal was unable to assist, as his predecessor in *R v Forde* [1923] 2 KB 400, [1923] All ER Rep 477 had j been in 1923.

[16] Even before enactment of the 1956 Act, a lacuna in the existing legislation had come to light. In both *Fairclough v Whipp* [1951] 2 All ER 834 and *DPP v Rogers* [1953] 2 All ER 644, [1953] 1 WLR 1017 there had been objectionable acts of indecency, in the first case involving an adult man and a child of nine, in the second a father and his eleven year-old daughter. But in neither case had there been an

assault since the child had, at the adult's invitation, touched him, albeit indecently. Following a report of the Criminal Law Revision Committee in 1959 (*First Report (Indecency with Children)* (Cmnd 835)) Parliament enacted the Indecency with Children Act 1960 which in s 1(1) provided:

'Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years ...'

In *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428 the issue was whether, under that section, it was necessary for the prosecution to prove the absence of a genuine belief on the part of the defendant that the child was over the specified age of 14. The House (Lord Irvine of Lairg LC, Lord Mackay of Clashfern, Lord Nicholls, Lord Steyn and Lord Hutton) unanimously held that it was.

[17] In reaching this conclusion the House relied on—

'the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence.' (See [2000] 1 All ER 833 at 836, [2000] 2 AC 428 at 460 per Lord Nicholls.)

Lord Steyn, quoting from Professor Sir Rupert Cross, referred ([2000] 1 All ER 833 at 845, [2000] 2 AC 428 at 470) to the presumption that mens rea is required in the case of all statutory crimes, a presumption operating as a constitutional principle and not easily displaced by a statutory text. Crucial to the conclusion of the House was the now classic statement of principle in the speech of Lord Reid in *Sweet v Parsley* [1969] 1 All ER 347 at 349–351, [1970] AC 132 at 148–150. The speech is too well known to require extensive citation; brief extracts will suffice:

'... there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea ... it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.' (See [1969] 1 All ER 347 at 349, 350, [1970] AC 132 at 148, 149.)

The general rule that a crime involves a guilty mind as well as a forbidden act is, as the Latin version of the rule makes clear and as Lord Reid emphasised, of very long standing. Brett J in his dissenting judgment in *R v Prince* (1875) LR 2 CCR 154 at 159–169, [1874–80] All ER Rep 881 at 889–895 referred to it, concluding: 'Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea.' (See (1875) LR 2 CCR 154 at 169, [1874–80] All ER Rep 881 at 895.) In *R v Tolson* (1889) 23 QBD 168 at 187, [1886–90] All ER Rep 26 at 37 Stephen J, an authority on the criminal law without rival in his time, observed:

'The mental element of most crimes is marked by one of the words "maliciously", "fraudulently", "negligently", or "knowingly", but it is the general—I might, I think, say, the invariable—practice of the legislature to

a leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.'

In *Sherras v De Rutzen* [1895] 1 QB 918 at 921, [1895-9] All ER Rep 1167 at 1169 Wright J held:

b 'There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals ...'

c He then went on to give examples of regulatory provisions which excluded the presumption of mens rea. In *Brend v Wood* (1946) 62 TLR 462 at 463 Lord Goddard CJ restated the rule:

d 'It should first be observed that at common law there must always be mens rea to constitute a crime; if a person can show that he acted without mens rea that is a defence to a criminal prosecution. There are statutes and regulations in which Parliament has seen fit to create offences and make people responsible before criminal Courts although there is an absence of mens rea, but it is certainly not the Court's duty to be acute to find that mens rea is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.'

f Although in a minority, Lord Reid in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256 anticipated much of what he was to say, authoritatively, in *Sweet v Parsley*. Later, expression was given to the presumption by, among others, Lord Scarman in *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1984] 2 All ER 503 at 508, [1985] AC 1 at 14. Thus the rule is not of recent growth, although it has at times been neglected. As Lord Reid observed in *Sweet v Parsley*:

g 'But I regret to observe that, in some recent cases where serious offences have been held to be absolute offences, the court has taken into account no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence.' (See [1969] 1 All ER 347 at 350, [1970] AC 132 at 150.)

h [18] The rule that a person under the age of 16 could not in law consent to what would otherwise be an indecent assault led to the description of an offence under ss 14(1) or 15(1) against a victim under the age of 16 as an absolute offence or an offence of strict liability. These descriptions were a misnomer. There always had to be such deliberation in the conduct of the defendant as would be necessary to prove an assault. But the need for mens rea in a fuller sense was made clear by the Court of Appeal (Criminal Division) (Lawton LJ, Michael Davies and Sheldon JJ) in *R v Kimber* [1983] 3 All ER 316, [1983] 1 WLR 1118. In that case the charge was one of indecent assault contrary to s 14(1) of the 1956 Act and the victim was an adult. The recorder directed the jury that the sole issue for their consideration was whether the victim had given her real and genuine consent,

adding that it did not matter whether the defendant believed or thought she was consenting. This was held to be a misdirection: a

'The offence of indecent assault is now statutory: see s 14 of the Sexual Offences Act 1956. The Crown had to prove that the appellant made an indecent assault on Betty. As there are no words in the section to indicate that Parliament intended to exclude mens rea as an element in this offence, it follows that the Crown had to prove that the appellant intended to commit it. This could not be done without first proving that the appellant intended to assault Betty. In this context assault clearly includes battery. An assault is an act by which the defendant intentionally or recklessly causes the complainant to apprehend immediate, or to sustain, unlawful personal violence: see *R v Venna* [1975] 3 All ER 788 at 793, [1976] QB 421 at 428–429. In this case the appellant by his own admissions did intentionally lay his hands on Betty. That would not, however, have been enough to prove the charge. There had to be evidence that the appellant had intended to do what he did unlawfully. When there is a charge of indecent assault on a woman, the unlawfulness can be proved, as was sought to be done in *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207, by evidence that the defendant intended to cause bodily harm. In most cases, however, the prosecution tries to prove that the complainant did not consent to what was done. The burden of proving lack of consent rests on the prosecution: see *R v May* [1912] 3 KB 572 at 575 per Lord Alverstone CJ. The consequence is that the prosecution has to prove that the defendant intended to lay hands on his victim without her consent. If he did not intend to do this, he is entitled to be found not guilty; and if he did not so intend because he believed she was consenting, the prosecution will have failed to prove the charge. It is the defendant's belief, not the grounds on which it was based, which goes to negative the intent.' (See [1983] 3 All ER 316 at 319, [1983] 1 WLR 1118 at 1121–1122.) b
c
d
e

[19] In *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428 the House considered s 1(1) of the 1960 Act in the light of the presumption that guilty knowledge is an essential ingredient of a statutory offence unless it is shown to be excluded by express words or necessary implication. It found no express words and no necessary implication having that effect. It was accordingly necessary for the prosecution to prove the absence of a genuine belief on the part of the defendant, whether reasonable or not, that the victim had been 14 or over. The House was invited in that case to treat the Acts of 1956 and 1960 as part of a single code (see [2000] 2 AC 428 at 457, 473), and that approach seems to me to be plainly correct. It is at once obvious that if an absence of genuine belief as to the age of an underage victim must be proved against a defendant under s 1 of the 1960 Act but not against a defendant under s 14 of the 1956 Act, another glaring anomaly would be introduced into this legislation. But that conclusion does not relieve the House of the need to carry out, in relation to s 14, the task that it carried out in relation to s 1. f
g
h

[20] Neither in s 14 nor elsewhere in the 1956 Act is there any express exclusion of the need to prove an absence of genuine belief on the part of a defendant as to the age of an underage victim. Had it been intended to exclude that element of mens rea it could very conveniently have been so provided in or following sub-s (2). j

[21] For reasons already given, significance cannot be attached to the inclusion of grounds of exoneration in sub-ss (3) and (4) and the omission of such a ground

- a from sub-s (2), although sub-ss (3) and (4) do reflect parliamentary recognition that a defendant should not be criminally liable if he misapprehends a factual matter on which his criminal liability depends. There is nothing in the language of this statute which justifies, as a matter of necessary implication, the conclusion that Parliament must have intended to exclude this ingredient of mens rea in s 14 any more than in s 1. If the effect of the presumption is read into s 14, with reference
- b to the defendant's belief as to the age of the victim, no absurdity results. With the wisdom of hindsight it can be seen that Avory J was right to hold, in *R v Forde*, that the statutory defence in s 2 of the 1922 Act could not be read into s 1 of that Act, but he was wrong in failing to apply to s 1 of the 1922 Act the overriding presumption referred to in [17] above. He may, no doubt, have been misled by the now discredited authority of *R v Prince* (1875) LR 2 CCR 154, [1874–80] All ER
- c Rep 881, which although not apparently cited will have been very familiar to him.

[22] I consider that Judge Thorpe reached the right conclusion. The Court of Appeal gave more weight to the re-enactment of the relevant provisions in 1956 than was appropriate for a consolidation Act.

- d [23] I would accordingly give an affirmative answer to the first certified question. It is common ground that a negative answer should be given to the second question. In giving those answers I would make the following concluding points: (1) Nothing in this opinion has any bearing on a case in which the victim does not in fact consent. While s 14(2) provides that a girl under the age of 16 cannot in law give any consent which would prevent an act being an assault, she
- e may in fact (although not in law) consent. If it is shown that she did not consent, and that the defendant did not genuinely believe that she consented, any belief by the defendant concerning her age is irrelevant, since her age is relevant only to her capacity to consent. (2) While a defendant's belief need not be reasonable provided it is honest and genuine, the reasonableness or unreasonableness of the belief is by no means irrelevant. The more unreasonable the belief, the less likely
- f it is to be accepted as genuine (see *R v Gladstone Williams* [1987] 3 All ER 411 at 415.) (3) Although properly applied to s 1 of the 1960 Act and s 14 of the 1956 Act, the presumption cannot be applied to ss 5 and 6 of the 1956 Act. Those sections as a pair derive directly from corresponding sections in the 1861 Act, as demonstrated above. The statutory or young man's defence was introduced into what is now s 6. Its omission from what is now s 5 is plainly deliberate. A genuine
- g belief that a child three years under the age of consent was over that age would in any event defy credulity. Section 6(3) of the 1956 Act plainly defines the state of knowledge which will exonerate a defendant accused under that section, and this express provision necessarily excludes the more general presumption. (4) Nothing in this opinion should be taken to minimise the potential seriousness
- h of the offence of indecent assault. While some instances of the offence may be relatively minor, others may be scarcely less serious than rape itself. This is reflected in the maximum penalty, now increased to ten years' imprisonment, and the mandatory requirement that those convicted be subject to the notification requirements of the Sex Offenders Act 1997. These considerations make it more
- i rather than less important that, in any forthcoming recasting of the law on sexual offences, the mens rea requirement should be defined with extreme care and precision. Parliament is sovereign and has the responsibility to decide where the boundaries of criminal activity should be drawn. Consideration will no doubt be given to the Law Commission's draft criminal code (Criminal Law: A Criminal Code for England and Wales) (1989) (Law Com no 177, vol 2) in cl 114 and 115:

'114. A person is guilty of an offence if he commits an act of gross indecency with or towards a child under the age of thirteen or if he incites a child under that age to commit such an act with him or another, unless—(a) he believes that he or that other is married to the child; or (b) he believes the child to be aged sixteen or above.'

Clause 115 is to the same effect, save that the specified age is 16.

[24] The rule of law is not well served if a crime is defined in terms wide enough to cover conduct which is not regarded as criminal and it is then left to the prosecuting authorities to exercise a blanket discretion not to prosecute to avoid injustice.

[25] I find it unnecessary to consider an argument addressed to the House based on art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

[26] For these reasons, and also those given by my noble and learned friends Lord Steyn and Lord Hobhouse of Woodborough, I would allow this appeal.

LORD NICHOLLS OF BIRKENHEAD.

[27] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, and with which I agree, I too would allow this appeal.

LORD STEYN.

[28] My Lords, the Court of Appeal certified the following points of law of general public importance:

'(a) Is a defendant entitled to be acquitted of the offence of indecent assault on a complainant under the age of 16 years, contrary to s 14(1) of the Sexual Offences Act 1956, if he may hold an honest belief that the complainant in question was aged 16 years or over? (b) If yes, must the belief be held on reasonable grounds?'

If question (a) is answered in the affirmative, the Director of Public Prosecutions now accepts that (b) must be answered in the negative, ie it is not necessary that the belief must be held on reasonable grounds. Given the recent unanimous decision of the House on a similar point in *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428 the concession was rightly made. Only the first question remains for consideration. I am in full agreement with the reasons given by Lord Bingham of Cornhill for answering this question in the affirmative. Given the importance of the point I will, however, summarise the considerations which have influenced my conclusion.

[29] The question before the House is one of the proper construction of s 14(1) of the Sexual Offences Act 1956. Counsel for the Director of Public Prosecutions invited the House to approach the question from a historical perspective. He started by emphasising the statutory precursors of s 14 of the 1956 Act, and dicta in *R v Prince* (1875) LR 2 CCR 154, [1874–80] All ER Rep 881; in *R v Forde* [1923] 2 KB 400, [1923] All ER Rep 477; and in *R v Maughan* (1934) 24 Cr App Rep 130. He said that Parliament, by which he meant the legislators making up the composite body, has consistently taken the view that in respect of age-based sexual offences, of which s 14 is an example, it is not a defence that the accused genuinely thought that the young person was over the prescribed age. This is another way of saying that there is a special rule of construction in respect of such offences under

a the 1956 Act. If this submission is correct, it follows that an accused's genuine belief that the girl was over 16 cannot be a defence under s 14(1).

[30] There are a number of interacting answers to this argument. First, as Lord Reid observed in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814, [1975] AC 591 at 613:

b 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'

The contextual meaning of the enacted text is controlling. It is unhelpful to inquire into the history of subjective views held by individual legislators or even a plurality of legislators from time to time. Secondly, the 1956 Act is an 'always speaking statute' (see *R v Ireland, R v Burstow* [1997] 4 All ER 225 at 233, [1998] AC 147 at 158). It must be interpreted in the world as it exists today, and in the light of the legal system as it exists today (see *Cross Statutory Interpretation* (3rd edn, 1995) pp 51–52; *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2000] 4 All ER 913 at 926–927, [2000] 3 WLR 1670 at 1684–1685). Specifically, s 14(1) must be so interpreted. Thirdly, as a matter of precedent, it is no longer possible to argue on the basis of *R v Prince* (1875) LR 2 CCR 154, [1874–80] All ER Rep 881 that there is a special rule of construction in respect of age-based sexual offences in the 1956 Act. That should have been clear from the decision of the House in *Sweet v Parsley* [1969] 1 All ER 347 at 349, [1970] AC 132 at 148. But in *B (a minor) v DPP* the House made explicit the rejection of such a special presumption. This made *R v Prince* a spent force and deprived *R v Forde* and *R v Maughan* of any convincing rationale. For these reasons I would reject the historical argument advanced on behalf of the Director of Public Prosecutions.

[31] That brings me to the more formidable argument on behalf of the Director of Public Prosecutions based on the language of s 14(1). In *B (a minor) v DPP* the House held that the 1956 Act is not the product of a legislative initiative designed to devise a more rational system. Except to point out that there is a strong theme running through the provisions of the 1956 Act of protection of young children from sexual depredations, there is little direct assistance to be gained from a review of other sections. It is necessary to concentrate on the language of s 14. It reads:

g '(1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.

(2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.

h (3) Where a marriage is invalid under section two of the Marriage Act, 1949, or section one of the Age of Marriage Act, 1929 (the wife being a girl under the age of sixteen), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief.

j (4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a defective.'

Section 15 makes corresponding provision for indecent assaults on a man. The maximum penalty for offences under ss 14 and 15 is a term of ten years' imprisonment. a

[32] It is well established that there is a constitutional principle of general application that 'whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea' (see *Sweet v Parsley* [1969] 1 All ER 347 at 349, [1970] AC 132 at 148; *B (a minor) v DPP* [2000] 1 All ER 833 at 844–847, [2000] 2 AC 428 at 470–472). The applicability of this presumption is not dependent on finding an ambiguity in the text. It operates to supplement the text. It can only be displaced by specific language, ie an express provision or a necessary implication. In the present case there is no express provision displacing the presumption. The question is whether it is ruled out by a necessary implication. In *B (a minor) v DPP* [2000] 1 All ER 833 at 839, [2000] 2 AC 428 at 464 Lord Nicholls of Birkenhead stated that a necessary implication 'connotes an implication which is compellingly clear'. That is how I will approach the matter. b
c

[33] It is now possible to face directly the question whether s 14(1) makes it compellingly clear that the supplementation of the text by the presumption is ruled out. The actual decision of the House in *B (a minor) v DPP* on the meaning of s 1(1) of the Indecency with Children Act 1960 springs to mind. The House concluded that on the statutory provision involved in that case the presumption was not displaced. But the particular wording of s 14(1) gives greater scope for the Crown's argument in the present case. Thus it is noteworthy that sub-s (4) of s 14, but not sub-s (2), makes specific provision, in the context of consent, for a defence of absence of mens rea. Nevertheless, I would hold that in the present case a compellingly clear implication can only be established if the supplementation of the text by reading in words appropriate to require mens rea results in an internal inconsistency of the text. Approaching the problem in this way, one can readily accept that s 14(2) could naturally have provided that a genuine belief by the accused that the girl was over 16 was no defence. Conversely, s 14(2) could have provided that a genuine belief that the girl was under 16 was a defence. In my view a provision of the latter type would not have been conceptually inconsistent with any part of s 14. By contrast, the terms of ss 5 and 6 of the 1956 Act, namely offences of having sexual intercourse with girls under 13 (s 5) and with girls under 16 (s 6), are inconsistent with the application of the presumption. The 'young man's defence' under s 6(3) makes clear that it is not available to anybody else. The linked provision in s 5, dealing with intercourse with younger girls, must therefore also impose absolute liability. There is nothing in s 14(1) as clearly indicative of the displacement of the presumption. In these circumstances it cannot in my view be said that there is a compellingly clear implication ruling out the application of the presumption. d
e
f

[34] This is a result which serves the public interest. It would have been a strange result to conclude that Parliament created by s 14(1) *offences of strict liability* where any heterosexual or homosexual contact takes place between two teenagers of whom one is under 16. Fortunately, the strong presumption of mens rea enabled the House to avoid such a result. g

[35] For these reasons, as well as the reasons given by Lord Bingham, I would allow the appeal. h
j

LORD HOBHOUSE OF WOODBOROUGH.

[36] My Lords, I agree that the appeal should be allowed for the reasons which my noble and learned friend Lord Bingham of Cornhill has given. I wholly agree

a with his speech and only add some further observations since I consider that the issue raised has effectively been determined by the decision of the Court of Appeal in *R v Kimber* [1983] 1 WLR 1118 and that of your Lordships' House in *B v DPP* [2000] 2 AC 428.

[37] Lord Bingham has provided a valuable review of the regrettable legislative history and the judicial and other comments that have, over the years, been cogently made about this surprising state of affairs. Section 14 of the Sexual Offences Act 1956 enacts a single criminal offence, that of indecently assaulting a woman. Conduct which would otherwise constitute an assault is not an assault if done with the free and lawful consent of the other person. The actus reus is the doing of the indecent act without the consent of the other. The prosecution must prove the absence of consent. In *R v Kimber* it had been ruled that it was irrelevant that the defendant honestly believed that in fact the other person was consenting. On this basis, the honest mistake of fact would be no defence; the prosecution would not have to satisfy the jury that the defendant was acting under such a mistake. The Court of Appeal in the passage already quoted by Lord Bingham rejected this proposition. The prosecution must prove mens rea; it must prove the intention of the defendant to assault.

[38] Section 14(2) provides a fact-based legal rule which, given the stated factual situation, qualifies the requirement that the indecent act be done without the actual consent of the other person. The additional fact is that the other person is under the age of 16 years. The result is that the actus reus becomes an indecent act done either without the consent of the other person or with or without the consent of the other person being a person under the age of 16 years. The prosecution must therefore prove as regards the actus reus either the fact of the absence of consent or the fact of an age of less than 16 years. It follows from the decision in *R v Kimber* that, unless some special legal rule is introduced, the prosecution must, as regards the defendant's mens rea, be prepared to prove that the defendant did not have an honest belief that the other person was in fact consenting and not under 16 years of age.

[39] The argument is that there is such an age-based special rule. This was one of the points which your Lordships' House had to consider in *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428. The argument was rejected. Lord Nicholls of Birkenhead said:

h 'In principle, an age-related ingredient of a statutory offence stands on no different footing from any other ingredient. If a man genuinely believes that the girl with whom he is committing a grossly indecent act is over 14, he is not intending to commit such an act with a girl under 14.' (See [2000] 1 All ER 833 at 839, [2000] 2 AC 428 at 463.)

Lord Steyn said: 'It is no longer possible to extract from *R v Prince* a special principle of construction applicable only to age-based sexual offences.' (See [2000] 1 All ER 833 at 850, [2000] 2 AC 428 at 476.) Lord Hutton said:

j 'Whilst, as I have stated, I think there is force in the view expressed by Blackburn J in *R v Prince* (1875) LR 2 CCR 154 at 171, [1874–80] All ER Rep 881 at 886, I am of opinion that to the extent that *R v Prince* can be viewed as establishing a general rule that mistake as to age does not afford a defence in age-based sexual offences, that rule cannot prevail over the presumption stated

by this House in *Sweet v Parsley*.' (See [2000] 1 All ER 833 at 855, [2000] 2 AC 428 at 482.)

As a matter of statutory construction, there is, as explained by Lord Bingham, no adequate reason for distinguishing between the provisions relating to the offence of gross indecency and ss 14 and 15 of the 1956 Act. These statements in *B (a minor) v DPP* are equally applicable in the present case.

LORD MILLETT.

[40] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill, with which I agree. For the reasons he gives I would allow the appeal and answer the certified questions as he proposes.

[41] I do so without reluctance but with some misgiving, for I have little doubt that we shall be failing to give effect to the intention of Parliament and will reduce s 14 of the Sexual Offences Act 1956 to incoherence. The section creates a single offence of indecent assault. It is intended for the protection of women. Subsection (2) and the first part of sub-s (4) extend the scope of the section. They are intended to protect women who are particularly vulnerable and who by reason of age or mental infirmity may be prevailed upon to give their consent to what would otherwise be an indecent assault. Subsection (3) and the proviso to sub-s (4) afford the defendant a limited defence based on the defendant's state of mind.

[42] The need for such a defence in the case of a woman with impaired mental faculties is obvious. Her mental state may well not be apparent, and it would be manifestly unjust to deny a defence where the defendant believed that she was normal and had no reason to suspect that she was not. The absence of a similar proviso to sub-s (2), while suggesting that no similar defence is intended in the case of underage girls, does not lead inevitably to that conclusion. But sub-s (3) is a different matter. Introduced when the age of marriage was raised to 16, its policy is self-evident. There is no need to extend the scope of the section, designed to protect women from assault and young girls from exploitation, to a girl whom the defendant believes he has married. In such a case the defendant has not taken advantage of her age for his own sexual gratification. On the contrary, he is labouring under the belief that he has undertaken a lifelong responsibility towards her.

[43] Yet sub-s (3) requires the defendant's mistaken belief in the subsistence of a valid marriage to be reasonable as well as honest. To afford a defendant who has not married the girl a more generous defence than one who believes he has is grotesque. It cannot have been the intention of Parliament, either in 1929 when it introduced the sub-s (3) defence, or when it consolidated the law in 1956. Parliament must have known that it was a commonplace for men to be convicted of the offence despite their genuine belief that the girl was over 16, a matter which went to mitigation but not defence. Parliament not only viewed this state of affairs with equanimity, but on the earlier occasion at least legislated on a basis which made no sense unless this was the law.

[44] But the age of consent has long since ceased to reflect ordinary life, and in this respect Parliament has signally failed to discharge its responsibility for keeping the criminal law in touch with the needs of society. I am persuaded that the piecemeal introduction of the various elements of s 14, coupled with the persistent failure of Parliament to rationalise this branch of the law even to the extent of removing absurdities which the courts have identified, means that

a we ought not to strain after internal coherence even in a single offence. Injustice is too high a price to pay for consistency.

Appeal allowed.

Kate O'Hanlon Barrister.

Kane v New Forest District Council

[2001] EWCA Civ 878

COURT OF APPEAL, CIVIL DIVISION
SIMON BROWN, MAY AND DYSON LJ
5, 13 JUNE 2001

Negligence – Highway – Duty of local planning authority – Obstruction of visibility – Planning authority requiring developer to construct footpath before commencing development works – Authority allowing footpath to be opened to public despite knowing that it lacked adequate sightlines – Car striking claimant when emerging from footpath – Claimant bringing proceedings against planning authority – Whether local planning authority having blanket immunity for anything done in exercise of planning functions – Whether authority liable for danger on highway which it had created.

In 1985 the defendant planning authority granted planning permission for a development. The proposal included a footpath, ending on the inside of a bend in a road, which was intended to provide a link across that road to a footpath on the other side. The highway authority responsible for the roadway described the access onto the road as totally unsuitable because of the lack of sightlines. Nevertheless, shortly before the grant of planning permission, the planning authority and the developer entered into a statutory agreement providing, inter alia, for the developer to construct the footpath. In 1987 the planning authority, the highway authority and the owner of a property abutting the highway entered into a statutory agreement whereby the owner agreed, upon the planning authority's written direction, to dedicate a strip of his land to the highway authority in order to improve the sightline to the footpath exit. In 1990 the planning authority entered into a statutory agreement with the developer under which the latter covenanted to construct the footpath before commencing the development works. In 1993, when the footpath was nearing completion, the planning authority asked the highway authority whether it was likely that progress on the improvement of the sightline would be made in the near future. In a letter in June 1994, the highway authority stated that it anticipated that it would take five or six weeks to take the strip of land into the highway. However, nothing had been done to improve the sightline by October 1994 when the footpath was opened to the public. Nor were any improvements in place by March 1995 when the claimant, K, was struck by a car after emerging from the footpath. Trees and vegetation growing alongside the road had reduced the driver's visibility to no more than 15 metres, and K, who suffered grievous injuries, accepted that the driver had had no chance to avoid him. However, he brought proceedings in negligence against the planning authority, pleading that it had caused or permitted the footpath to be created by the developer and used by the public before any or any adequate measures had been taken to improve visibility. The district judge dismissed the claim under CPR 24.2 on the basis that K had no real prospect of succeeding in the claim. K's appeal was dismissed by the judge, but he was subsequently granted permission for a second-tier appeal to the Court of Appeal. On that appeal, the planning authority submitted that K's case depended on the contention that it had been negligent in requiring the construction of the footpath as a condition of planning permission, and that such a contention was unavailable since local planning authorities

- a enjoyed blanket immunity in law in respect of anything done in the exercise of their planning functions. Alternatively, the planning authority contended that it had not been under a statutory duty in 1994 to prevent the opening of the footpath until it could safely be used; that at most there had been a statutory power; that it had not acted irrationally in failing to require or request the developer to keep the footpath closed until the sightlines had been improved; and
- b that there were no exceptional circumstances for holding it liable for its failure to do so.

Held – (1) It was far from clear that a local planning authority would be immune from liability if it permitted, still less required, the construction of a foreseeably dangerous footpath or if it failed when granting the planning permission, or

c requiring the work, to impose a condition forbidding the opening of the footpath to the public until the sightlines had been cleared. The imposition of such a condition could not be contrary to anyone's interests. Nor could it be wholly detrimental to the proper process of considering planning applications for a local planning authority to have regard to the private law interests of those who would

d use a prospectively dangerous footpath. Moreover, there could be no reason why the planning process would be adversely affected by making the planning authority potentially liable to an action in negligence for failing to take that elementary precaution. However, in the instant case it was unnecessary to hold the planning authority negligent for not having imposed such a condition in 1990 when the construction of the footpath had been stipulated. K had a case that was

e independent of any anterior negligence, namely that the planning authority, instead of merely relying on the highway authority's letter in June 1994, should have ensured that the footpath was not opened until work had been completed to improve the sightlines (see [23], [24], [32], [33], [35], below); *Lam v Brennan and Borough of Torbay* [1997] PIQR P488 considered.

- f (2) Where an authority had created the source of a danger on the highway, it was not entitled thereafter to wash its hands of the danger and simply leave it to others to cure. In the instant case, the local planning authority had created the source of danger since it had required the footpath to be constructed. In those circumstances, it was one thing to say that at the time when the planning authority had required the construction of the footpath it had every reason to
- g suppose that the improvements to the sightlines would ultimately allow it to be safely opened and used: quite another to say that it was later entitled to stand idly by whilst, as it had to have known, the footpath lay open to the public in a recognisably dangerous state. It followed that K had not merely a realistic prospect of establishing a claim in negligence against the planning authority, but
- h a positively powerful case. Accordingly, the appeal would be allowed (see [28], [29], [31]–[35], below); *Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801 distinguished.

Notes

- j For the liability of public authorities in respect of a failure to exercise statutory powers, see 33 *Halsbury's Laws* (4th edn reissue) para 619.

Cases referred to in judgments

Barrett v Enfield London BC [1999] 3 All ER 193, [1999] 3 WLR 79, HL.

Dunlop v Woollahra Municipal Council [1981] 1 All ER 1202, [1982] AC 158, [1981] 2 WLR 693, PC.

Lam v Brennan and Borough of Torbay [1997] PIQR P488, CA.

Osman v UK (1998) 5 BHRC 293, ECt HR.

Stovin v Wise (*Norfolk CC, third party*) [1996] 3 All ER 801, [1996] AC 923, [1996] 3 WLR 388, HL.

Strable v Dartford BC [1982] JPL 329, CA.

Swain v Hillman [2001] 1 All ER 91, CA.

X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Cases also cited or referred to in skeleton arguments

Bybrook Barn Centre Ltd v Kent CC (2000) Times, 5 January, [2000] CA Transcript 2092.

Caparo Industries plc v Dickman [1990] 1 All ER 568, [1990] 2 AC 605, HL.

TP v UK [2001] 2 FCR 289, ECt HR.

Z v UK [2001] 2 FCR 246, ECt HR.

Appeal

The appellant, Sean Patrick Kane, appealed with permission of Mantell LJ granted on 30 June 2000 from the decision of Judge Thompson QC sitting in the Queen's Bench Division of the High Court at the Southampton District Registry on 3 April 2000, dismissing his appeal from the decision of District Judge Cooper on 7 December 1999 dismissing his proceedings for negligence against the respondents, New Forest District Council, on the grounds that he had no real prospect of succeeding in the claim. The facts are set out in the judgment of Simon Brown LJ.

Anthony Coleman (instructed by *Moore & Blatch*, Southampton) for the appellant.
John M Snell (instructed by *Beachcroft Wansbroughs*, Winchester) for the respondents.

Cur adv vult

13 June 2001. The following judgments were delivered.

SIMON BROWN LJ.

[1] On 1 March 1995 the appellant suffered grievous injuries when struck by a motor car whilst out walking in the New Forest. He had emerged from a footpath and was crossing the road opposite. The motor car came from his right and, says the appellant, the driver had no chance to avoid him: the footpath ended on the inside of a bend in the road and the trees and vegetation growing alongside the road reduced the oncoming driver's visibility to no more than some 10 to 15 metres. The appellant rather puts his blame for the accident upon the respondent district council, the authority responsible for the creation of this footpath and its emergence at a foreseeably dangerous point in the road.

[2] Initially the appellant brought his claim also against the Hampshire County Council (the HCC), the highway authority responsible for the roadway. Following discovery, however, he accepts that the HCC had consistently warned the respondents about the danger of this footpath and he no longer attributes blame to them.

[3] On 7 December 1999 the appellant's claim was dismissed by District Judge Cooper under CPR 24.2, the rule which allows summary judgment to be given against a claimant if the court considers that the 'claimant has no real prospect of succeeding in the claim'. The appellant's appeal against that order was dismissed by Judge Thompson QC on 3 April 2000. Both the district judge

a and Judge Thompson held the claim to be unsustainable in the light of existing authority, most particularly the House of Lords decision in *Stovin v Wise* (Norfolk CC, third party) [1996] 3 All ER 801, [1996] AC 923 and the Court of Appeal decision in *Lam v Brennan and Borough of Torbay* [1997] PIQR P488.

[4] Now before us is the appellant's second-tier appeal brought by permission of Mantell LJ. The question it raises is whether the circumstances of this case give
b rise to a common law duty of care on the part of the respondent planning authority—or, more strictly, whether the appellant has 'a "realistic" as opposed to a "fanciful" prospect of success' in establishing a breach of such a duty—see *Swain v Hillman* [2001] 1 All ER 91 at 92.

[5] With that brief introduction let me turn next to flesh out the facts although I need do so only comparatively briefly. These, of course, must at this stage be
c assumed in the appellant's favour. That said, there is really very little dispute about them: the circumstances in which this footpath came to be constructed and opened appear reasonably clearly from the disclosed documents.

[6] The story begins in 1984 when the respondents as the local planning authority were considering an application by Wilcon Homes Ltd (Wilcon) for
d planning permission for the construction of a substantial residential estate on land to the north of Main Road at Marchwood in Hampshire. It is unnecessary to describe the topography in any detail. Suffice it to say that the proposal included a footpath on the north side of Main Road running essentially in a north-south direction just to the west of a stream—a footpath intended, as the respondents wrote to the HCC on 2 March 1984, 'to achieve a link across the road to a
e footpath [on the south side of Main Road] alongside the stream'.

[7] In their reply dated 29 March 1984 the HCC described this access onto Main Road as 'totally unsuitable because of the lack of sightlines'.

[8] In June 1985 a s 52 agreement was entered into between Wilcon and the respondents providing amongst other things for Wilcon to construct the footpath,
f and in October 1985 planning permission for the erection of 129 dwellings and associated garages and works was duly granted to Wilcon.

[9] To the west of the footpath at its southern end and bordering the north side of Main Road lay a property called 'The White Cottage' and on 23 July 1987 a tripartite s 52 agreement was entered into between the respondents, the HCC and the owner of 'The White Cottage' by which the latter agreed that upon the
g respondents' written direction, to be given within ten years, he would dedicate free of charge to the HCC as highway authority a strip of land up to 3½ metres wide fronting Main Road specifically for the improvement of the relevant sightline to the footpath exit.

[10] On 25 April 1990 a supplemental s 52 agreement was entered into
h between Wilcon and the respondents whereby Wilcon covenanted to construct the footpath before commencing their development works.

[11] On 22 January 1993 the respondents sent a memorandum to the HCC under the heading 'Proposed Line of Sight Improvement, Main Road, Marchwood', enclosing a copy of the tripartite s 52 agreement with the owner of 'The White Cottage', stating
j 'Wilcon Homes will shortly be constructing the footpath ... You may therefore consider this brings a new urgency to the proposed line of sight improvements.'

[12] The HCC's area surveyor replied to that memorandum on 15 March 1993, stating: 'I am presently drawing up a proposed programme of works for 1993/94 and I hope to include this scheme in that programme.'

[13] On 13 July 1993, following a site visit, the respondents wrote to Wilcon Homes stating:

'It was generally agreed that the junction of the footpath with Main Road was a safety problem due to inadequate sight lines ... The District Council agreed to contact the Hampshire County Council to see if they were willing to cut back vegetation on highway land for the same reason [ie to improve sightlines].'

[14] On 8 September 1993 the respondents wrote to the HCC's area surveyor:

'You may be aware that the construction of [the] footpath ... is nearing completion. Concern has been expressed locally that the footpath emerges at a point where it is dangerous to cross Main Road. I am aware that an agreement was reached in 1987 with the owners of The White Cottage to dedicate a strip of land to the highway authority in order to improve sight lines ... the sight line has not been improved and I wonder if any progress is likely to be made in the near future ... In view of the current hazardous situation I would be grateful if you would give consideration to how matters may be improved, for instance by the improvement of sight lines or the erection of pedestrian/vehicle warning signs.'

[15] The area surveyor replied on 17 September 1993: 'We have a minor highway improvements scheme for this section of road scheduled for 1993/94.'

[16] He wrote again on 23 June 1994, stating:

'Negotiations have recently taken place with Mr Bray, the present owner of White Cottage, over the provision of the brick wall [also the subject of the s 52 agreement]. Subject to your approval and to that of Mr Bray to the brick-type, arrangements will be put in hand forthwith to take the land into the highway. I anticipate that this will take us about 5 or 6 weeks.'

[17] Alas, the envisaged five or six-week period was long exceeded and in the event it appears that nothing was done to improve the sightline until after the appellant's accident on 1 March 1995. Meantime, in October 1994 the footpath had been opened to the public.

[18] One of the appellant's main pleaded particulars of negligence against the respondents is that they 'caused or permitted the footpath to be created by Wilcon and/or used by the public before any or any adequate measures had been taken to improve visibility along [Main] Road to the west of point E [where the footpath joined Main Road]'.

[19] Mr Coleman's skeleton argument on this appeal puts 'the claimant's case in a nutshell' thus:

'By insisting on the construction and by permitting the opening of the footpath emerging onto Main Road at point E before the necessary road and/or sight line improvements had been carried out [the respondents] positively created a hazard on the highway which caused or materially contributed to the claimant's accident.'

[20] Mr Snell argues that the appellant's case on analysis falls into two parts, each of which is blocked by binding authority. The first part of the appellant's case, submits Mr Snell, depends upon the contention that it was negligent of the respondents to have required the construction of this footpath as a condition of planning permission (a requirement crystallised in Wilcon's covenants under the two s 52 agreements). Yet, runs Mr Snell's argument, no such contention is available against the respondents: local planning authorities enjoy blanket immunity in law in

- a respect of anything done in the exercise of their planning functions. This is a wide submission indeed. In support of it, Mr Snell relies principally upon this court's judgment in *Lam v Brennan and Borough of Torbay* [1997] PIQR P488, a decision which itself had regard to the Privy Council's judgment in *Dunlop v Woollahra Municipal Council* [1981] 1 All ER 1202, [1982] AC 158 and this court's decision in *Strable v Dartford BC* [1982] JPL 329. The court in *Lam's* case
- b said (at 502–503):

- c 'In our view it is quite plain that the regime of the Town and Country Planning Acts is, in the words of Lord Browne Wilkinson in [*X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 364–365, [1995] 2 AC 633 at 731] "...a regulatory system ... for the benefit of the public at large ... [involving] ... general administrative functions imposed on public bodies and involving the exercise of administrative discretions." Such a system is one in respect of which reported decisions reveal no example of a private right of action for breach
- d of statutory duty ever having been recognised by the Court ... [G]iven the discretionary nature of the power conferred to grant or refuse planning permission under section 29 of the 1971 Act, it seems to us clear that the policy of the Act conferring that power is not such as to create a duty of care at common law which would make the public authority liable to pay compensation for foreseeable loss caused by the exercise or non-exercise of
- e that power. As Collins J. put it: "The local authority's duty under the Planning Acts is to control and regulate development in the interests of the inhabitants of the area. It is of course inevitable, particularly where there are major developments, that some people are going to be adversely affected ... There may even be nuisances created in some situations. Of course the
- f local authority has to consider the effect on the environment and the adverse effect, if any upon neighbouring occupiers. Those are all proper planning considerations. [However] ... It seems to me that it would be wholly detrimental to the proper process of considering planning applications if the local authority, in addition had to have regard to the private law interests of any persons who might be affected by the grant of permission, and to ask
- g itself in each case whether it had properly had regard to the individual rights of those concerned. If it were potentially liable to actions in negligence in those circumstances, it seems to me that the carrying out of its important functions in the public interest would be likely to be adversely affected."

- h [21] *Lam's* case, I may note, was a case where the plaintiffs' complaint against the local planning authority was of the grant of a planning permission in the implementation of which the grantee had carried out injurious spraying processes which constituted a nuisance. The grantee was impecunious so there was no chance of recovering damages against him. Unsurprisingly to my mind the court
- j declined to hold the local planning authority responsible in law for the nuisance: on no view was it a necessary consequence of the grant of planning permission. As the Court of Appeal observed (at 500):

'... the granting of a planning permission is not a licence or consent to the commission of a nuisance in the course of any activity upon premises coming within the scope of the planning permission granted.'

[22] *Dunlop's* case and *Strable's* case were very different cases and really are authority for no more than that local planning authorities are not liable in damages for financial loss resulting from their negligent dealing with planning applications. a

[23] It seems to me far from clear on these authorities that a local planning authority would be immune from liability if they permitted (still less if they required) the construction of a foreseeably dangerous footpath or (which is perhaps the better way of putting the present case) if they failed when granting the planning permission (or requiring the work) to impose a condition forbidding the opening of the footpath to the public until the sight lines had been cleared. How could the imposition of such a condition be contrary to anyone's interest? How could it have been 'wholly detrimental to the proper process of considering planning applications' (to use Collins J's words approved by the Court of Appeal in *Lam's* case) for the respondents to have had regard to the 'private law interests' of those who would use this prospectively dangerous footpath? Why would the planning process be 'adversely affected' by making the respondents potentially liable to an action in negligence for failing to take this elementary precaution? b
c

[24] All that said, it is to my mind unnecessary here to hold the respondents negligent for not having imposed such a condition back in 1990 when the construction of this footpath was stipulated. Rather I would regard what Mr Snell called the second part of the appellant's case as essentially free-standing ie as independent of any finding of anterior negligence. This second part is the appellant's fairly obvious contention that in mid-1994, instead of merely relying on the HCC's letter of 23 June 1994 anticipating that it would take some five or six weeks to include 'The White Cottage' frontage within the highway and thereby improve the sightlines, the respondents should have ensured that the footpath was not opened until that work had been completed. Whether or not they had any particular contractual right or statutory power to prohibit the footpath's opening until it could safely be used seems to me frankly immaterial: there is no reason to doubt that Wilcon would have co-operated readily with any request to keep it closed. d
e
f

[25] It is at this stage of the argument that Mr Snell deploys his second main authority, the House of Lords decision in *Stovin v Wise* (*Norfolk CC, third party*) [1996] 3 All ER 801, [1996] AC 923. g

[26] By the summer of 1994, Mr Snell submits, there was certainly no statutory duty upon the respondents to prevent the opening of the footpath until the sightlines were improved; at most there was a statutory power. The House of Lords in *Stovin v Wise* held by a 3 to 2 majority that the minimum pre-conditions for basing a duty of care on a statutory power were, first, that it would have been irrational not to have exercised the power so that there was in effect a public duty to act, and secondly, that there were exceptional grounds for holding that the policy of the statute required compensation to be paid to persons who suffered loss because the power was not exercised. Here, he argues, it was not irrational of the respondents not to have required or requested Wilcon to keep the footpath closed until the sightlines were improved and nor are there exceptional grounds for holding the respondents liable for their failure to do so. Rather, he submits, the blame for this accident could as well be put upon the HCC for not having accelerated the improvement works and/or Wilcon for opening the footpath with a foreseeably dangerous exit point onto Main Road. h
j

[27] I would reject this argument. It is plain that *Stovin v Wise* proceeded upon the basis 'that the complaint against the council was not about anything which it had

a done to make the highway dangerous, but about its omission to make it safer' ([1996] 3 All ER 801 at 818, [1996] AC 923 at 943 per Lord Hoffmann in the leading speech for the majority)—or (as Lord Nicholls put it in the leading speech for the minority):

'The starting point is that the council did not create the source of danger.

b This is not a case of a highway authority carrying out road works carelessly and thereby creating a hazard. In the present case the council cannot be liable unless it was under a duty requiring it to act. If the plaintiff is to succeed the council must have owed him a duty to exercise its powers regarding a danger known to it but not created by it.' (See [1996] 3 All ER 801 at 806, [1996] AC 923 at 929.)

c [28] Here, by contrast, the starting point must surely be that the respondent council *did* create the source of danger. They it was who required this footpath to be constructed. I cannot accept that in these circumstances they were entitled to wash their hands of that danger and simply leave it to others to cure it by improving the sightlines. It is one thing to say that at the time when the respondents required the construction of this footpath they had every reason to
d suppose that the improvements along 'The White Cottage' frontage would ultimately allow it to be safely opened and used: quite another to say that they were later entitled to stand idly by whilst, as they must have known, the footpath lay open to the public in a recognisably dangerous state.

e [29] In short, the appellant seems to me to have not merely a 'realistic' prospect of establishing a claim in negligence against the respondents here but a positively powerful case. Whether or not they in turn can look to contribution from the HCC and/or Wilcon is for present purposes immaterial.

f [30] I add only this. Amongst various statutory powers drawn to our attention as having perhaps been available to eliminate the danger in this case is s 154(1) of the Highways Act 1980. This enables a competent authority (defined so as apparently to include the respondents in the present case) to serve a notice on the owner or occupier of land requiring him to lop or cut any 'hedge, tree or shrub' which
g 'obstructs or interferes with the view of drivers of vehicles'. As we indicated during the course of argument, however, it seemed to us altogether simpler and more realistic to put the appellant's case on the straightforward basis that the respondents here could and plainly should have required the opening of this footpath to be delayed until after the sightlines had been improved.

[31] I would allow this appeal.

MAY LJ.

h [32] I agree that this appeal should be allowed for the reasons given by Simon Brown LJ whose account of the facts I gratefully adopt.

j [33] It is, to my mind, evident from the facts which Simon Brown LJ has related that the respondent district council required, by the two s 52 agreements, the construction of what was to become a public footpath whose exit onto Main Road would, if nothing were done to improve matters, be dangerous. They thereby assumed a responsibility to those, including the claimant, who might wish to use the footpath to see that it was not open until the danger was removed. That is, in my view, an entirely orthodox application of common law principles of negligence. There is nothing in *Stovin v Wise* (Norfolk CC, third party) [1996] 3 All ER 801, [1996] AC 923 which suggests a different conclusion. In *Stovin v Wise*, the county council had not created the hazard. In the present case the respondents had created the hazard. Nor on the facts of this case are the respondents immune

from a claim in negligence because they were exercising a statutory function under planning legislation. It may be, depending on the facts, that the ordinary exercise of a statutory power to grant or refuse planning permission would not create a duty of care at common law carrying with it a liability to pay compensation to those affected by this—see *Lam v Brennan and Borough of Torbay* [1997] PIQR P488. But I reject Mr Snell's submission that a planning authority has blanket immunity from claims for negligence whatever the facts. That is simply not consonant with recent developments of the law both in this jurisdiction and in Strasbourg—see for example *Barrett v Enfield London BC* [1999] 3 All ER 193, [1999] 3 WLR 79 and *Osman v UK* (1998) 5 BHRC 293.

[34] There is no question but that the respondents were aware of the danger. Although preliminary steps were taken to enable the danger to be removed, the relevant works were not carried out when the footpath was opened. The respondents had the effective power to require Wilcon not to open the footpath until it was safe to do so. It is, in my view, at best an unpersuasive quibble to suggest, as Mr Snell does, that the respondents were powerless to do this. I am sure that in the real world a suitable letter to Wilcon telling them to bar use of the footpath until its exit onto the road was safe would have achieved that result. Wilcon had no interest whatever other than to satisfy the respondents' request in relation to this footpath, which, after all, the respondents had required in the first place by means of the s 52 agreement. This seems to me to be a solid basis in law for the claimant's case that his accident was caused by the respondents' breach of the duty of care which, in my judgment, they assumed.

DYSON LJ.

[35] I agree with both judgments.

Appeal allowed.

Dilys Tausz Barrister.

a **Banca Carige SpA Cassa Di Risparmio
Genova E Imperia v Banco Nacional De
Cuba and another**

b CHANCERY DIVISION (COMPANIES COURT)

LIGHTMAN J

27–29 MARCH, 11 APRIL 2001

c *Practice – Service out of the jurisdiction – Claim whose whole subject matter relates to property within the jurisdiction – Whether claim having to be claim to property within the jurisdiction or some interest in it – CPR 6.20(10).*

The applicant Italian bank, C, was a creditor of the first respondent, BNC. For many years, BNC was the central bank of Cuba. As such, it enjoyed immunity in English law from process of execution on any of its assets within the United Kingdom.

d Those assets included the issued share capital of HIB, a company incorporated in England, whose principal role was to serve the interests of the central bank by the provision of finance for trade with Cuba, foreign exchange dealings on behalf of that country and the maintenance of current and deposit accounts on behalf of Cuban state-owned entities. In May 1997, as part of a reorganisation of the Cuban banking sector, BNC's role as central bank was transferred to the second respondent, BCC. At that point, BNC's shares in HIB lost their immunity from the process of execution. However, in June 1997 BNC agreed to sell its shares in HIB to BCC. On completion of that sale in 1998, the shares once again became immune from the process of execution. Subsequently, C brought proceedings against BNC and BCC under s 423^a of the Insolvency Act 1986, alleging that the share sale had been

f a transaction at an undervalue, that the transaction had been entered into for the purpose of putting the shares beyond the reach of BNC's creditors and that in those circumstances BCC should be required to pay monetary compensation. C sought permission to serve the proceedings outside the jurisdiction, relying on CPR 6.20(10)^b. Under that provision, the court had a discretion to grant such

g permission in respect of a claim whose whole subject matter related to property within the jurisdiction. BNC and BCC contended, inter alia, that a claim only fell within r 6.20(10) if it were a claim to property within the jurisdiction or some interest in it, and that accordingly it was not sufficient that the claim related to a transaction affecting such property.

h **Held** – On its true construction, CPR 6.20(10) was not confined to claims relating to the ownership or possession of property. Rather, it extended to any claim for relief (whether for damages or otherwise) so long as it related to property located within the jurisdiction. That construction vested in the court a wide jurisdiction, but since it was discretionary the court could and would consider in each case

j whether the character and closeness of the relationship was such that the exorbitant jurisdiction against foreigners abroad should properly be exercised. In the instant case the test laid down by r 6.20(10) was satisfied, but C was unable to show a serious question to be tried on the question whether BNC had had the

a Section 423, so far as material, is set out at [15], below

b Rule 6.20(10) is set out at [20], below

dishonest intention required by s 423 of the 1986 Act. The parties to the share sale agreement had considered that the shares should be vested in whatever company was the central bank, and that was the reason for the transfer. Accordingly, permission to serve the proceedings abroad would be refused (see [33], [36], [39], [40], [43], below).

Per curiam. The fact that the central bank of a foreign state enjoys immunity in England not from suit but only from enforcement does not mean that the court will refuse leave to commence proceedings in England designed to obtain a judgment to be enforced in another jurisdiction where there is no immunity from enforcement. However, the fact that there is immunity against enforcement in England is a relevant factor in the exercise of a discretion whether to grant leave to serve abroad or whether to grant discretionary relief. That factor may attract greater weight in a case where there is no evidence before the court that there is another jurisdiction where there is a gap in the immunity against execution and the judgment can therefore be enforced. Unless there is such a gap, the proceedings will be fruitless (see [41], below).

Notes

For transactions defrauding creditors and for discretion to grant leave to serve out of the jurisdiction, see respectively 7(3) *Halsbury's Laws* (4th edn reissue) paras 2612–2615 and 8(1) *Halsbury's Laws* (4th edn reissue) para 671.

For the Insolvency Act 1986, s 423, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 1078.

Cases referred to in judgment

Agnew v Usher (1884) 14 QBD 78; *affd* (1884) 51 LTNS 752, CA.

Banco Nacional de Cuba v Cosmos Trading Corp (17 July 1998, unreported), Ch D; *affd* [2000] 1 BCLC 813, CA.

Bell Group Ltd (in liq) v Westpac Banking Corp (1996) 20 ACSR 760, Aust Fed Ct.

Camdex International Ltd v Bank of Zambia (No 2) [1997] 1 All ER 728, [1997] 1 WLR 632, CA.

Cardinal Financial Investment Corp v Central Bank of Yemen (12 April 2000, unreported), QBD; *affd* [2001] Lloyd's Rep Bank 1, CA.

Crescent Oil and Shipping Services Ltd v Banco Nacional De Angola (28 May 1999, unreported), QBD.

De Sanchez v Banco Central de Nicaragua (1985) 770 F 2d 1385, US Ct of Apps (5th Cir).

Gulf Bank KSC v Mitsubishi Heavy Industries Ltd [1994] 1 Lloyd's Rep 323.

Harrods (Buenos Aires) Ltd (No 2), Re [1991] 4 All ER 334, [1992] Ch 72, [1991] 3 WLR 397, CA.

Hispano Americana Mercantil SA v Central Bank of Nigeria [1979] 2 Lloyd's Rep 277, CA.

Holland v Lampen-Wolfe [2000] 3 All ER 833, [2000] 1 WLR 1573, HL.

I Congreso del Partido [1981] 2 All ER 1064, [1983] 1 AC 244, [1981] 3 WLR 328, HL.

Jyske Bank (Gibraltar) Ltd v Spjeldnaes (5 October 1998, unreported), Ch D.

Jyske Bank (Gibraltar) Ltd v Spjeldnaes [1999] 2 BCLC 101; *rvsd* sub nom *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511, CA.

Kuwait Airways Corp v Iraqi Airways Co [1995] 3 All ER 694, [1995] 1 WLR 1147, HL.

Kuwait Airways Corp v Iraqi Airways Co (No 3) [2001] 1 All ER (Comm) 557, [2001] 1 Lloyd's Rep 161, CA.

Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] 3 All ER 404, [1991] 1 AC 187, PC.

Littrell v USA (No 2) [1994] 4 All ER 203, [1995] 1 WLR 82, CA.

- a *Paramount Airways Ltd, Re* [1992] 3 All ER 1, [1993] Ch 223, [1992] 3 WLR 690, CA.
Saltram Wine Estates Pty Ltd v Independent Stave Co (1992) 57 SASR 156, Aust SC.
Slingsby v Slingsby [1912] 2 Ch 21, CA.
Trendtex Trading Corp Ltd v Central Bank of Nigeria [1977] 1 All ER 881, [1977] QB 529, [1977] 2 WLR 356, CA.
- b *TSB Bank plc v Katz* [1997] BPIR 147.

Applications

- The respondents, Banco Nacional de Cuba (BNC) and Banco Central de Cuba (BCC), applied for the discharge of (i) the order of Mr Registrar Buckley on 6 June 2000 declaring that the applicant, Banca Carige SpA Di Risparmio Di Genova E Imperia
- c (Carige) did not need leave to serve out of the jurisdiction its claim against the respondents under s 423 of the Insolvency Act 1986, and (ii) the directions given by the registrar on 12 June 2000 as to the manner of service. BCC further applied for an order that the court had no jurisdiction over it on the grounds that it had immunity in the proceedings. The facts are set out in the judgment.
- d *Richard Sheldon QC* and *William Trower* (instructed by *Slaughter and May*) for BNC. *William Blair QC* (instructed by *Herbert Smith*) and *Campbell McLachlan* of that firm for BCC.
- Robin Potts QC* and *Philip Gillyon* (instructed by *Holman Fenwick & Willan*) for Carige.

e *Cur adv vult*

11 April 2001. The following judgment was delivered.

LIGHTMAN J.

f Introduction

- [1] In form I have applications before me by the respondents Banco Nacional de Cuba (BNC) and Banco Central de Cuba (BCC) for the discharge: (a) of an order by Mr Registrar Buckley made on 6 June 2000 declaring that the applicant Banca Carige SpA Di Risparmio Di Genova E Imperia (Carige) did not need leave to serve its claim against them out of the jurisdiction; and (b) of the directions which he gave on 12 June 2000 as to the manner of service. But in substance I have an application by Carige for permission to serve its claim against them out of the jurisdiction. The proceedings centre on an agreement dated 16 June 1997 (the agreement) for the sale by BNC to BCC of shares (the shares) in Havana
- g *International Bank Ltd* (HIB), a company incorporated in this country. The agreement was completed by the transfer of the shares on 25 February 1998 and payment of the purchase price on 3 April 1998. In the proceedings Carige, which is a creditor of BNC in the sum of some £13m, claims that the transfer of the shares was at an undervalue and made for the purpose of putting them beyond
- h the reach of Carige and other creditors of BNC, and seeks under s 423 of the Insolvency Act 1986 an order for payment of monetary compensation by BCC.
- j The question raised is whether the court should give the necessary permission to serve abroad so as to allow this action to proceed. There are raised important questions as to the meaning of the provisions of CPR 6.20(10), the application of the doctrine of sovereign immunity and the approach to be adopted on applications for permission to serve out of the jurisdiction proceedings under s 423.

Facts

[2] Carige was established in 1870 with a registered office in Genoa, Italy. BNC was established by a Cuban Decree (Law 13 of 1948) on 23 December 1948 and was until 28 May 1997 the central bank of the Republic of Cuba and a commercial bank. On 13 October 1960 the Cuban banking sector was nationalised and from 23 February 1961 by Law 930 of 1961 BNC was transformed into the only bank in Cuba. Its functions included the granting of credit and the incurring of obligations in relation to Cuban state trading activities. By letters dated 25 February and 20 March 1987 Carige and BNC entered into an agreement under which, to further trade between Italy and Cuba, Carige agreed to provide to BNC a line of credit equivalent to 20 milliards of Italian Lira to finance the export of certain Italian goods to Cuba. The purpose of Carige in granting the facility was to make a significant contribution towards the improvement of economic relations between Italy and Cuba. The currency for each transaction was German marks. By late 1988 BNC was experiencing difficulty in making repayment under the facility. As at 31 March 1993 BNC's debt (including interest) stood at DM38,521,427 (about £12m). In March 1993 to enforce payment Carige took proceedings in the three countries, namely Italy, Spain and the United Kingdom, where there could be found assets of BNC or Cuba or Cuban state entities. In Genoa it obtained 'conservative attachment' of assets of the Cuban state and Cuban state entities; in Spain it obtained orders of 'Exequatur' (enforcement) and attached two apartments in Madrid and accounts at Spanish banks of BNC; and in the United Kingdom (where BNC held the shares and was owed a debt by HIB) on 14 July 1993 Carige served a statutory demand on BNC. On 5 August 1993, BNC and Carige entered into a settlement agreement (the settlement) (to which the Cuban government and a Cuban state-owned entity called Cubaniquel were also parties) which provided for rescheduling repayment by BNC and the discontinuance of the attachment in Genoa and Madrid and the proceedings here. The settlement made the debt repayable by six equal instalments between 30 June 1997 and 31 December 1999. At later dates BNC disposed of its assets in Spain and as regards its assets in the United Kingdom reduced to practically nil the debt owed by HIB and (what is critical in this action) sold the shares to BCC. The evidence of Mr de Cossio Rodriguez (Mr Rodriguez), the secretary of BNC, is to the effect that these disposals were wholly unconnected with the settlement or any possible claims that might be made against BNC or the shares.

[3] There was announced in 1994 a complete reorganisation of the Cuban banking system. This was gradually implemented. The most significant aspect of this reorganisation was the division of the functions of BNC as central bank and commercial bank. On 28 May 1997 by Decree Law 172 BCC was created, and the role of central bank was transferred to BCC. BCC was granted organic autonomy, independent legal personality and its own patrimony. BNC was left with the single role of commercial bank. As such it remained the owner of the assets acquired and subject to the liabilities incurred as a commercial bank totalling at least £6bn. These liabilities included the debt to Carige.

[4] HIB is an authorised institution under the Banking Act 1987. To obtain such authorisation the Bank of England required and obtained a letter of comfort from its then shareholder controller BNC. In March 1997 HIB met with and informed the Bank of England of the reorganisation and of the proposed transfer of its ownership to BCC. The requirements for continued authorisation after this transfer were subsequently discussed in correspondence. Most particularly BCC

a was required to give, as the new shareholder controller, a letter of comfort and this it provided on 15 October 1997.

[5] On 14 June 1997 the board of BCC resolved to acquire the shares. On 16 June 1997 in Cuba BCC and BNC entered into the agreement. The agreement, which was governed by Cuban law, was for the sale of the shares to BCC for a sum equal to the par value of the issued share capital, namely £12,999,500. The agreement was conditional on the absence of objection by the Bank of England. The price was not designed to reflect the true value of HIB: its asset value exceeded £15m and its group profits for the year to 31 December 1996 were £852,363 and for the year ending 31 December 1997 were £1,660,099. Under and by reason of Cuban law, the payment of the purchase price had to be made in Cuban pesos at the official rate of exchange. This rate of exchange was less than 5% of the commercial rate of exchange. Under Cuban law BCC could have granted permission for payment in sterling or at a different rate of exchange, but this permission was neither sought nor granted, and the grant of such permission would have been remarkable in a transaction between two state entities. The Bank of England gave approval on 16 February 1998; the transfer of shares was executed by BNC on 19 February 1998; BCC was registered as holder of the shares on 25 February 1998; and the purchase price was paid in Cuban pesos with a commercial value of some £500,000 on 3 April 1998.

[6] So long as it remained the Cuban central bank, under United Kingdom law BNC was immune from process of execution of any judgment on any of its assets within the United Kingdom. The shares were accordingly so immune until the transfer of this role to BCC. During the brief interval between the transfer of roles (28 May 1997) and the transfer of the shares to BCC (25 February 1998), which I shall refer to as 'the period of exposure', the shares were vulnerable, but that vulnerability ceased when the transfer was completed.

[7] Mr Rodriguez in his evidence explains the entry into the agreement as an arrangement forming part of the restructuring of the Cuban banking system. It was not an attempt to ring fence the shares from creditors. He says:

'26. HIB is a company incorporated in England. HIB's principal role has always been to serve the interests of Cuba's central bank by the provision of trade finance for trade with Cuba, foreign exchange dealings on behalf of Cuba and the maintenance of current and deposit accounts on behalf of Cuban state-owned entities ... 27. Until 16 June 1997, HIB's £13m issued share capital was owned by BNC. That share capital was divided into 130,000 shares of £100 each, 129,995 of which were held by BNC. BNC held the shares in HIB in its capacity as the central bank of the republic of Cuba ... 28. When Cuba took steps in 1997 to reorganise its banking sector, including the transfer from BNC to BCC of BNC's functions as a central bank, steps were taken to transfer the HIB shares to the newly constituted central bank (BCC) ... 29. Banca Carige alleges that BNC was attempting to ring fence its assets at the time of the transfer. As I have mentioned above, this is wrong. Although regarded as only a small part of the reorganisation of the Cuban banking sector, it was very much part of that process. The shares had always been held by the entity exercising the Cuban central bank function and there was no reason for this to change: in making the transfer BNC and BCC regarded the status quo as regards HIB as being maintained.'

[8] The agreement, as I said, was dated 16 June 1997. The first instalment under the settlement became due on 30 June 1997. BNC was unable to pay the

instalments in full or on the due dates, but BNC did pay DM7,015,167 on 15 September 1997 and DM897,750 on 31 December 1997. The continuing default by BNC gave rise to lengthy correspondence between Carige and BNC. Carige showed remarkable patience, but increasingly pressed as a condition for sympathetic consideration of the difficulties facing BNC that the parties to the settlement should agree to lift their immunity to suit. No specific reference to immunity under any particular legal system was referred to and in particular no reference was made to immunity under English law. As I have already said immunity from process of execution under English law had already expired. Eventually on 3 February 1998 BNC and Cubaniquel executed waivers of immunity. BNC sent the waivers to Carige on 18 February 1998. On 5 March 1998 Carige requested a waiver of immunity from BCC. On 20 May 1998 BNC executed a waiver on behalf of the Cuban government. By letter dated 25 November 1998, Carige gave the first indication that in requesting the lifting of immunity it had had in mind execution on assets of BNC in the United Kingdom, for it stated that, having learnt of the sale by BNC of its assets in the United Kingdom and Spain, it now required the agreement of BCC to waive its immunity. BCC refused to provide such a waiver on the reasonable ground that to do so would be incompatible with fulfilling its functions as a central bank. BNC made further payments to Carige of €915,723 on 12 April 1999, €861,509 on 12 January 2000 and €2,502,710 on 25 September 2000.

[9] On 7 April 1998 another creditor of BNC, Cosmos Trading Corp (Cosmos), obtained leave to present and presented a petition to wind up BNC. BNC had no assets within the jurisdiction, but the purpose of presenting a petition and of obtaining an order was to enable the liquidator to invoke s 238 of the 1986 Act ('Transactions at an undervalue') or s 423 and recover monetary compensation from BCC for the benefit of creditors of BNC. Any relief had to be limited to a judgment for recovery of compensation since sovereign immunity protected BCC from any order for retransfer of the shares or the enforcement of any judgment for payment in this country. Neuberger J (*Banco Nacional de Cuba v Cosmos Trading Corp* (17 July 1998, unreported)) and (on appeal) the Court of Appeal ([2000] 1 BCLC 813) expressed the view that the transaction was at an undervalue and that it was not a commercial transaction, but part of the reorganisation of the banking arrangements of the Cuban state. Neuberger J expressed the view that none the less claims by the liquidator under both ss 238 and 423 of the 1986 Act would have a reasonable prospect of success. Neuberger J gave his reasons as follows:

'First the contract for the sale of the shares was expressed to be for the payment of the value of the shares at par in sterling, and there is no explanation as to why, when the contract was completed, it was decided that it should be in Cuba and in pesos at the artificial official rate. I note in particular that while the contract expressed in sterling was entered into when it might have been assumed that Cosmos was not pursuing its claim, completion in pesos at the official rate was after Cosmos had revived its claim. Secondly the contract was entered into in the context of the restructuring of the Cuban financial system which was apparently necessitated by the major adverse effect on the Cuban economy resulting from the collapse of the former Soviet Union. In such circumstances the aim of restructuring might not merely have been to put things on a better footing, but also to rearrange matters in such a way as to improve Cuba's position with regard to its creditors and, therefore, perhaps almost inevitably, to the disadvantage of those creditors. Accordingly, it

- a may well be that it could be shown that the agreement to transfer the shares (and/or its completion) was part of the restructuring exercise which had as one of its significant purposes the financial benefit of the Cuban State and its banks to the prejudice of their creditors.'

- [10] Sir Richard Scott V-C (with whom two other members of the Court of Appeal agreed) did not think it necessary to express any conclusion one way or the other whether there was made out a case of a purpose to defeat creditors. Both Neuberger J and Sir Richard Scott V-C held that the petition had no sufficient connection with the jurisdiction and that the liquidation of BNC would secure no benefits to creditors: it was unrealistic to think that the English appointed liquidator would be able to extract any sum awarded him against BCC from BCC and it was inconceivable that the English court would enforce any award against BCC by winding it up, for such an order would interfere with the functions of a central bank in the exercise of its sovereign authority.

- [11] Following the failure of that petition, Carige commenced these proceedings. By an originating application dated 2 June 2000 to which BNC and BCC were the respondents, Carige sought: (i) a declaration that the transfer by BNC to BCC of the shares constituted a transaction at an undervalue within the meaning of s 423; (ii) a declaration that the transfer was entered into for the purposes of putting assets beyond the reach of Carige and of the creditors of BNC and/or otherwise prejudicing the interests of Carige and of the other creditors; and (iii) an order that BCC pay to BNC or alternatively to Carige for the benefit of all persons on whose behalf the application was to be treated as made, the value of the shares at the date of the transfer to be assessed less the sum paid by BCC to BNC in consideration of the transfer. The only relief sought is accordingly against BCC: BNC is joined merely as a necessary party to the proceedings. The claim is made under s 423 alone because relief under that section (unlike relief under s 238) is available to a creditor outside a liquidation, administration or receivership.

- f [12] On 6 June 2000 Carige applied to Mr Registrar Buckley for an order that pursuant to CPR 6.19(2) the application could be served on BCC and BNC without the permission of the court and the registrar made such an order. On an application dated 12 June 2000 Mr Registrar Buckley gave further directions as to service.

- g [13] On 20 November 2000, BNC and BCC made separate applications for orders: (i) that the court had no jurisdiction to try the claims made by Carige; (ii) alternatively that the court should not exercise any jurisdiction which it might have to try the claims by Carige; and (iii) that the order and directions given by Mr Registrar Buckley be discharged and/or set aside. In addition BCC also applied for an order that the court had no jurisdiction over BCC on the ground that it is immune from the jurisdiction of the courts of the United Kingdom as respects these proceedings. These are the applications which are now before me.

- j [14] It is perhaps useful at this stage to summarise the connection of the parties, the agreement and the shares with the United Kingdom. BNC and BCC are both Cuban government owned entities established by Cuban law, and neither have any presence in the United Kingdom. BNC's only foreign representative offices are in Madrid and Beijing. The proper law of the agreement is that of Cuba and it was made and completed there. The agreement was connected with the internal reorganisation of the Cuban banking sector. Carige has no presence within the United Kingdom. The only connection of any sort with the United Kingdom is the presence here of the shares, being shares in a United Kingdom company whose share register is here.

Section 423 of the Insolvency Act 1986

[15] The relevant provisions of ss 423 to 425 read as follows:

'423. Transactions defrauding creditors.—(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if ... (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—(a) restoring the position to what it would have been if the transaction had not been entered into, and (b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make ...

(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor".

424. Those who may apply for an order under s. 423.—(1) An application for an order under section 423 shall not be made in relation to a transaction except ... (c) in any other case, by a victim of the transaction.

(2) An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.

425. Provision which may be made by order under s. 423.—(1) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)—(a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made ... (d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct ...'

Application or claim form

[16] The applications have raised a whole series of issues to which it is now necessary to turn. The first is purely procedural. Carige's originating process is an originating application, a form of process issued out of the Companies Court for which provision is made by rr 7.2 and 7.3 of the Insolvency Rules 1986, SI 1986/1925. These rules were contained in Ch 1, Pt 7 of the rules. The rules are made under rule making powers for which provision is made by ss 411 and 412 of the 1986 Act. These powers however do not extend to giving effect to Pt XVI of the 1986 Act in which s 423 appears. (Section 423 is not exclusively an insolvency provision: it operates outside insolvency proceedings even as it is sought to be applied in this case where there are no insolvency proceedings.) This is now well established: see *TSB Bank plc v Katz* [1997] BPIR 147 and *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* (5 October 1998, unreported) referred to at [1999] 2

- a BCLC 101 at 124. Accordingly Carige adopted the wrong form of originating process. But despite this procedural defect, I have power to treat the originating application as a claim form, and I think it proper to do so.

Leave to serve out of the jurisdiction

- b [17] BCC and BNC seek to set aside the order of Mr Registrar Buckley to the effect that leave was not required. The basis on which this order was sought and made was CPR 6.19(2) which authorises service of a claim form on a defendant out of the jurisdiction 'where each claim included in the claim form against the defendant to be served is a claim which, under any other enactment, the court has power to determine ...'

- c [18] The claimant maintained before the registrar that the claim under s 423 answered this description, for (read literally) it is a claim against BNC and BCC under an enactment which the court has power to try. There is an obiter dictum of Evans-Lombe J to this effect in the *Jyske Bank* case [1999] 2 BCLC 101 at 123. But the meaning of RSC Ord 11, r 1(2)(d), the predecessor of CPR 6.19(2), was authoritatively stated by Dillon LJ (with whom the other members of the Court of Appeal agreed on this question) in *Re Harrods (Buenos Aires) Ltd (No 2)* [1991] 4 All ER 334 at 359, [1992] Ch 72 at 116:

- e 'But in my judgment to be within Ord 11, r 1(2)(b) an enactment must, if it does not use the precise wording in the rule, at least indicate on its face that it is expressly contemplating proceedings against persons who are not within the jurisdiction of the court or where the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction. It is not enough, in my judgment, that the enactment, like the Companies Act 1985, gives a remedy in general cases—against "other members of the company"—without any express contemplation of a foreign element.'

- f [19] Unfortunately neither Evans-Lombe J in the *Jyske Bank* case nor Mr Registrar Buckley in this case was referred to this authority. It is quite clear that a claim under s 423 does not fall within r 6.19(2), and accordingly leave was required. I accordingly discharge Mr Registrar Buckley's order and his consequent directions. I may add that I entirely agree with the submissions on behalf of BNC and BCC that, when leave is not required, the court retains a discretion to decline jurisdiction and accordingly, even if (contrary to my view) an application under s 423 fell within the order, a challenge to the exercise of jurisdiction could be maintained (see *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 All ER 404 at 416, [1991] 1 AC 187 at 212).

- h *Application for permission*

- j [20] In the light of the matters I have referred to, the practical course was to treat as before me an application by Carige for permission to serve out of the jurisdiction. In its skeleton argument Carige made it clear that the ground on which the application was founded was CPR 6.20(10), which reads as follows:

'CLAIMS ABOUT PROPERTY WITHIN THE JURISDICTION

(10) the whole subject matter of a claim relates to property located within the jurisdiction ...'

This application itself raises a series of issues, each of which must again be considered in turn.

Sovereign immunity: jurisdiction

[21] Questions of sovereign immunity are capable of arising in respect of jurisdiction and enforcement. Where (as in this case) a question of immunity of a state-owned entity under the State Immunity Act 1978 (SIA) is raised, it must be determined before the substantive action can proceed and accordingly I should decide this question first on this application. On this part of the case I am indebted to Mr Blair QC for his valuable assistance. The English common law adopted the 'restrictive' theory of sovereign immunity, in respect of which the authoritative statement of principle is that of Lord Wilberforce in *I Congreso del Partido* [1981] 2 All ER 1064 at 1074, [1983] 1 AC 244 at 267:

'The conclusion which emerges is that in considering, under the "restrictive" theory, whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the state has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental or sovereign activity.'

[22] The common law principles (subject to one important gloss) were given statutory effect by the SIA. The gloss is the conferment on central banks of immunity of all of its property from execution. The relevant sections of the SIA (so far as material) read as follows:

1. General immunity from jurisdiction.—(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act ...

2. Submission to jurisdiction.—(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom ...

3. Commercial transactions and contracts to be performed in United Kingdom.—(1) A State is not immune as respects proceedings relating to—(a) a commercial transaction, entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom ...

(3) In this section "commercial transaction" means—(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority ...

13. Other procedural privileges.—(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below—(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and (b) the property of a State shall

a not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection ...

b 14. *States entitled to immunities and privileges.*—(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to ... (b) the government of that State; and (c) any department of that government, but not to any entity (hereafter referred to as a “separate entity”) which is distinct from the executive organs of the government of the State and capable of suing or being sued.

c (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

d (3) If a separate entity (not being a State’s central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

e (4) Property of a State’s central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

f [23] BCC is for the purposes of the SIA (as is typical of modern central banks) a separate entity from the state. The decree which set it up explicitly provides that it has independent legal status and is not responsible for the obligations of the state. The jurisdictional rules applicable to such entities under the SIA are as follows. (i) The immunity and privileges conferred by Pt I of the SIA on states do not apply to separate entities (s 14(1)). (ii) A separate entity is immune from the jurisdiction of the United Kingdom courts if, and only if (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a state would have been so immune (s 14(2)). (iii) Sections 3 to 11 set out a number of situations in which a state (and therefore a separate entity such as a central bank) is not immune. Section 3(1)(a) provides that a state is not immune as respects proceedings relating to commercial transactions entered into by it. (iv) A central bank, if a separate entity, differs from other such entities in two respects: (a) even if not immune from suit, its property will normally be immune from execution because its property is not regarded as in use or intended for use for commercial purposes; and (b) it is specifically provided that such a separate entity is entitled to immunity from injunctive relief and execution as if it were a state. Accordingly (as stated in *Dicey and Morris on the Conflict of Laws* (13th edn, 2000) vol 1, p 241 (para 10-013)) the

property of a central bank will only be liable to process of execution if it has waived in writing its immunity from execution. a

[24] The critical distinction under the statutory scheme is between what is or is not for the purposes of s 3(1)(a) a commercial transaction and what is or is not for the purposes of s 14(2)(a) an exercise of sovereign authority. The distinction lies (as found by the majority of the House of Lords in *Kuwait Airways Corp v Iraqi Airways Co* [1995] 3 All ER 694, [1995] 1 WLR 1147) in the distinction between 'acta jure gestionis' (ie commercial acts) and 'acta jure imperii' (ie governmental acts), and the test for this distinction was stated as follows: b

'... the ultimate test of what constitutes an act jure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform. It follows that, in the case of acts done by a separate entity, it is not enough that the entity should have acted on the directions of the state, because such an act need not possess the character of a governmental act. To attract immunity under s 14(2), therefore, what is done by the separate entity must be something which possesses that character ... But where an act done by a separate entity of the state on the directions of the state does not possess the character of a governmental act, the entity will not be entitled to state immunity ... Likewise, in the absence of such character, the mere fact that the purpose or motive of the act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity under s 14(2) of the 1978 Act.' (See [1995] 3 All ER 694 at 707–708, [1995] 1 WLR 1147 at 1160 per Lord Goff of Chieveley.) c
d
e

[25] On the authorities, it is clear that (a) it is first necessary to consider what is the relevant act of the separate entity which forms the basis of the claim to immunity; (b) to qualify for immunity, the act must be governmental rather than commercial in character; (c) this is a question of the analysis of the particular facts against the whole context in which they have occurred; (d) if the act in question is not governmental, the mere fact that the purpose or motive of the act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity. f

[26] In categorising the acts of a central bank, as in other contexts, it may be difficult to draw the line between governmental and commercial acts, since the role of a central bank is necessarily to exercise a role over financial and economic activity. The authorities (both before and after the SIA) have held that (1) the issue of a letter of credit by a central bank is a commercial act (see *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881, [1977] QB 529, *Hispano Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277); (2) the issue of bank notes is governmental (see *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728 at 732, [1997] 1 WLR 632 at 636); (3) the regulation and supervision of a nation's foreign exchange reserves is an aspect of a government's sovereign function of regulating the monetary system and is governmental (see *Crescent Oil and Shipping Services Ltd v Banco Nacional De Angola* (28 May 1999, unreported), Cresswell J applying *De Sanchez v Banco Central de Nicaragua* (1985) 770 F 2d 1385); (4) the issue of a promissory note by a central bank is a commercial activity (see *Cardinal Financial Investment Corp v Central Bank of Yemen* (12 April 2000, unreported), affirmed in the Court of Appeal ([2001] Lloyd's Rep Bank 1)). g
h
j

[27] As regards BCC, the relevant act is its entry into and completion of the agreement. BCC and BNC contend that it was not a commercial transaction, but

- a was part of the reorganisation of Cuba's central bank and as such was a governmental act; and that it would be superficial to characterise the act as 'commercial' merely because private individuals constantly buy and sell shares. It is well established that the context in which what would otherwise be private acts are done may bring them within the area of immunity (see eg *Littrell v USA* (No 2) [1994] 4 All ER 203, [1995] 1 WLR 82 and *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573). The context they rely on includes the following.
- b (1) BNC previously held the HIB shares in its capacity as the central bank of Cuba. (2) HIB's principal role was, and is, to serve the interests of Cuba's central bank. Effecting functions that need to be carried out in the London financial market through a separately incorporated local subsidiary under the control and ownership of the central bank in the case of an economy such as that of Cuba is an orthodox
- c procedure. (3) The reorganisation of the Cuban banking system was itself clearly a sovereign activity. (4) The shares were a central bank asset both before and after the transfer, and the transfer merely maintained its status as such.

- [28] On the other hand BNC and BCC entered into what was in form a private law contract and completed it as such. There is no evidence that the sale was
- d pursuant to any legislative or executive direction. In this respect the agreement is in a quite different position from the rest of the reorganisation which was effected by legislation. In the language of Lord Wilberforce in *I Congreso del Partido* [1981] 2 All ER 1064 at 1071, [1983] 1 AC 244 at 263, everything was done as between vendor and purchaser: there was no exercise and no need for exercise of sovereign powers. The private law character of the transaction is not
- e discoloured by the context in which the agreement was executed ie the fact that the parties to it regarded the transfer of the shares to BCC as an obvious and necessary sequel to the statutory reorganisation. Nor is its private law character controverted by the purpose or motive behind the transaction of serving the interests of the state in bringing to fruition the completion of the reorganisation
- f of banking in the final form which it sought. I therefore hold that BCC's entry into and completion of the agreement were commercial rather than governmental (albeit the parties to the agreement were both state-owned entities) and that accordingly BCC enjoys no immunity in respect of the transaction in question.

g Judicial self-restraint

- [29] Distinct from the doctrine of sovereign immunity, there is a rule of law requiring municipal courts to exercise judicial restraint in the exercise of jurisdiction in respect of sovereign acts of a state or a separate entity of a state within a state's own territory or outside it and which leads to a form of immunity 'ratione materiae' ie by reason of the subject matter. The rule may require the exercise of judicial
- h restraint even in the case of a commercial transaction in respect of which the doctrine of sovereign immunity is inapplicable (see *Kuwait Airways Corp v Iraqi Airways Co* [1995] 3 All ER 694 at 713, [1995] 1 WLR 1147 at 1165). It is far from being a principle of overwhelming applicability and is sensitive to the issues in a given case (see *Kuwait Airways Corp v Iraqi Airways Co* (No 3) [2001] 1 Lloyd's Rep 161 at 217 (para 336)). The latest guidance on this area of law is to be found
- j in the decision of the Court of Appeal in the *Kuwait Airways* (No 3) case, where Brooke LJ said (at 214):

'319. The second insight, however, is that, whether the sovereign acts within his own territory or outside it, there is a certain class of sovereign act which calls for judicial restraint on the part of our municipal Courts. This is the

principle of non-justiciability. It is or leads to a form of immunity *ratione materiae*. It may not be easy to generalize about such acts, and the application of the principle may be fact sensitive. Guidance, however, is to be found in such considerations as whether there are “judicial or manageable standards” by which to resolve the dispute, whether the Court would be in a “judicial no-man’s land”, or perhaps whether there would be embarrassment in our foreign relations, at any rate if that possibility was drawn to the Court’s attention by the executive. Sensitive issues involving diplomacy between states, or uncertain or controversial issues of international law, may be other examples of situations calling for judicial restraint. The distinction which has been developed in the analogous area of sovereign immunity between situations where the sovereign acts by way of sovereign authority (*acta iure imperii*) and where he acts in the commercial sphere (*acta iure gestionis*) may also be of some assistance, because with the development of the restrictive theory of sovereign immunity there has come the realization that it is not every impleading of a sovereign that requires judicial restraint or gives rise to a legitimate fear of giving offence. In essence, the principle of non-justiciability seeks to distinguish disputes involving sovereign authority which can only be resolved on a state to state level from disputes which can be resolved by judicial means.’

[30] If it were material to investigate the motives behind the reorganisation of the banking system in Cuba (as was contemplated in the passage which I have quoted from the judgment of Neuberger J in *Banco Nacional de Cuba v Cosmos Trading Corp* (17 July 1998, unreported)) and this was for any reason not covered by sovereign immunity, such an investigation would in my view squarely fall within this form of immunity. But it seems to me that the investigation of the motives for entry into the agreement and most particularly for fixing the price payable is a judicially manageable exercise. It has to be borne in mind that at least the primary focus is upon the state of mind of BNC when no longer the central bank, and not of BCC. Though the exercise might occasion a degree of embarrassment and give rise to a legitimate fear of giving some offence, it would not do so to a degree requiring the dispute to be resolved at state to state level rather than by judicial means. I do not think therefore that this doctrine affords a bar to the claim in this action. But the political sensitivity of the issues raised is very much relevant to the exercise of discretion on the issues where such exercise is called for on the application before me.

CPR 6.20(10)

[31] Rule 6.20(10) is a wholly new formulation, which is not directly derived from the RSC and has yet to be the subject of judicial consideration. The claim made by Carige in this case relates to the character of the agreement (whether a transaction at an undervalue) and the purpose for which it was entered into, and Carige seeks relief in the form, not of a proprietary nature, but of an award of compensation. The question raised is as to the nature of the relationship required by the rule of the claim to the property situate here. Carige says that it is sufficient that the claim relates to a transaction affecting such property. BCC and BNC, however, say that that is not enough and that it is necessary that the claim is to the property or some interest therein. On this novel and important issue I must acknowledge my debt to Mr Potts QC and Mr Gillyon.

a [32] RSC Ord 11, r 1 (the predecessor to CPR 6.20) provided (so far as material) as follows:

‘... (g) the whole subject-matter of the proceedings is land situate within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to land so situate;

b (h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction;

c (i) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situate within the jurisdiction ...’

d The authorities on RSC Ord 11, r 1(g) established that (leaving aside the provision for perpetuation of testimony) an action only fell within the rule if the claim was confined to a claim to a proprietary or possessory interest in the land and that the rule did not extend to a claim for any other relief e.g. damages arising from a breach of contract or tort relating to the land: see *Agnew v Usher* (1884) 14 QBD 78 at 79 (affirmed (1884) 51 LTNS 752) and *Slingsby v Slingsby* [1912] 2 Ch 21 at 24. In the place of Ord 11, r 1(g), (h) and (i) is now to be found CPR 6.20(10) which reads: ‘... the whole subject matter of a claim relates to property located within the jurisdiction ...’

e [33] The critical differences between Ord 11, r 1(g) and CPR 6.20(10) is the substitution for the words ‘is land situate within the jurisdiction’ of the words ‘relates to property located within the jurisdiction’. The implications are that (1) the rule is no longer limited to land and now extends to personal property; and (2) instead of the whole claim having to be confined to a claim to a proprietary or possessory interest, it is sufficient that the whole claim relates to property. f The evident purpose of the new rule is to lay down a single rule in place of the three earlier rules which embraces and extends beyond the contents of those rules. It is to be noted that at p 128 of *Civil Procedure* (White Book, Autumn 2000) the comment is made on CPR 6.20(10): ‘This wide and new provision is no longer confined to land and the old cases are redundant.’ In my view on its proper construction the rule cannot be construed as confined to claims relating to the ownership or possession of property. It extends to any claim for relief (whether for damages or otherwise) so long as it is related to property located within the jurisdiction. This construction vests in the court a wide jurisdiction, but since the jurisdiction is discretionary the court can and will in each case consider whether g the character and closeness of the relationship is such that the exorbitant jurisdiction against foreigners abroad should properly be exercised. h

[34] I am not deterred from reaching this conclusion by the authorities cited by Mr Blair. The first was the decision of the Australian Federal Court in *Bell Group Ltd (in liq) v Westpac Banking Corp* (1996) 20 ACSR 760. In that case consideration had to be given to Federal Court Rules Ord 8, r 1(h) which provided for service outside the jurisdiction ‘where the subject matter of proceedings so far as concerns the person to be served is property in the Commonwealth’. Nicholson J (at 764) held (citing earlier Australian authorities which support the proposition): ‘With respect to FCR O 8 r 1(h), for property to be the subject matter of the proceedings, what must be in issue is a right or interest in the property ...’ The language of the rule under consideration follows that in RSC j

Ord 11, r 1(g) and accords with the English authorities on the meaning of that rule. It is of no assistance on the current rule. a

[35] The second authority relied on was the judgment of Matheson J in *Saltram Wine Estates Pty Ltd v Independent Stave Co* (1992) 57 SASR 156 at 160–162. In that case he had to construe the rule in South Australia providing for the grant of leave ‘Whenever the subject matter of the claim is or relates to: real or personal property situate within the jurisdiction’. He identified as its predecessor a rule similar to Ord 11, r 1(h) which reads: ‘... any act, deed, will, contract, obligation or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action ...’ He referred to the Australian authorities which interpreted this earlier rule narrowly and required the action to have a direct effect on the property itself, its possession or title. He then held that the change of word from ‘affecting’ to ‘relates’ was not intended to alter the established requirement for the action to have a direct effect on the property itself, its possession or title and accordingly that a claim for damages likewise did not fall within the new rule any more than it did within the old. I do not, however, think that the reasons which impelled Matheson J to give the word ‘relate’ a restrictive meaning apply in respect of CPR 6.20(10). (It is to be noted that the word ‘affect’ only appeared in Ord 11, r 1(d) and in that context was given a wide meaning: see e.g. *Gulf Bank KSC v Mitsubishi Heavy Industries Ltd* [1994] 1 Lloyd’s Rep 323 at 327.) It would involve placing a gloss on the deliberately wide terms in which CPR 6.20(10) is drafted. b
c
d

[36] In my view the test laid down by CPR 6.20(10) is satisfied. The claim does relate to the shares, which are property situate here, and the claim under s 423 of the 1986 Act relates to the shares and most particularly the disposition of the shares. I therefore hold that Carige has satisfied the requirements of CPR 6.20(10), but such a decision leaves entirely open the question whether the nature of the claim is such that the courts’ discretion should be exercised in granting permission. e
f

A serious issue to be tried

[37] I must next examine whether Carige has raised a serious issue to be tried. For this purpose it is necessary to show a serious issue on each of the four constituents of a successful claim, namely (a) that the transaction was at an undervalue; (b) that the transaction was for the purpose of putting assets beyond the reach of existing or future claimants or prejudicing them in relation to their claims; (c) that Carige is a victim of the transaction; and (d) that the circumstances are such that the court would exercise its discretion to grant the relief sought. g

[38] It is common ground that Carige can show a serious case to be tried whether the sale was at an undervalue: BNC as owner of the shares was free as owner not to sell at all and was free to sell to a purchaser other than to BCC and at a price reflecting true (rather than par) value of the shares and on terms that Cuba should not be the proper law of the agreement (with the consequent requirement to complete in Cuban pesos at the official rate). I am satisfied that Carige can show a serious issue whether it is a victim of the transaction. It is no answer, as suggested by BNC and BCC, that the shares were immune from execution when in the hands of BNC so long as it remained the central bank and that the transaction merely continued such immunity by transferring them to BCC. That immunity could only last so long as BNC was the central bank and (but for the transfer) the immunity would have expired and the full value of the shares would have become available to its creditors of whom Carige was one. h
j

- a [39] But I do not think that Carige can show a serious question to be tried that BNC had the purpose which Carige imputes to it when entering into and completing the agreement of putting the shares beyond the reach of creditors or prejudicing them. There is some disarray in the authorities as to whether the iniquitous purpose must be a dominant or a substantial purpose. On balance the authorities and textbooks favour the former view. But it is unnecessary to resolve this issue
- b for the purpose of deciding this case, for Carige cannot show a serious case whichever test is applied. The uncontroverted evidence of BNC and BCC is to the effect that there was no intention to ring fence the shares or prejudice creditors. Carige's case essentially rests on the fact that the sale was at an undervalue. There is nothing suspicious about the two Cuban state entities agreeing that the law of Cuba should be the proper law of the agreement and once it is established
- c (as it is on the evidence before me) that Cuban law as the proper law of the agreement required payment in pesos at the official exchange rate, completion of the agreement in pesos adds little or nothing. (Neuberger J in the *Banco Nacional* case in the passage cited at [9] above for whatever reason did not have in mind this explanation of the completion of the agreement in pesos at the official rate.)
- d The existence of the undervalue is not in the context of the transaction in question indicative of an iniquitous intention: it is consistent with a view that the transfer was regarded by the parties to it as a formality consequent upon the replacement by BCC of BNC as the central bank. The evidence before me establishes that the parties to the agreement considered that the shares should be vested in whatever company was the central bank and that was the reason for the transfer. The price reflected the par value and accordingly the cost to BNC of capitalising HIB: BCC took over HIB on terms under which in fact BCC reimbursed BNC this capitalisation.
- e

- [40] It is clear that at the time of the internal reorganisation of the Cuban banking sector BNC was in serious financial difficulties with debts totalling some
- f £6bn and was unlikely to be able to repay its creditors, let alone on time, and this included Carige. But it seems to me inherently improbable that BNC or BCC should enter into the agreement for the dishonest purpose of putting the shares (valued perhaps at £30m) beyond the reach of creditors. It is to be noted that BNC left itself vulnerable during the period of exposure. There is no evidence of any sense of urgency on the part of BNC or BCC to limit or bring to its close this
- g period of exposure. An allegation of knowing participation in a dishonest transaction is a very serious allegation, and all the more serious if directed at a central bank. The allegation in this case can at its highest be described as speculative. It lacks any evidential support. The evidence filed goes only the other way. Such a claim
- h could only succeed if on disclosure material came to light which supported the thesis presented, but there is no reason to believe that there is any such material. I find no support in the protracted correspondence (to which I have referred) in which Carige sought releases from sovereign immunity in turn from BNC and BCC. This correspondence reveals only the degree of embarrassment of a state-owned entity unable to meet its debts. It is to be noted that BNC has adopted
- j a consistent approach to all its foreign creditors treating them all equally, and that it has continued to make payments to them. In my judgment there is no basis for even making the allegation of dishonesty, least of all against a central bank of a sovereign state. In my view, permission to serve proceedings abroad should be refused on the ground that there is no serious issue to be tried whether BNC had the dishonest intention which is the essential ingredient of the claim under s 423 of the 1986 Act.

[41] Likewise I do not think that there is a serious issue to be tried whether the court would grant Carige the relief which it seeks if Carige succeeded at a trial in establishing the other constituents of a claim under s 423 against BCC. It is clearly established by the decision of the Court of Appeal in *Re Paramount Airways Ltd* [1992] 3 All ER 1 at 11–12, [1993] Ch 223 at 239–240 that the court has a discretion (analogous to that whether to make a winding up order) whether to grant relief under s 423 having regard in particular to the sufficiency of the connection of the claim to England. I have summarised at [14] above the connection of the claim with this country. In my view it is tenuous, and it is fortuitous that by reason of that tenuous connection the English court can assert jurisdiction to try claims against BCC and BNC under s 423 and grant judgment against BCC for payment of a sum of money to be distributed amongst the victims. Section 423 contemplates that the necessary machinery can be brought into play (e.g. by means of the appointment of a receiver) for distribution (a form of mini-winding up), but the exercise in respect of a state entity, formerly the central bank, and in respect of Cuba's sovereign debt with creditors totalling some £6bn is not merely daunting but invasive of the sovereign affairs of Cuba. If there were to be any appropriate forum for such an exercise, it could only be Cuba itself. I may add that any likely dividend to creditors would be unlikely to be sufficient to justify the exercise, having regard to the likely costs and the size of the total indebtedness, which dwarfs into insignificance the amount in issue. But the consideration of the machinery of enforcement is academic, since BCC enjoys immunity from enforcement in this country. The only evidence relating to immunity of assets of central banks against enforcement abroad relates to Italy and the United States of America. In the first of these countries (though there is a conflict between the expert evidence adduced by the parties) in my judgment the balance of the evidence favours the view that there is immunity as regards assets used for *jure imperii* functions; and in the second there is clearly like immunity in respect of enforcement to that enjoyed here. The fact that the European Convention on State Immunity 1972 (Basle, 16 May 1972; Misc 31 (1972); Cmd 5081) makes no provision for immunity of central banks from execution does not mean that under the law of the parties to the convention there is no provision for such immunity: the convention sets a floor and not a ceiling. The fact that BCC enjoys immunity, not from suit, but only from enforcement, does not mean that an English court will refuse leave to commence proceedings here designed to obtain a judgment to be enforced elsewhere where there is no immunity from enforcement, but the fact that there is immunity against enforcement here is a relevant factor in the exercise of a discretion whether to grant leave to serve abroad or whether to grant discretionary relief, and this factor may attract greater weight in a case where there is no evidence before the court that there is anywhere else where there is a gap in the immunity against execution and the judgment can be enforced. Unless there is such a gap the proceedings will be fruitless. I think that it is clear that the fortuitous connection with the United Kingdom is an insufficient ground for granting the relief sought under s 423, even as the Court of Appeal in *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] 1 BCLC 813 held that it was an insufficient ground for granting a winding up order.

[42] Under CPR 6.20(10) the court has a residual discretion, even if the serious issue to be tried is established, whether to grant leave. For the reasons given in the foregoing paragraph alone I would decline to exercise this discretion in favour of Carige. I would be confirmed in this view by the consideration that, though the issue of iniquitous intent on the part of BNC is justiciable, and though the

- a* court is not precluded from examining and investigating the serious charge of dishonesty as the motivation for entry into the agreement, it is an invasion into a sensitive area which the court should not lightly undertake; and the character and relationship of the claim to property situate in this country is not such as to give rise to any impelling reason why the court should assume jurisdiction; and the connections of the parties and their dealings with this country and the evidence
- b* relied on by Carige, and the value (other than in terms of public relations) to Carige of any judgment obtained are all too insubstantial to require or justify the court undertaking the exercise.

Conclusion

- c* [43] For the above reasons I discharge the order and directions of the registrar and refuse permission to Carige to serve its proceedings on BCC or BNC abroad.

Order accordingly.

Manjit Gheera Barrister

Ebert v Official Receiver and others

[2001] EWCA Civ 340

COURT OF APPEAL, CIVIL DIVISION

CHADWICK AND BUXTON LJ

20 FEBRUARY, 14 MARCH 2001

Vexatious proceedings – Leave to institute or continue proceedings – Leave to apply to Court of Appeal for permission to appeal – Refusal of leave – Whether High Court judge’s refusal to grant vexatious litigant leave to apply to Court of Appeal for permission to appeal infringing right of access to court under human rights convention – Supreme Court Act 1981, s 42 – Human Rights Act 1998, Sch 1, Pt I, art 6.

The applicant, E, was the subject of a civil proceedings order under s 42^a of the Supreme Court Act 1981, the provision restricting vexatious legal proceedings. He made a substantive application to a judge in the Chancery Division, which was refused. The judge also refused his application for permission to appeal. E then wished to apply to the Court of Appeal for permission to appeal. In order to do so, he required the leave of the judge under s 42(3) of the 1981 Act. By virtue of s 42(4), no appeal could be brought against a refusal by the judge to grant leave for such an application. E contended that, if the judge refused him leave to apply to the Court of Appeal for permission to appeal against the decision on the substantive application, he would have no access to the Court of Appeal because he was a vexatious litigant, and that would be contrary to his human rights. Although the judge thought that there was no ground for him to give permission to appeal, he felt that the Court of Appeal might wish to consider, on an application for permission to appeal, whether it would be contrary to E’s human rights for the judge to shut him out from seeking permission to appeal because he was a vexatious litigant. For that reason, he gave E leave to apply to the Court of Appeal for permission to appeal against his rejection of the substantive application. Although it did not directly arise on E’s application to the Court of Appeal, the court decided that it would be helpful to answer the question raised by the judge, namely whether a refusal by a High Court judge to grant a vexatious litigant leave to apply to the Court of Appeal for permission to appeal would constitute a denial of his right of access to a court under art 6^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act).

Held – A High Court judge was not inhibited in any way by the provisions of the convention or the 1998 Act in his decision as to whether to grant leave under s 42

a Section 42, so far as material, provides: ‘... (3) Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application ...’

(4) No appeal shall lie from a decision of the High Court refusing leave required by virtue of this section ...’

b Article 6, so far as material, provides: ‘1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...’

- a of the 1981 Act, and the restriction on appeal in s 42(4) did not infringe any provision of the convention or the 1998 Act. The detailed and elaborate procedures operated under s 42 respected the important convention values that procedures relating to the assertion of rights should be under judicial rather than administrative control; that an order inhibiting a citizen's freedoms should not be made without detailed inquiry; that the citizen should be able to revisit the issue
- b in the context of new facts and of new complaints that he wished to make; and that each step should be the subject of a separate judicial decision. The procedures also respected proportionality in the general access to public resources, in that they sought to prevent the monopolisation of court services by a few litigants. Since the general system relating to vexatious litigants complied with the requirements of the convention, it was doubtful whether a separate question in fact arose in
- c relation to the restriction on appeals imposed by s 42(4). However, it was trite law that convention jurisprudence did not require a state to provide an appellate procedure, as opposed to access to a court of first instance. Accordingly, judges considering applications for leave under s 42(3) should continue to apply the criteria adopted in the current domestic law, which were not affected by the 1998
- d Act. Where an application was made for leave to apply to the Court of Appeal for permission to appeal, the judge should equally consider that application on its merits. If the judge refused to grant leave there was no appeal to the Court of Appeal against that refusal, and judges should therefore neither grant permission to appeal against that refusal nor grant leave to apply to the Court of Appeal for such permission. Powers to grant leave under s 42 were exclusively those of the
- e High Court. It was therefore not open to a vexatious litigant to make an original application to the Court of Appeal in a case where he had been refused leave by a judge of the High Court, and any such application would not be placed before the Court of Appeal. E's application itself would be refused (see [1], [5], [6], [8], [9], [12], [13], below).
- f *H v UK* (1985) 45 DR 281 applied.

Notes

For the right of access to a court and for vexatious litigants, see respectively 8(2) *Halsbury's Laws* (4th edn reissue) para 141 and 41 *Halsbury's Laws* (4th edn reissue) para 902.

- g For the Supreme Court Act 1981, s 42, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1083.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 523.

h Cases referred to in judgment

A-G v Matthews (14 November 2000, unreported), DC; *aff'd* sub nom *A-G v Covey*, *A-G v Matthews* [2001] EWCA Civ 254, (2001) Times, 2 March 2001.

Ashingdane v UK (1985) 7 EHRR 528, ECt HR.

Belgian Linguistic Case (No 2) (1968) 1 EHRR 252, ECt HR.

- j *Golder v UK* (1975) 1 EHRR 524, ECt HR.

H v UK (1985) 45 DR 281, E Comm HR.

Application for permission to appeal

Gedaljahu Ebert, who was the subject of a civil proceedings order made under s 42 of the Supreme Court Act 1981, applied with leave of Neuberger J for permission to appeal to the Court of Appeal from the judge's decision refusing a

substantive application made by Mr Ebert. The facts are set out in the judgment of the court. a

Mr Ebert appeared in person.

Cur adv vult

14 March 2001. The following judgment of the court was delivered. b

BUXTON LJ.

[1] We heard this application for permission to appeal on 20 February 2001. At the conclusion of the hearing we gave our reasons why the application should be dismissed. We indicated, however, that we took the view that there was a further point which had been raised by the judge below; and which we thought it appropriate that we should address. We said that we would take time to consider the point, and to deliver judgment on it in writing. That we now do. This, therefore, is the judgment of the court on the application for permission to appeal. c

[2] The applicant, Mr Ebert, is the subject of a civil proceedings order under s 42 of the Supreme Court Act 1981. He made a substantive application to Neuberger J which the judge refused, and in respect of which he refused permission to appeal to this court: that was the matter dealt with in the earlier parts of our judgment. Mr Ebert then wished to apply to this court for that permission. In order to do that, however, he required the leave of the judge under s 42(3) of the 1981 Act. The judge was not minded to grant that leave. However, on that point Mr Ebert made a submission to him that related to the position under the Human Rights Act 1998. Of that, the judge said: d

‘Mr Ebert has raised the point that if I refuse him permission to apply to the Court of Appeal for permission to appeal my decision, then he has no access to the Court of Appeal because he is a vexatious litigant. He says that is contrary to his human rights. I strongly suspect that there is nothing in the point at all. Part of the purpose of making somebody a vexatious litigant is to stop the courts being bothered with hopeless applications to the full extent possible consistent with that person’s right of access to the courts. I have not studied the law on this topic, but it seems to me that the correct course for me to take is to permit Mr Ebert to apply to the Court of Appeal for permission to appeal my wholesale rejection of today’s application simply on the basis that, although I think there is no ground for me to give permission to appeal, the Court of Appeal may want to consider, on an application for permission to appeal, whether in fact it is contrary to Mr Ebert’s human rights for me to be able to shut him out from seeking permission to appeal because he is a vexatious litigant.’ e

[3] Like the judge, we were strongly of the opinion that there was nothing in Mr Ebert’s complaint that the judge was precluded, on human rights grounds, from refusing leave under the vexatious litigant provisions to make an application for permission to appeal to this court. The issue does not directly arise in the present appeal, because Mr Ebert was given leave by the judge to apply to this court for permission to appeal. However, as we have already indicated, we thought that we should none the less answer the question raised by the judge as to the position under the vexatious litigant provisions, and that we should take f

a time to reflect on the matter. That is not least because this point is likely to arise unforeseen and in unclear terms, as it did before the judge, and we think that guidance on it may be found helpful. We set out our conclusions in a series of paragraphs. It may assist in reading those paragraphs if we say that we use the word 'leave' to refer to the leave required or granted under s 42 of the 1981 Act, and 'permission' to refer to permissions to appeal to this court.

b [4] Where a vexatious litigant has (with leave) pursued a case or application in the court below, and has been unsuccessful, it is, in the first instance, for the judge to consider any application for permission to appeal. Whilst, strictly speaking, the vexatious litigant needs leave even to make that further application, no doubt that issue will normally be subsumed in consideration of whether permission should be given to appeal; at least in a case where the judge to whom the application for permission is made is a judge of the High Court. If the judge grants permission to appeal, the appeal proceeds in the normal way. If he does not grant permission to appeal, any further application to this court can only be made with leave under s 42(3). It is for the judge of the High Court (whether the trial judge or a different judge) to whom the application for leave to apply to this court for permission to appeal is made to determine it in the normal way.

c [5] If leave is granted, the application for permission proceeds in this court in the normal way. If, however, the application for leave is refused by the judge of the High Court, by s 42(4) of the 1981 Act no appeal can be brought against that decision. The two issues therefore arise. (i) Is the judge of the High Court inhibited in any way by the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) or of the Human Rights Act 1998 in his decision as to whether to grant leave? (ii) Does the restriction on appeal in s 42(4) infringe any provision of the convention or of the 1998 Act; it being appreciated that if it does so, the court would have to take remedial steps under either ss 3(1) or 4 of the 1998 Act?

e [6] The answer to both of these questions turns on the conformity with the convention of the general system for controlling vexatious litigants; and the answer to both of the questions is No.

f [7] The issue turns on the citizen's right of access to the courts, which is guaranteed in general terms by art 6 of the convention. However, in an early and classic case on that subject, *Golder v UK* (1975) 1 EHRR 524, the European Commission of Human Rights observed, in the course of a general survey of the subject, that in the case of the United Kingdom vexatious litigant provisions: 'The control of vexatious litigants is entirely in the hands of the courts ... Such control must be considered an acceptable form of judicial proceedings.'

g [8] The Court of Human Rights did not need to pass on that issue in *Golder's* case, nor has it done so subsequently. The Commission has, however, had to consider an application that specifically challenged the vexatious litigant provisions, in *H v UK* (1985) 45 DR 281. Declaring the application inadmissible, the Commission recalled that the right of access to a court was not absolute, as had been made clear in *Golder's* case and also, for instance, in *Ashingdane v UK* (1985) 7 EHRR 528, and continued (at 285) in relation to the particular complaint:

j 'The vexatious litigant order ... did not limit the applicant's access to court completely, but provided for a review by a senior judge ... of any case the applicant wished to bring. The Commission considers that such a review is not such as to deny the essence of the right of access to court; indeed, some form of regulation of access to court is necessary in the interests of the proper

administration of justice and must therefore be regarded as a legitimate aim ...'

[9] If we may respectfully say so, that conclusion was not surprising. The detailed and elaborate procedures operated under s 42 of the 1981 Act respect the important convention values that procedures relating to the assertion of rights should be under judicial rather than administrative control; that an order inhibiting a citizen's freedoms should not be made without detailed inquiry; that the citizen should be able to revisit the issue in the context of new facts and of new complaints that he wishes to make; and that each step should be the subject of a separate judicial decision. The procedures also respect proportionality in the general access to public resources, in that they seek to prevent the monopolisation of court services by a few litigants; an aim, and the national arrangements to implement it, that the Strasbourg organs, applying the doctrine of the margin of appreciation, are likely to respect.

[10] We are fortified in those general conclusions by the fact that the general procedure under s 42 was reviewed by the Divisional Court in *A-G v Matthews* (14 November 2000, unreported), and was regarded by that court as being in conformity with the requirements of art 6.

[11] We are further fortified in our view that *H v UK* (1985) 45 DR 281 accurately states the convention jurisprudence on the particular issue of vexatious litigants by the case being cited without criticism by institutional writers (see Starmer *European Human Rights Law* (1999) p 355 (para 13.8), and Clayton and Tomlinson *The Law of Human Rights* (2000) vol 1, p 640 (para 11.191)).

[12] Since the general system relating to vexatious litigants complies with the requirements of the convention, we doubt if a separate question in fact arises in relation to the restriction on appeals imposed by s 42(4) of the 1981 Act. However, it is trite law that convention jurisprudence does not require a state to provide an appellate procedure, as opposed to access to a court of first instance (see eg *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 at 283 (para 9)).

[13] Our conclusions therefore are as follows. (i) Judges considering applications for leave under s 42(3) should continue to apply the criteria adopted in the current domestic law, which are not affected by the 1998 Act. (ii) Where an application is made for leave to apply to this court for permission to appeal, the judge should equally consider that application on its merits. If the judge refuses to grant leave there is no appeal to this court against that refusal, and judges should therefore neither grant permission to appeal against that refusal nor grant leave to apply to this court for such permission. (iii) Powers to grant leave under s 42 of the 1981 Act are exclusively those of the High Court. It is therefore not open to a vexatious litigant to make an original application to this court in a case where he has been refused leave by a judge of the High Court, and any such application will not be placed before the court.

Application refused.

Kate O'Hanlon Barrister.

a **Preston and others v Wolverhampton
Healthcare NHS Trust and others
Fletcher and others v Midland Bank plc**
[2001] UKHL 5

b

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD GOFF OF CHIEVELEY, LORD NOLAN, LORD HOPE OF
CRAIGHEAD AND LORD CLYDE

24 JULY 2000, 8 FEBRUARY 2001

c

European Community – Equality of treatment of men and women – Equal pay for equal work – Pension – Occupational pension schemes excluding part-time workers from membership in contravention of Community law – National legislation requiring claims to be brought within six months of termination of employment – Whether legislation compatible with Community law – Principle of effectiveness – Principle of equivalence – Equal Pay Act 1970, s 2(4) – EC Treaty, art 119 (now art 141 EC).

d

Pension – Equality of treatment of men and women – Part-time employees' retrospective claims time-barred and restricted by national legislation – Whether legislation compatible with Community law – Equal Pay Act 1970, s 2(4) – EC Treaty, art 119 (now art 141 EC).

e

The applicants were among a number of female part-time workers who had been excluded from membership of various occupational pension schemes for staff of the respondent employers. They had each been employed regularly, but periodically or intermittently, by the same employer under successive legally separate contracts. The schemes were contracted-out pension schemes which, in the past, had not included part-time workers as members but which had been amended in line with the principle of equal treatment pursuant to art 119^a of the EC Treaty (now art 141 EC), which had direct effect in all member states. The Equal Pay Act 1970, which gave effect to art 119, provided that every contract under which a woman was employed was deemed to include an 'equality clause'. By virtue of s 2(4)^b of the 1970 Act, any claim in respect of an equality clause had to be brought within a period of six months following the end of the employment. However, the applicants commenced proceedings in the industrial tribunal against their employers more than six months after the end of their employment. In those proceedings, they sought retroactive membership of the relevant pension schemes for the periods of part-time employment completed by them before the amendment of the schemes. They contended, inter alia, that the procedural requirements in s 2(4) of the 1970 Act were incompatible with Community law, in that, first, those requirements rendered it excessively difficult or impossible in practice to exercise the rights conferred on them by art 119 of the Treaty (the principle of effectiveness), and, second, the requirements were less favourable than those applicable to similar actions of a domestic nature (the principle of equivalence). The industrial tribunal held that the time limit under

f

g

h

j

a Article 119, so far as material, is set out at [1], below

b Section 2(4), so far as material, is set out at [1], below

s 2(4) was applicable so that the workers' claims were time-barred, a decision which was confirmed by the Employment Appeal Tribunal and the Court of Appeal. On further appeal, the House of Lords stayed the proceedings and referred to the Court of Justice of the European Communities the question, inter alia, whether Community law precluded the application of the procedural rule in s 2(4) to the actions brought under art 119 of the Treaty. The Court of Justice held, inter alia, that the rules of procedure in s 2(4) were compatible with Community law in cases where they were not less favourable than those for similar actions based on domestic law, but that Community law precluded a rule such as s 2(4) where there had been a stable employment relationship. On the return of the proceedings to the House of Lords, their Lordships were required to determine: (i) whether an action for breach of contract was sufficiently similar to a claim for infringement of art 119 to serve as a comparator for the purposes of the principle of equivalence; and (ii) if so, whether or not the rules of procedure in s 2(4) were less favourable than those governing such an action. In contending that they were less favourable, the applicants relied on the discrepancy between the six-month limitation period in s 2(4) and the six-year limitation period for claims in contract.

Held – Although an action for breach of contract might provide a sufficiently similar comparator to a claim under art 119 of the EC Treaty, the procedural rules in s 2(4) of the 1970 Act were not less favourable than those which would apply to a claim for breach of contract in the circumstances of the instant cases. There were factors to be set against the difference in limitation periods. A claim under a contract could only go back six years from the date of the claim, whereas a claim brought within six months of the termination of the employment could go back to the beginning of the employment or to 8 April 1976 (the date of the judgment establishing that art 119 had direct effect), whichever was the later. Moreover, the claimant could wait until the employment was over, thereby avoiding the possibility of friction with the employer if proceedings to protect her position were brought during the period of employment, as would be necessary since the six-year limitation ran from the accrual of a completed cause of action. It was also relevant to have regard to the lower costs involved in the claim before an employment tribunal and, if proceedings finished there, the shorter time scale involved: the period of six months itself was not an unreasonably short period for a claim to be referred to an employment tribunal. Moreover, the informality of the proceedings was a relevant factor. Accordingly, in cases where there was no stable employment relationship, s 2(4) did not violate Community rules as to effectiveness and equivalence. The question as to which of the workers had such a stable employment relationship would be referred back to the employment tribunal. It followed that the appeals would be allowed in part (see [23], [30], [31], [35], [36], below).

Levez v TH Jennings (Harlow Pools) Ltd Case C-326/96 [1999] All ER (EC) 1 applied.

Notes

For Community provisions on equal pay, see 52 *Halsbury's Laws* (4th edn) paras 21.12–21.16.

For the Equal Pay Act 1970, s 2, see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 41.

Cases referred to in opinions

- a** *Bell v Peter Browne & Co* [1990] 3 All ER 124, [1990] 2 QB 495, [1990] 3 WLR 510, CA.
Defrenne v Sabena Case 43/75 [1981] 1 All ER 122, [1976] ECR 455, ECJ.
Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze Case C-231/96 [1998] ECR I-4951.
Fisscher v Voorhuis Hengelo BV Case C-128/93 [1995] All ER (EC) 193, [1994] ECR I-4583, ECJ.
- b** *Levez v TH Jennings (Harlow Pools) Ltd* Case C-326/96 [1999] All ER (EC) 1, [1998] ECR I-7835, ECJ.
Magorrian v Eastern Health and Social Security Services Board Case C-246/96 [1998] All ER (EC) 38, [1997] ECR I-7153, ECJ.
- c** *Matra Communications SAS v Home Office* [1999] 3 All ER 562, [1999] 1 WLR 1646, CA.
Palmisani v Istituto Nazionale della Previdenza Sociale (INPS) Case C-261/95 [1997] ECR I-4025.
Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland Case 33/76 [1976] ECR 1989.
Vroege v NCIV Instituut voor Volkshuisvesting BV Case C-57/93 [1995] All ER (EC) 193, [1994] ECR I-4541, ECJ.

Appeals

- In conjoined proceedings brought by (i) Shirley Anne Elizabeth Preston and 12 others against Wolverhampton Healthcare NHS Trust and 17 others (Secretaries of State, councils and electricity companies) and (ii) Dorothy Mary Isobel Fletcher and eight others against Midland Bank plc (now HSBC Bank plc) (the bank), the applicants appealed with leave of the Appeal Committee of the House of Lords from the decision of the Court of Appeal (Waite, Otton and Schiemann LJ) ([1997] ICR 899) delivered on 13 February 1997 dismissing their appeal from the decision of the Employment Appeal Tribunal ([1996] IRLR 484)
- f** delivered on 24 June 1996 dismissing their appeal against the decision of the Industrial Tribunal at Birmingham delivered on 4 December 1995. The applicants claimed that, as part-time workers, they had been unlawfully excluded from various occupational pension schemes. The industrial tribunal held as a preliminary issue that, pursuant to s 2(4) of the Equal Pay Act 1970, as amended, claims not brought within the period of the applicants' employment, or within six months of its termination, were out of time. By order of 5 February 1998, the House of Lords ([1998] 1 All ER 528, [1998] 1 WLR 280) stayed the proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling under art 177 of the EC Treaty (now art 234 EC) three questions as to whether art 119 of the EC Treaty (now art 141 EC) precluded the application of the procedural
- g** rules in s 2 of the 1970 Act to the actions brought by the applicants under art 119 of the Treaty. The Court of Justice gave its answers in a judgment delivered on 16 May 2000 ([2000] All ER (EC) 714, [2001] 2 WLR 408). The facts are set out in the opinion of Lord Slynn of Hadley.
- h**
- j** *David Pannick QC and John Cavanagh* (instructed by Reynolds Porter Chamberlain) for Mrs Preston and others.
David Pannick QC and Jane McNeill (instructed by Lawford & Co) for Mrs Fletcher and others.
Nicholas Paines QC and Raymond Hill (instructed by the Treasury Solicitor) for the Secretaries of State.
Cherie Booth QC and Clive Lewis (instructed by Sharpe Pritchard) for the councils.

Christopher Jeans QC and Jason Coppel (instructed by Eversheds) for the electricity companies. a

Christopher Jeans QC and Jason Coppel (instructed by Stephenson Harwood) for the bank.

Their Lordships took time for consideration. b

8 February 2001. The following opinions were delivered.

LORD SLYNN OF HADLEY.

[1] My Lords, these appeals are brought by part-time workers to challenge the compatibility in relation to their employment of s 2(4) and (5) of the Equal Pay Act 1970 (as amended by s 8(6) of and Sch 1, Pt I, para 6(1) to the Sex Discrimination Act 1975), s 2(5) being read with effect from 6 April 1978 with reg 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, SI 1976/142. c

Those provisions are as follows.

Section 2: d

‘(4) No claim in respect of the operation of an equality clause relating to a woman’s employment shall be referred to an industrial tribunal ... if she has not been employed in the employment within the six months preceding the date of the reference.

(5) A woman shall not be entitled, in proceedings brought in respect of a failure to comply with an equality clause (including proceedings before an industrial tribunal), to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings were instituted.’ e

Regulation 12: f

‘(1) The Equal Pay Act shall be so modified as to provide that where a court or an industrial tribunal finds that there has been a breach of a term in a contract of employment which has been included in the contract, or modified, by virtue of an equality clause and which relates to membership of a scheme, or where it makes an order declaring the right of an employee to admission to membership of a scheme in pursuance of the equal access requirements, it may declare that the employee has a right to be admitted to the scheme in question with effect from such date (“the deemed entry date”) as it may specify, not being earlier than whichever is the later of the following dates, namely—(a) 6 April 1978; and (b) the date two years before the institution of the proceedings in which the order was made.’ g
h

Article 119 of the EC Treaty (arts 117 to 120 of the EC Treaty have been replaced by arts 136 EC to 143 EC) (OJ 1992 C224 p 6) provides:

‘Each Member State shall ... maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment, from his employer.’ j

a [2] The facts of the cases are set out in my speech on 5 February 1998 ([1998] 1 All ER 528 at 530 ff, [1998] 1 WLR 280 at 283 ff) to which I refer. Your Lordships asked a number of questions of the Court of Justice of the European Communities pursuant to art 177 of the EC Treaty (now art 234 EC), to which that court replied in its judgment delivered on 16 May 2000 ((Case C-78/98) [2000] All ER (EC) 714, [2001] 2 WLR 408).

b [3] The Court of Justice in that judgment ([2000] All ER (EC) 714 at 747–748, [2001] 2 WLR 408 at 441 (para 31)) referred to its decision in *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989 at 1997 (para 5) that—

c ‘in the absence of Community rules on this subject, it is for the domestic legal system of each member state ... to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law’.

d [4] However, where reliance is placed on the performance of domestic procedural conditions those conditions must not be such as to make the enforcement of Community law rights impossible in practice and they must not be less favourable than those applying to a similar claim of a domestic nature.

[5] It is in the light of the court’s judgment in the present case that the issues on the appeal must now be decided.

EFFECTIVENESS—SECTION 2(4)

e [6] The first question posed asked, in part (a), whether the requirement of s 2(4) that a claim could only be referred to an industrial tribunal if a woman had been employed in the employment within the six months preceding the date of reference meant that it was excessively difficult or impossible in practice for rights under art 119 to be exercised. The court said that it was settled case law that f the fixing of reasonable limitation periods for bringing proceedings satisfied the Community law principle of effectiveness in that it constituted an application of the fundamental principle of legal certainty.

[7] Accordingly, the court ruled ([2000] All ER (EC) 714 at 748, [2001] 2 WLR 408 at 442 (para 34)) that a limitation period of six months—

g ‘cannot be regarded as constituting an obstacle to obtaining the payment of sums to which, albeit not yet payable, the claimants are entitled under art 119 of the Treaty. Such a limitation period does not render impossible or excessively difficult the exercise of rights conferred by the Community legal order and is not therefore liable to strike at the very essence of those rights.’

h [8] This, however, is subject to the proviso that such limitation period is not less favourable for actions based on Community law than for those based on domestic law.

[9] The applicants’ argument on this point must therefore be rejected.

j EFFECTIVENESS—SECTION 2(5)

[10] The first question in part (b) asks whether the rule that pensionable service is to be calculated only by reference to service after a date falling no earlier than two years prior to the date of her claim meant that it was excessively difficult or impossible in practice for the claimant to exercise her rights under art 119. The Court of Justice stressed two preliminary points. The first is that the object of such a claim as that in the present case is—

'not to obtain, with retroactive effect, arrears of benefits under the occupational pension scheme but is to secure recognition of the right to retroactive membership of that scheme for the purpose of evaluating the benefits to be paid in the future.' (See [2000] All ER (EC) 714 at 748, [2001] 2 WLR 408 at 442 (para 37).)

In the second place, a claimant could not claim more favourable treatment if she succeeded than she would have had if she had been duly accepted as a member (see [2000] All ER (EC) 714 at 749, [2001] 2 WLR 408 at 442 (para 38)). This meant that in order to claim retroactively to join an occupational pension scheme, contributions relating to the period of membership concerned would have to be paid (see [2000] All ER (EC) 714 at 749, [2001] 2 WLR 408 at 442 (para 39)).

[11] The court then referred (see [2000] All ER (EC) 714 at 749, [2001] 2 WLR 408 at 442 (para 40)) to its own decision in *Magorrian v Eastern Health and Social Security Services Board* Case C-246/96 [1998] All ER (EC) 38 at 59, [1997] ECR I-7153 at 7187 (para 41) in which it had been held that a rule similar to the rule in the present case, that the right to be admitted to a scheme may have effect from a date no earlier than two years before the bringing of proceedings—

'would deprive the [persons concerned] of the additional benefits under the scheme to which they are entitled to be affiliated, since those benefits could be calculated only by reference to [a starting date falling] two years prior to commencement of proceedings by them.'

Such a rule struck at the very essence of the rights conferred by the Community legal order and rendered any action by individuals relying on Community law impossible in practice (see [2000] All ER (EC) 714 at 749, [2001] 2 WLR 408 at 442–443 (para 41)). Such a rule as that in s 2(5) of the 1970 Act was therefore incompatible with Community law as was a procedural rule like reg 12 of the 1976 regulations which prevented the entire record of service completed by those concerned before the two years preceding the date on which they commenced proceedings from being taken into account for the purpose of calculating the benefits which would be payable even after the date of the claim (see [2000] All ER (EC) 714 at 749, [2001] 2 WLR 408 at 443 (paras 42 and 43)).

[12] Accordingly, the rules in s 2(5) of the 1970 Act and in reg 12 of the 1976 regulations are precluded by Community law. The respondents cannot therefore rely on that section or that regulation to defeat a claim for periods prior to the two years to be taken into account, subject to the employee paying contributions owing in respect of the period for which membership is claimed retroactively. Future pension benefits have therefore to be calculated by reference to full and part-time periods of service subsequent to 8 April 1976, the date of the court's judgment in *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ECR 455 (when the court held that art 119 of the EC Treaty had direct effect) (see *Vroege v NCIV Instituut voor Volkshuisvesting BV* Case C-57/93 [1995] All ER (EC) 193, [1994] ECR I-4541 and *Fisscher v Voorhuis Hengelo BV* Case C-128/93 [1995] All ER (EC) 193, [1994] ECR I-4583).

EQUIVALENCE—SECTION 2(4)

[13] Having decided that s 2(4) of the 1970 Act did not render the claim impossible in practice, there remained the question whether the limitation was less favourable than for similar actions based on domestic law. In the first place it has to be asked whether there is a similar action to take as the comparator. On

- a the basis of its judgment in *Levez v TH Jennings (Harlow Pools) Ltd* Case C-326/96 [1999] All ER (EC) 1, [1998] ECR I-7835, the court ruled (see [2000] All ER (EC) 714 at 750, [2001] 2 WLR 408 at 444 (para 51)) that since the 1970 Act was adopted to give effect to the Community principle of non-discrimination on grounds of sex in relation to pay pursuant to art 119 and Council Directive (EEC) 75/117 (on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women) (OJ 1975 L45 p 19) it was not appropriate to compare the procedural rules for the two claims. Accordingly, an action alleging a breach of the 1970 Act was not a domestic action 'similar' to a claim for infringement of art 119.

Similarity

- c [14] Whether a domestic law action is similar to a claim for infringement of art 119 depends on whether the purpose, the cause of action and the essential characteristics of the two proceedings are similar (see the Court of Justice's judgment in the present case [2000] All ER (EC) 714 at 750–751, [2001] 2 WLR 408 at 444 (paras 55–57)).

- d [15] The first question is thus whether the purpose, essential characteristics and cause of action in proceedings identified by the applicants as being similar are in fact similar to a claim for the infringement of art 119.

- e [16] The applicants originally relied on claims under the 1975 Act and the Race Relations Act 1976 but they no longer pursue those contentions. They do, however, say that claims for breach of contract are similar to claims for infringement of art 119 as limited by s 2(4) of the 1970 Act, since the breach of contract alleged is in respect of a failure by the employer to conform with the deemed equality clause introduced into the contract by s 1 of the 1970 Act. It is said that Advocate General Léger, in his opinion in the present case, contemplated an appropriate comparison being one with a domestic action by a part-time worker who complained that he had been unlawfully excluded from an occupational scheme when the employer knew or ought to have known that such exclusion was unlawful (see [2000] All ER (EC) 714 at 735–736, [2001] 2 WLR 408 at 427–428 (paras 92–101 of the opinion)).

- g [17] The respondents say that the domestic law claim to be similar must 'in juristic structure [be] very close to the Community claim' (*Matra Communications SAS v Home Office* [1999] 3 All ER 562 at 572, [1999] 1 WLR 1646 at 1658, per Buxton LJ). The claim in Community law is essentially to establish the right of retroactive access to the pension scheme as the Court of Justice has stressed. A claim in contract could only be for damages for failure to give effect to the bargain agreed between the parties by the employer failing to pay into the pension scheme and thereby not paying the appropriate pension when it eventually fell due. A claim in contract is essentially different from a claim to a statutory right or a claim under art 119 which is for the enforcement of a fundamental right which overrides any bargain which the parties might have agreed. The fact that reg 11 of the 1976 regulations excludes the right to damages and that reg 12 gives a right of retrospective access to the scheme only serves to emphasise the lack of similarity.

- j [18] It is clear that there may be no similar action for the purposes of this inquiry (see *Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* Case C-261/95 [1997] ECR I-4025 at 4049 (para 39) and *Levez's case* [1999] All ER (EC) 1 at 23–24, [1998] ECR I-7835 at 7872 (para 50)). The court is not therefore driven to find the nearest comparison but to decide whether there really is a similar action to that to enforce rights under the statute and under art 119.

[19] Some distinctions between what, on the surface, were arguably similar claims have been accepted by the Court of Justice as precluding the application of the principle of equivalence. Thus in *Palmisani's* case [1997] ECR I-4025 at 4048 (para 34) the court said:

'... the measures implementing [Council Directive (EEC) 80/987 (on the approximation of the laws of the member states relating to the protection of employees in the event of the insolvency of their employer) (OJ 1980 L283 p 23)] contained in the [Italian] Legislative Decree [No 80] pursue an objective that differs from that of the compensation scheme established by that decree. While the former aim to provide employees, by means of specific guarantees of payment of unpaid remuneration, with protection under Community law in the event of the insolvency of their employer, the latter seeks, by definition, to make good to a sufficient extent the loss or damage sustained by the beneficiaries of the Directive as a result of its belated transposition.'

[20] Again in *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* Case C-231/96 [1998] ECR I-4951 the court was asked to consider whether Community law permitted actions for the reimbursement of charges paid in breach of a Community law directive (Council Directive (EEC) 69/335 (concerning indirect taxes on the raising of capital) (OJ Sp Edn 1969 (II) p 412)) to be subject to a time limit of three years, a period which differed from the limitation period (ten years) which Italian national law laid down for actions for the recovery of sums paid between individuals when they were not due. The court, having set out the established principles of national procedural autonomy, subject to observance of the principles of effectiveness and equivalence, went on to hold ([1998] ECR I-4951 at 4991 (para 36)) that the principle of equivalence does not oblige 'a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law', and ([1998] ECR I-4951 at 4991 (para 37)):

'Thus, Community law does not preclude the legislation of a Member State from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.'

[21] I accept that there is force in the respondents' arguments and that one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law, nor is it enough to say of every claim under art 119 that somehow or other a claim could be framed in contract. I have, however, come to the conclusion that these arguments should not prevail.

[22] The essential matter here is that moneys have not been paid to the trustees of a pension fund to purchase pension rights on eventual retirement or on reaching the prescribed age. A successful claim under art 119 obtains, retroactively, full access to the scheme so that the necessary contributions to obtain the appropriate pension rights for that individual have to be paid. A claim in contract would be for damages for the failure to pay those sums to the trustees leading to

a a total or, in some cases, a partial loss of the pension rights. In form they are plainly different but in substance the eventual benefit to the employee is sufficiently similar for present purposes. To adopt the words of the Court of Justice (see [2000] All ER (EC) 714 at 751, [2001] 2 WLR 408 at 445 (para 57 of the judgment)) the 'right of action available under domestic law is a domestic action similar to proceedings to give effect to rights conferred by article 119 of the Treaty'.

b This is so whether the contractual term is express, implied or imposed by statute. [23] Accordingly, resisting the temptation to say simply that a claim under art 119 and under the 1970 Act is *sui generis*, I would uphold Mr Pannick QC's submission that a claim in contract may provide a sufficiently similar comparison.

Less favourable rules

c [24] That, however, leaves the question whether the rules of procedure for claims under art 119 are no less favourable than those governing domestic actions in contract so as to satisfy the principle of equivalence.

[25] In deciding that question—

d 'the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts' (*Levez's case* [1999] All ER (EC) 1 at 23, [1998] ECR I-7835 at 7870–7871 (para 44): see [2000] All ER (EC) 714 at 751, [2001] 2 WLR 408 at 445 (para 57)).

e The court further ruled ([2000] All ER (EC) 714 at 751, [2001] 2 WLR 408 at 445 (paras 62 and 63)):

f '62. It follows that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context. Moreover, such an examination may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue.

g 63. In view of the foregoing, the answer to the third part of the second question must be that, in order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules.'

[26] The applicants contend that the six-year limitation period for bringing a claim for breach of contract provided for by s 5 of the Limitation Act 1980 is plainly more favourable than the six months from the date of termination of employment under s 2(4) of the 1970 Act. Under s 5 of the 1980 Act the time does not run until the cause of action has accrued, and where there is (as there is here) a continuing obligation to provide equal access to the rights under the pension scheme, then time does not run until the last time when the employers could have admitted the applicants to the scheme—ie the last date of employment. This is a much longer period and therefore more favourable than the six-month limitation from the end of employment provided for in s 2(4) of the 1970 Act.

j [27] I do not accept that the limitation period in contract only begins to run from the date of the termination of employment. In *Bell v Peter Browne & Co* [1990] 3 All ER 124 at 127, [1990] 2 QB 495 at 501 Nicholls LJ distinguished cases where—

'a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach.'

[28] In the present case, it seems to me that there was an obligation to admit the employee to the scheme and to provide payments for the employee's future pension periodically during the period of employment. That obligation may have been on a daily or weekly or other periodic basis but each time there was an obligation to admit to the scheme and to make the necessary payments to the trustees and the obligation was breached a complete cause of action arose since the damage existed at once. The next time the obligation was breached a separate cause of action occurred in respect of that second breach. The time limit of six years runs from each complete cause of action. Accordingly, I do not accept that the comparison is between six years from the date of termination of employment for all failures to carry out the equality clause obligations by giving access to the scheme and six months from the date of termination of employment under s 2(4). Once six years had run in respect of each specific breach claims in respect of that breach were statute-barred.

[29] There is still a six-year period for contract claims rather than a six-month claim for infringement of art 119. This, however, is not the end of the inquiry. Merely to look at the limitation periods is not sufficient. It is necessary to have regard 'to the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts' ([2000] All ER (EC) 714 at 751, [2001] 2 WLR 408 at 445 (para 61)).

In *Levez's* case ([1999] All ER (EC) 1 at 24, [1998] ECR I-7835 at 7872 (para 51)) the Court of Justice said:

'On that point, it is appropriate to consider whether, in order fully to assert rights conferred by Community law before the County Court, an employee in circumstances such as those of [the applicant] will incur additional costs and delay by comparison with a claimant who, because he is relying on what may be regarded as a similar right under domestic law, may bring an action before the Industrial Tribunal, which is simpler and, in principle, less costly.'

[30] There are, thus, factors to be set against the difference in limitation periods. As has already been seen the claim under a contract can only go back six years from the date of the claim, whereas a claim brought within six months of the termination of employment can go back to the beginning of employment or 8 April 1976 (the date of the judgment in *Defrenne's* case), whichever is the later. Moreover, the claimant can wait until the employment is over, thus avoiding the possibility of friction with the employer if proceedings to protect her position are brought during the period of employment, as will be necessary since the six-year limitation runs from the accrual of a completed cause of action. It is in my view also relevant to have regard to the lower costs involved in the claim before an employment tribunal and, if proceedings finish there, the shorter time scale involved. The period of six months itself is not an unreasonably short period for a claim to

a be referred to an employment tribunal. The informality of the proceedings is also a relevant factor.

[31] I am not satisfied that in these cases it can be said that the rules of procedure for a claim under s 2(4) are less favourable than those applying to a claim in contract. I therefore hold that s 2(4) does not breach the principle of equivalence.

b *A stable employment relationship*

c [32] The employees concerned in these appeals were variously employed, some under consecutive, but separate, contracts of service with breaks in between (eg teachers on a termly or academic year contract); some were regularly employed over a long period on this basis, others were not regularly employed but were employed from time to time and in that category some had what has been called an 'umbrella' contract. Where there is an 'umbrella' contract there is an ongoing contractual relationship but in the other cases there are separate contracts of employment. The Employment Appeal Tribunal ([1996] IRLR 484) and the Court of Appeal ([1997] ICR 899) held that s 2(4) was dealing with specific contracts so that as a matter of interpretation a claim could only be brought in respect of employment in existence within the six months preceding the reference of the claim to the industrial tribunal. Your Lordships ([1998] 1 All ER 527, [1998] 1 WLR 280) agreed with that interpretation but the question inevitably arose as to whether or not such interpretation meant that s 2(4) was incompatible with art 119. The Court of Justice, whilst accepting that time limits could be imposed in the interests of legal certainty, considered:

e '68. Whilst it is true that legal certainty also requires that it be possible to fix precisely the starting point of a limitation period, the fact nevertheless remains that, in the case of successive short-term contracts of the kind referred to in the third question, setting the starting point of the limitation period at the end of each contract renders the exercise of the right conferred by article 119 of the Treaty excessively difficult.

f 69. Where, however, there is a stable relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies, it is possible to fix a precise starting point for the limitation period.

g 70. There is no reason why that starting point should not be fixed as the date on which the sequence of such contracts has been interrupted through the absence of one or more of the features that characterise a stable employment relationship of that kind, either because the periodicity of such contracts has been broken or because the new contract does not relate to the same employment as that to which the same pension scheme applies.' (See [2000] All ER (EC) 714 at 752, [2001] 2 WLR 408 at 446 (paras 68–70).)

h [33] Accordingly, it is clear that where there are intermittent contracts of service without a stable employment relationship, the period of six months runs from the end of each contract of service, but where such contracts are concluded at regular intervals in respect of the same employment regularly in a stable employment relationship, the period runs from the end of the last contract forming part of that relationship.

j [34] Unless, as is to be hoped and indeed expected, agreement can be reached as to which of the applicants had such a stable environment relationship, the question must be referred back to the employment tribunal.

[35] I would, accordingly, allow the appeal to the extent: (a) of declaring that the respondents cannot rely on the two-year rule in s 2(5) of the 1970 Act to

prevent the applicants from retroactively gaining membership of the pension scheme in the period of employment back to 8 April 1976 or to the date of commencement of employment, whichever is the later, or from receiving pension benefits from such schemes which would otherwise have been due to be paid in the period after the application to the tribunal, calculated so as to take into account their service since 8 April 1976, so long as relevant pension contributions are paid by the applicants; (b) of declaring that the respondents cannot rely on the six months' limitation in s 2(4) of the 1970 Act as amended, so as to require a claim for membership of an occupational pension scheme to be brought within six months of the end of each contract of employment to which the claim relates where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies. I would refer the question as to which of the appellants can satisfy that condition back to the employment tribunal.

[36] I would declare that the provision in s 2(4) in the cases where there is no stable relationship does not violate Community rules as to effectiveness and equivalence.

LORD GOFF OF CHIEVELEY.

[37] My Lords, I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend Lord Clyde. I agree with it, and on the basis there set out I concur in the order proposed by my noble and learned friend Lord Slynn of Hadley.

LORD NOLAN.

[38] My Lords, I have had the opportunity of reading in draft the speech prepared by noble and learned friend Lord Clyde. I agree with it, and on the basis there set out, I concur in the order proposed by my noble and learned friend Lord Slynn of Hadley.

LORD HOPE OF CRAIGHEAD.

[39] My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Slynn of Hadley. I agree with it, and for the reasons which he has given I would allow the appeal to the extent that he has indicated and make the same order as he has proposed.

LORD CLYDE.

[40] My Lords, following on the reference made by this House, the Court of Justice of the European Communities has advised that the limitation period of six months laid down in s 2(4) of the Equal Pay Act 1970, as amended, is not contrary to Community law provided that 'that limitation period is not less favourable for actions based on Community law than for those based on domestic law' ([2000] All ER (EC) 714 at 748, [2001] 2 WLR 408 at 442 (para 35)). This question now has to be resolved. It involves an application of the so-called principle of equivalence. The initial problem which has arisen is whether there is any action based on domestic law which will serve as a comparison, and if so, what it is.

[41] It is said of the comparable action, if it exists, that it is to be 'similar' to the action based on Community law. Obviously that does not mean that it is to be identical. But the requirement of similarity or comparability is an inexact one and it is not immediately easy to identify the candidate for comparison, if it exists. The House sought guidance from the Court of Justice on this issue. This formed

a the second question put to the court. In its judgment the court has replied ([2000] All ER (EC) 714 at 750, [2001] 2 WLR 408 at 443–444 (para 49)):

b 'In order to verify whether the principle of equivalence has been complied with in the present case, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to verify whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of the allegedly similar domestic actions (see *Levez v TH Jennings (Harlow Pools) Ltd* Case C-326/96 [1999] All ER (EC) 1 [at 22, 23, [1998] ECR I-7835 at 7870] (paras 39 and 43)).'

c [42] The court, having answered the first part of the second question by holding that an action alleging infringement of a statute such as the 1970 Act, which was the means used by the United Kingdom of discharging its obligations under art 119 of the EC Treaty (arts 117 to 120 of the EC Treaty have been replaced by arts 136 EC to 143 EC), answered the second part of the second question, which
d sought guidance on the criteria for identifying a 'similar' action in domestic law, in these terms ([2000] All ER (EC) 714 at 751, [2001] 2 WLR 408 at 444 (para 57)):

e 'In view of the foregoing, the answer to the second part of the second question must be that, in order to determine whether a right of action available under domestic law is a domestic action similar to proceedings to give effect to rights conferred by art 119 of the Treaty, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics.'

f [43] The sole candidate which the applicants have put forward as a comparator is an action for breach of contract. The respondents have replied that the action based on Community law is *sui generis* and that there is no comparable action. If one applies the criteria laid down by the court there seems to me to be considerable force in that submission. The claim under Community law was regarded by the Advocate General [Léger] as 'concerned not with arrears of pay or other remuneration but with retroactive membership for the claimants of an occupational pension scheme' ([2000] All ER (EC) 714 at 735, [2001] 2 WLR 408 at 428 (para 95 of the opinion)). If one then looks to the considerations of purpose and cause of action, or the essential characteristics, being the criteria specified by the Court of Justice, it seems to me that the action under Community law is in essence requiring a provision to be added to the terms of the claimants' contracts of
h employment which ought to be there in order to comply with the law. The purpose of such an action is the establishment of a right which should, in accordance with European law, be recognised in the United Kingdom and should be among the terms of the contracts of employment. On the other hand, if the criteria are applied to the suggested action under domestic law, it seems to me that that
j action would in essence be one which proceeded upon a breach of contract, on the basis that the employer had failed to observe an obligation in the contract which gave the right to membership of the pension scheme to the employee in question, and the purpose of the action, being one for breach of contract, would presumably be to obtain an award of damages. I have considerable difficulty in seeing that as between these two actions one would be comparing like with like. If there is no comparator, that is an end of the case.

[44] But it may be that this is to apply too strict or precise a standard for the comparison. Certainly the Advocate General was able to conceive that a comparator might exist. He stated ([2000] All ER (EC) 714 at 736, [2001] 2 WLR 408 at 428 (para 101)):

‘... I consider that, in order to ensure compliance with the principle of equivalence, the House of Lords might regard as “similar” to the claims in the main proceedings, an action under domestic law by a part-time worker who, for reasons unconnected with discrimination on grounds of sex or race, has been unlawfully excluded from membership of an occupational pension scheme, even though his employer knew or ought reasonably to have known that such exclusion was illegal.’

If one adopts a broad view of the exercise of comparison I can see that an action for breach of contract might well be accepted as an appropriate comparator. To use the language of my noble and learned friend, Lord Slynn of Hadley (see para [23], above), whose speech I have had the advantage of reading in draft, the suggested action for breach of contract ‘may provide a sufficiently similar comparison’.

[45] But even if by that standard the principle of equivalence can be satisfied I do not consider that the applicants should succeed. On the basis of the wider approach to the problem of comparison which my noble and learned friend, Lord Slynn of Hadley, has adopted I am in full agreement with him that the rules of procedure for a claim under s 2(4) of the 1970 Act are not less favourable than those which would apply to a claim for breach of contract in the circumstances of the present cases. I would, accordingly, agree with the conclusion which he has reached and with the form of order which he proposes.

Appeals allowed in part.

Kate O’Hanlon Barrister.

a

Re Norris

[2001] UKHL 34

HOUSE OF LORDS

b

LORD HOPE OF CRAIGHEAD, LORD BROWNE-WILKINSON, LORD CLYDE, LORD HUTTON
AND LORD HOBHOUSE OF WOODBOROUGH

5 APRIL, 28 JUNE 2001

c

Drugs – Drug trafficking – Confiscation order – Satisfaction of order – Third party rights – Appellant’s husband being convicted of drug trafficking – Prosecution alleging in Crown Court confiscation order proceedings that husband was true owner of property registered in wife’s name – Crown Court judge rejecting wife’s evidence that she was owner and concluding that husband was true owner – Wife reasserting claim to ownership in High Court proceedings to enforce confiscation order – Whether wife’s claim abuse of process – Drug Trafficking Offences Act 1986, s 11.

d

The appellant, Mrs N, bought a property in which she lived with her three sons. She was registered as having the unencumbered title to the property. Subsequently, criminal proceedings for drug trafficking were instituted against her husband, Mr N, and he was convicted. Under the provisions of the Drug Trafficking Offences Act 1986, the Crown Court was required, before passing sentence on Mr N, to determine whether he had benefited from drug trafficking and, if so, to assess the value of the proceeds of the drug trafficking, determine the amount to be recovered from him and make a confiscation order requiring him to pay that amount. In determining the amount to be recovered, the court had to determine the amount that might be realised at the time when the confiscation

e

order was made. That in turn required the court to determine the value of Mr N’s realisable property. None of the provisions of the 1986 Act dealing with the making of the confiscation order (ss 1 to 4) made any reference to any right of a third party to intervene or be heard in the Crown Court proceedings. At a Crown Court hearing in 1996, Customs and Excise claimed that Mr N had the sole beneficial interest in the property. Mr N called his wife to give evidence in

g

rebuttal. The judge held that he was entitled to make certain presumptions against Mr N and that the burden of proof was on him. He then proceeded to reject Mrs N’s evidence that she owned the house, concluding instead that her husband had provided the finance for its purchase. The judge thereupon made a confiscation order in the sum of £386,397 against Mr N. Of that sum, £300,000

h

was assessed to be the amount which could be realised by the sale of the property. In 1999 Customs and Excise made an ex parte application to a High Court judge under s 11^a of the 1986 Act—one of the provisions dealing with the enforcement of confiscation orders—for the appointment of a receiver and other orders. By virtue of s 11(8), the court could not, in respect of any property, exercise various

j

powers conferred by that section unless a reasonable opportunity had been given for persons holding an interest in the property to make representations to the court. The judge made the orders sought, including a declaration that Mr N held the beneficial interest in the property. The order also required any person having possession of Mr N’s assets forthwith to deliver up the same. Mrs N subsequently

a Section 11, so far as material, is set out at [16], below

applied for the order to be varied so as to recognise her title or interest in the property. Customs and Excise contended that the matter had been concluded by the order of the Crown Court judge, and that accordingly Mrs N's application was an abuse of process. The judge upheld that objection and dismissed Mrs N's application without considering its merits. On appeal, the Court of Appeal held that Mrs N's interests in the Crown Court proceedings had been identical to those of her husband; that they had been adequately represented by her husband's counsel; that she had had a fair opportunity to put her case to the Crown Court; that it was therefore unimportant that she had not formally been a party to the criminal proceedings; that she was seeking to re-litigate issues which had been decided by Crown Court on the same or substantially the same evidence and submissions; and that in those circumstances her application to the High Court had been an abuse of process. Accordingly, the appeal was dismissed, and Mrs N appealed to the House of Lords. a
b
c

Held – Where, in High Court proceedings for the enforcement of a confiscation order under s 11 of the 1986 Act, a third party claimed an interest in a property which formed the subject matter of the enforcement proceedings, such a claim would not be rendered an abuse of process merely because, in the Crown Court proceedings for the imposition of the order, the judge had rejected the third party's evidence that she was the owner and had held instead that the property was beneficially owned by the defendant. Such a conclusion gave effect to the division of responsibility and function between the Crown Court exercising the criminal jurisdiction and the High Court exercising the civil jurisdiction. The criminal jurisdiction was concerned only with what order to make under ss 1 to 4 of the 1986 Act, and the procedure of the criminal court was solely concerned with the parties before it—the prosecution and the defendant. The English system of criminal justice did not itself confer any civil jurisdiction upon the criminal courts and it took a clear and express provision in a statute to achieve that result. The 1986 Act did not contain any such provision, and indeed its clear intention was to preserve the distinction between the respective jurisdictions. It was part of the structure of the Act that questions might have to be determined as to the respective interests of different persons in the same property. Although the extent of the defendant's interest was relevant to the Crown Court's assessment of the value of his realisable property, the question of what other persons, if any, had an interest and what was the extent of their interests had to be decided by the High Court in the exercise of its jurisdiction. Thus the issues to be determined in the Crown Court and in the High Court were related, but not the same. It followed that, in the instant case, Mrs N was not misusing the procedure of the High Court. Rather, she was making the proper use of the civil jurisdiction of the High Court to protect her proprietary rights. The time and place for Mrs N to assert her civil law rights over the property was when Customs and Excise attempted in the High Court to deprive her of her interest. It was at that stage that she became directly affected and had the right to invoke the remedies of the court in the defence of her civil law rights. In the criminal court she was a mere witness with no right of representation, no control of the proceedings and no right of appeal. Nor had her interests been identical with those of her husband. It had been in his interests to put forward the interest of his wife because he could use it to get a reduction in the confiscation order that was going to be made against him. She wished to preserve for herself and her children her right to live at the property, against her husband if necessary and d
e
f
g
h
j

- a against anyone claiming through him. The proceedings in the Crown Court had been for the benefit of Mr N and the Customs and Excise, not Mrs N. Furthermore, in the civil proceedings the starting point was that Mrs N was the registered freehold owner of the property and in occupation of it. Her apparent title had to be displaced by evidence. No presumptions were to be made against her, and the burden of proof was upon Customs and Excise. It followed that
- b Mrs N should be allowed to proceed with her defence to the claim which Customs and Excise were making against her, and accordingly the appeal would be allowed (see [1]–[9], [17], [23]–[26], [28], below).

Hunter v Chief Constable of the West Midlands Police [1981] 3 All ER 727 and *Ashmore v British Coal Corp* [1990] 2 All ER 981 distinguished.

c **Notes**

For the rights of third parties in High Court proceedings for the enforcement of a confiscation order, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1320.

Sections 1–4 and 11 of the Drug Trafficking Offences Act 1986 have been repealed by the Drug Trafficking Act 1994, s 67(1), Sch 3.

d

Cases referred to in opinions

Ashmore v British Coal Corp [1990] 2 All ER 981, [1990] 2 QB 338, [1990] 2 WLR 1437, CA.

Gokal v Serious Fraud Office [2001] EWCA Civ 368.

- e *Hunter v Chief Constable of West Midlands Police* [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.

K, Re (3 July 1995, unreported).

McIntosh v Lord Advocate [2001] UKPC D1, [2001] 2 All ER 638, [2001] 3 WLR 107.

R v Calcutt (1985) 7 Cr App Rep (S) 385, CA.

- f *R v Ferguson* [1970] 2 All ER 820, [1970] 1 WLR 1246, CA.

R v Robson (1990) 92 Cr App Rep 1, CA.

United States Government v Montgomery [2001] UKHL 3, [2001] 1 All ER 815, [2001] 1 WLR 196.

Appeal

- g Wendy Teresa Norris, the registered freehold proprietor of a property known as 7 Berryfield Close, Chislehurst Road, Bickley, Kent (the property), appealed with permission of the Appeal Committee of the House of Lords given on 25 October 2000 from the order of the Court of Appeal (Stuart-Smith, Schiemann and Tuckey LJ) on 27 January 2000 ([2000] 1 WLR 1094) dismissing her appeal from the order of
- h Latham J on 31 March 1999 dismissing her application for the variation of an order made by the judge on 4 February 1999 whereby, on an ex parte application by the respondent, HM Customs and Excise, under s 11 of the Drug Trafficking Offences Act 1986, he declared that Mrs Norris' husband, a convicted drug trafficker who was the subject of a confiscation order under the 1986 Act, held the beneficial interest in the property. The facts are set out in the opinion of
- j Lord Hobhouse of Woodborough.

Andrew Nicol QC and *Simon Cheetham* (instructed by *Saunders & Co*) for Mrs Norris.

Andrew Mitchell QC and *Kennedy Talbot* (instructed by the *Solicitor for the Customs and Excise*) for Customs and Excise.

Their Lordships took time for consideration.

28 June 2001. The following opinions were delivered.

LORD HOPE OF CRAIGHEAD.

[1] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree with it, and for the reasons he gives I would allow the appeal.

[2] The Court of Appeal held that Mrs Norris had a fair opportunity to put her case in the Crown Court where she and her husband were making common cause and she gave evidence (see [2000] 1 WLR 1094). It was on that basis that Tuckey LJ (at 1101) said that it would be an abuse of process for her to relitigate the same issues in the High Court. But, as my noble and learned friend has explained, the proceedings in the Crown Court and those in the High Court are designed to serve different purposes and the interests of Mrs Norris and her husband in the matrimonial home are not the same. Mrs Norris was not a party to the proceedings in the Crown Court, nor did the procedure which the statute lays down require her case that she had a beneficial interest in the property to be put at that stage.

[3] At the stage when the proceedings were in the Crown Court the only question which had to be resolved was the value of the husband's interest in the house. The question for that court was the amount of the defendant's realisable property, as this was the upper limit on the amount of money which he could be ordered to pay under s 1(5) of the Drug Trafficking Offences Act 1986 by that court. It was not the function of the Crown Court to make any order which affected the interests that any third parties might have in the property whose value it took into account when determining the amount of the defendant's realisable property.

[4] The scheme of the Act, so far as third-party interests are concerned, is for their claims to be resolved in the High Court. The question for the High Court, when the proceedings reach this stage, relates not to the amount of money which the defendant must pay—that has already been fixed by the order made in the Crown Court—but to the powers which the receiver is to be authorised to exercise. It is at this stage that third parties are entitled to have their claims heard and determined. This is when, as a matter of both substance and procedure, representations may be made as to their interests, if any, in the property which the receiver wishes to realise. This is provided for expressly by s 11(8) of the Act, consistently with which RSC Ord 115, r 7(4) lays down the procedure by which those holding any interest in the realisable property are to be notified.

[5] Provisions designed to protect the interests of third parties are conspicuously absent from the rules of procedure that apply at the stage of the hearing in the Crown Court. Third parties are not entitled to participate in the criminal proceedings in that court. But the issue for the Crown Court is not whether any property in which a third party might have an interest is to be confiscated. The order which it makes is an order which is directed against the defendant only, and it is simply an order for the payment of a sum of money. The question of realisation, if the exercise of powers by a receiver is needed in order to make good the order which the defendant is required to satisfy, is reserved for the High Court.

[6] I do not therefore, with respect, agree with the observation by Tuckey LJ that the situation which has arisen in this case is exactly that which the doctrine

- a of abuse of process is designed to prevent (see [2000] 1 WLR 1094 at 1101). The scheme of the Act itself shows that this proposition must be unsound. It cannot be an abuse of process for a third party holding an interest in property, to whom a right is given by s 11(8) of the Act to make representations to the High Court, to seek to exercise that right just because he or she gave evidence in the Crown Court in support of the defendant's case that the property was not to be valued and taken into account as realisable property. I agree with my noble and learned friend, Lord Hobhouse, that there may be other cases where the position which a third party wishes to adopt may be regarded as an abuse of process which should not be allowed to stand in the way of the enforcement of a confiscation order. But, for all the reasons which he has given, that has not been shown to be the position in this case.

c **LORD BROWNE-WILKINSON.**

[7] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hobhouse of Woodborough. For the reasons he gives I, too, would allow the appeal.

d **LORD CLYDE.**

[8] My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend, Lord Hobhouse of Woodborough. For the reasons he has given, I, too, would allow this appeal.

e **LORD HUTTON.**

[9] My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree with it and for the reasons he has given I, too, would allow this appeal.

f **LORD HOBHOUSE OF WOODBOROUGH.**

- g [10] My Lords, Mrs Norris, the appellant, is the wife of Clifford Norris, a convicted drug trafficker who is presently serving a sentence of 9½ years' imprisonment passed upon him by Judge Brown at the Crown Court at Lewes on 24 June 1996. At the same time Judge Brown also made a confiscation order in the sum of £386,397, with four years' imprisonment consecutive in default, under ss 1 and 6 of the Drug Trafficking Offences Act 1986. In February 1999 an ex parte application was made by HM Customs and Excise, the respondents to this appeal, to Latham J sitting as a judge of the High Court for the appointment of a receiver under s 11 of the Act and other orders. Latham J made the orders asked for on 4 February. One of the orders made was a declaration 'that the defendant
- h [Mr Clifford Norris] holds the beneficial interest in 7 Berryfield Close, Chislehurst Road, Bickley, Kent, title number SGL 42481'. 7 Berryfield Close was the house in which Mrs Norris and her three sons lived. They had lived there since she bought it in May 1988. She was registered as having the unencumbered title to the property. The order also required any person having possession of Mr Norris's
- j assets forthwith to deliver up the same to the receiver, subject only to a period of 28 days from the date of the order being allowed before the requirement to deliver up 7 Berryfield Close should take effect.

[11] Mrs Norris had only heard about the ex parte application a few days before as the result of a telephone call from Mr Norris's solicitors. She attended the hearing before Latham J but it is not suggested that she was then in a position to take any part. She was not represented. Following the making of the order,

she took legal advice. She swore an affidavit dated 4 March 1999, with accompanying exhibits, and applied for the order to be varied so as to recognise her title or interest in 7 Berryfield Close. Her application was met by the response from the Customs and Excise that it was an abuse of process for her to make any such application, the matter having been concluded by the order of Judge Brown. Latham J upheld the objection of the Customs and Excise and dismissed Mrs Norris's application without considering its merits. Her appeal to the Court of Appeal was likewise dismissed (see [2000] 1 WLR 1094). She has appealed here with your Lordships' leave.

[12] In order to explain the issue which arises on this appeal, it is necessary to refer in greater detail to the scheme of the 1986 Act and the procedural history. To take the statute first, its purpose is stated in the preamble to be 'to make provision for the recovery of the proceeds of drug trafficking'. It was a new Act. Sections 1 to 5 deal with the making of what the Act calls 'confiscation orders' (s 1(8)(a)). However, this is a misnomer. The orders are financial orders ordering a defendant convicted of a drug-trafficking offence to pay sums of money to the state. Under the 1986 Act the order is to be made at the time of passing sentence and is subject to appeal to the Court of Appeal, Criminal Division, by the defendant as an appeal against sentence. When a defendant has been convicted of a drug-trafficking offence, the statute requires the Crown Court, before sentencing him, to determine whether he has benefited from drug trafficking; this question is a general one and not confined to the offence of which he has been convicted. If the Crown Court concludes that he has benefited, it is then required to determine, in accordance with s 4, the amount to be recovered from the defendant and order him to pay that amount. It is this order to pay which is referred to as a 'confiscation' order. Section 4 requires the Crown Court to undertake a two-stage process. First it must assess the value of the defendant's proceeds of drug trafficking (s 4(1)). Secondly the court must decide whether the defendant has satisfied it that the amount which might be realised at the time the confiscation order is made is less than the value of the proceeds and, if it is so satisfied, then the order to be made is restricted to the lesser sum (s 4(3)). The decision whether the defendant has benefited from drug trafficking and, if he has, the assessment of the value of those proceeds is to be made by the Crown Court making certain assumptions (s 2). These are, broadly, that, unless shown to be incorrect in the defendant's case, any property or money received by the defendant or any expenditure of the defendant, during the period of six years ending with the institution of the criminal proceedings against him, represent the proceeds of drug trafficking. The inquiry is therefore a historical one extending back six or more years and requires the drug trafficker to show that there were, over this period, sources other than drug trafficking for his expenditure and acquisition or accumulation of wealth.

[13] The question of the amount that might be realised at the time the confiscation order is made involves a different exercise. It is an exercise to be undertaken as at the date of the making of the confiscation order. By s 5(3), the amount is the value at that time of the realisable property of the defendant together with the value at that time of any gift 'caught' by the Act. It thus has to take into account as well property which, maybe, is no longer held by the defendant. 'Realisable property' is defined in s 5(1) as meaning any property 'held' by the defendant and any property held by a person to whom the defendant has directly or indirectly made a gift caught by the Act. Property is defined so as to have an all-embracing meaning and property is 'held' by any person if 'he holds any

a interest in it' (s 38(7)). A gift is 'caught' by the Act if it was made by the defendant at any time during the six-year period or, if made by him at some other time, if it has been shown to have been, or to represent, the proceeds of drug trafficking (s 5(9)). The presumptions in s 2(3) do not apply to s 5. The effect of ss 4 and 5 is that the amount that might be realised at the time the confiscation order is made is to be the market value of the property held by the defendant or donee or, b where another also has an interest in that property, the market value of the defendant's or donee's beneficial interest in the relevant property (s 5(4)). As stated previously, the burden of proof is upon the defendant to satisfy the Crown Court that this amount is less than the value of the proceeds. If he fails to do so the result is simply that the confiscation order is made in the sum that is equal to the value of the defendant's benefit as assessed, reflecting the presumptions c which have been made against him.

[14] All the requirements of ss 1 to 4 are to be performed by the judge of the Crown Court for the purpose of his discharging his duty to make a confiscation order against the convicted defendant in the criminal proceedings and deciding as between the prosecution and the defendant whether he has benefited from drug d trafficking and, if so, in what sum to make a confiscation order. Section 3 and the Crown Court Rules 1982, SI 1982/1109 provide for a procedure to be followed involving the service of statements by the prosecutor and the defendant in order to reduce the area of dispute. Section 3(2) requires the defendant to particularise what he will rely on in disputing any allegation in the prosecutor's statement and if the defendant fails to do so he may be treated as having accepted the allegation. e Section 4 provides that the Crown Court may issue a certificate giving the court's opinion as to any matter about which it was satisfied, relevant to its determination of the amount that might be realised at the time the confiscation was made and the court shall issue such a certificate if it has been satisfied that the amount which might be so realised was less than the amount which it has f assessed to be the value of the defendant's proceeds of drug trafficking. Nothing in ss 1 to 4 or the Crown Court Rules makes any reference to any right of any other person to intervene or be heard in the Crown Court in any way in connection with these matters.

[15] Sections 6 to 13 and 15 to 18 deal with the enforcement of confiscation g orders. Section 6 gives the Crown Court and the magistrates' courts powers similar to those they have in relation to fines. Sections 7 to 13 confer powers on the High Court as part of its civil jurisdiction. They are of two types. Under ss 7 to 10, restraint and charging orders may be made to preserve property belonging or deemed to belong to the defendant; the definition in s 5(1) of 'realisable h property' is used. The jurisdiction commences at the time when criminal proceedings are instituted in England or Wales against a defendant for a drug-trafficking offence and there is reasonable cause to believe that the defendant has benefited from drug trafficking. The jurisdiction subsists until the proceedings have been concluded, an expression which is broadly defined in s 38(12) so as to include any pending proceedings up to the complete satisfaction of any confiscation order j that may have been made. Under s 8, the High Court may prohibit any person from dealing with any realisable property. Section 8(4) expressly requires that a restraint order shall be applied for ex parte by the prosecutor to a judge in chambers and that the order shall provide for notice to be given to persons affected by the order. There are obviously two reasons for this latter requirement. The first is so that any such person shall be bound by the order. The second is so that any such person shall have the opportunity to apply to have the order

discharged or varied. This was made explicit by RSC Ord 115, rr 4 and 5 which provide for an inter partes hearing and applications to discharge or vary the ex parte order. The judge may also under s 8(6) appoint a receiver to take possession of realisable property subject to a restraint order. The provisions in ss 9 and 10 for making a charging order follow a similar scheme. However, here, a distinction is made between the realisable property and the defendant's or donee's interest in it and the charge applies only to the interest. The question whether it should be a condition of the charging order that notice be given to any other person holding an interest in the property is left along with the question of the other terms of the order to the judge in chambers.

[16] The second type of power conferred upon the High Court is directed to realising the value of realisable property and applying the proceeds so that the sum payable under the confiscation order can be fully discharged. This is achieved through a receiver appointed by the High Court under s 11. The drafting of s 11 and the associated ss 12 and 13 acknowledge that others besides the defendant and the donee of a gift caught by the Act may have an interest in the relevant property and that, whilst the receiver is given the power to take possession of the relevant property and realise its value, the order does not override or confiscate the interests of others in the value of that property. Section 13(4) expressly provides that the powers shall be exercised with a view to allowing any person, other than the defendant or the recipient of a gift caught by the Act, 'to retain or recover the value of any property held by him'. This would be implicit even in the absence of an express provision since the confiscation order only applies to the convicted defendant and, indirectly through such defendant, donees caught by the Act. To apply it so as to confiscate the property of innocent third parties would be not only exorbitant but also outside the purpose of the Act. Any such confiscation would now also raise human rights issues. Sections 11 and 12 support this scheme by providing for others to make representations to the High Court. Section 11(8) is expressed in mandatory terms:

'The court shall not in respect of any property exercise the powers conferred by subsection (3)(a), (5) or (6) above unless a reasonable opportunity has been given for persons holding an interest in the property to make representations to the court.'

The 'court' which has the powers referred to is the High Court (see sub-s (1)). The respondents before your Lordships surprisingly sought to argue that in sub-s (8) the court to which such persons were to have a reasonable opportunity to make representations was the Crown Court not the High Court. This argument had been advanced in the Court of Appeal and rightly rejected by Tuckey LJ (see [2000] 1 WLR 1094 at 1100). The relevant court is clearly the High Court seised of the enforcement proceedings. The person entitled to make representations is any person holding any interest in relevant property. The High Court must be prepared to hear representations from any such person (s 11(8)) and allow him to retain or recover the value of his interest in the property (s 13(4)). Again, this requirement of the Act has been carried through into RSC Ord 115: r 8(1) applies (inter alia) rr 4 and 5 to the exercise of the powers under s 11.

[17] The scheme of the Act is thus to enable the monetary order made against the convicted defendant to be enforced by effecting recovery from the defendant's property including property which he has given away during the six-year period.

- a* This extension of the statutory powers takes into account the obvious possibility that those engaging in drug trafficking may transfer their wealth to others in order to try and frustrate the attempts of the authorities to recover them but without affecting the trafficker's expectation that he will ultimately be able to benefit from the proceeds of his trafficking. The concept of realisable property is used both as a measure of the defendant's current wealth for the purpose of fixing
- b* the monetary amount of the confiscation order made and for defining what assets can be used for the purpose of enforcing the order and recovering the relevant sum. Property 'held' being widely defined so as to include property in which any relevant person has an interest, it must be contemplated that there is realisable property in which two or more people will have an interest. It is therefore part of the structure of the Act that questions may have to be determined as to the
- c* respective interests of different persons in the same property. Although the extent of the defendant's interest is relevant to the Crown Court's assessment of the value of his realisable property, the question of what other persons, if any, have an interest and what is the extent of their interests must be decided by the High Court in the exercise of its jurisdiction.
- d* [18] Turning to the facts of this case, I will take them in chronological sequence. Criminal proceedings were instituted against the defendant, Mr Norris, by the issue of a warrant in May 1989; therefore the six-year period started in May 1983. On 26 May 1989 an *ex parte* restraint order was made by Roch J in chambers restraining the defendant until further order from disposing of any of his property, including some specified items, and a charging order was
- e* made in respect of 7 Berryfield Close and Mrs Norris was restrained until further order from disposing of 7 Berryfield Close. This order was served on Mrs Norris. She did not apply to vary or discharge the order. She continued, as the registered owner of the property, to live with her three sons at 7 Berryfield Close as her home—her only home. She had no intention of moving or of disposing of it. The
- f* defendant disputed his guilt of the offences with which he was charged. He was tried and convicted. It appears that the evidence at his trial included evidence of observations made of his movements. Since 1988 he had been on the run and evading arrest. In June 1996, the defendant was brought before Judge Brown for sentence and the making of a confiscation order. The Customs and Excise and the defendant were represented. Defence counsel agreed the defendant's
- g* proceeds of drug trafficking in the sum of £1,350,000. The amount which might be realised was partly agreed as well but not whether anything should be included for the value of 7 Berryfield Close. The Customs and Excise, without adducing any evidence other than some documents relating to its purchase in 1988 and the purchase of a previous house in 1986, simply submitted that all the beneficial
- h* interest in the house was in the defendant and that the registration in the name of Mrs Norris was a sham. Counsel for the Customs and Excise relied upon the burden of proof being on the defendant to disprove this by calling evidence. Counsel for the defendant called Mrs Norris as a witness. She was sworn. She explained that she was on anti-depressants and produced a doctor's letter.
- j* She outlined the matrimonial history. The first matrimonial home was a house in Oakdene Road, bought in 1981 for £43,000. She put up £11,000 which she had been given by her grandmother and the defendant put up £12,000 with the balance of the purchase price, £20,000, being borrowed on mortgage. The defendant paid the mortgage instalments. The property and the mortgage was in their joint names. About £25,000 profit was made when in February 1984 they sold the Oakdene Road house. The next house, 9 Prince Consort Drive, Chislehurst,

was registered in her own name alone. It was bought with the proceeds of Oakdene and a mortgage. The defendant paid the mortgage. In 1986 she sold Price Consort Drive for £195,000 and, using the proceeds, bought another house in Chislehurst called 'Northwood' with a mortgage for £70,000. She treated it as her house and it was registered in her name. She did not like the house and in 1988 she sold it for £460,000 which enabled her to pay off the mortgage and still have a surplus after paying £350,000 for 7 Berryfield Close. By this time in 1988 the defendant had gone on the run and was no longer living with her and the children. Counsel for the defendant also asked her about other matters relevant only to mitigation of sentence, including the defendant's relations with his brother (who had also been convicted) and his responsibility. He also asked her about her continuing belief in her husband's innocence.

[19] She was cross-examined by counsel for the prosecution. She was asked about the matrimonial history and the financing of the various house purchases. It was put to her: 'You have come here today for the sentence of your husband, Mrs Norris, to try to persuade the court that all of the house belongs to you' to which she responded: 'It is my house; it has always been my house.' She was questioned about various details presumably with a view to undermining her credit—or her memory since she did not have access to the relevant documents. In re-examination she was asked further about various details which again she had to answer without seeing relevant documents. Nothing new was put forward in the final speeches and counsel for the defendant devoted his main submissions to mitigation and the relative parts played by the various defendants. Counsel agreed the net value of 7 Berryfield Close at £300,000. The judge then gave his judgment. He summarised the evidence of Mrs Norris and the submissions of counsel and concluded:

'I have to look at the Act itself, the *presumption* which I am entitled to make and the evidence which was called by the defence and make my decision thereon. I am bound to say that I do not accept the evidence of Mrs Theresa Norris. In my view she is trying her best to assist her husband, and indeed herself and her family. I am afraid that in my view it would be putting one's head in the sand, having heard *all the evidence in the case as the jury did*, to have even to consider the view that she put before me in her evidence, *namely that in her view her husband is not guilty of the offence that he has been convicted of*. In my view the *defendant* has not discharged the *burden cast upon him* by the Act of Parliament. In my judgment Clifford Norris has provided the finance for all these properties and the improvements made upon them.' (Lord Hobhouse's emphasis.)

He made a confiscation order in the sum of £386,397, the limiting factor being the amount which might be realised, £300,000 for the house and £86,397 for other items of cash and chattels. He sentenced the defendant to 9½ years' imprisonment. No certificate under s 4(2) was issued (perhaps because a reasoned judgment had been given).

[20] From the point of view of Mrs Norris, the next thing which happened was the *ex parte* application under s 11 for the appointment of a receiver and a declaration which was heard by Latham J on 4 February 1999. She has stated in her uncontradicted affidavit that she only heard about this application as a result of a telephone call from the defendant's solicitors two days before. She applied on affidavit to set aside or vary the order so far as it related to 7 Berryfield Close. The affidavit (dated 4 March 1999) sets out on oath and with supporting documents

- a her case for submitting that she had at least a 50% interest in the property. The Customs and Excise have filed no affidavit in response to that of Mrs Norris but simply relied upon the affidavit dated 19 January 1999 which had led the *ex parte* application. That affidavit had been made by an employee of the Customs and Excise on the basis of a perusal of the papers in the case. It referred briefly to the order that had been made by judge Brown and the fact that he had found that the
- b defendant held the entire beneficial interest in 7 Berryfield Close after he had heard and rejected the evidence of Mrs Norris who had been called by the defendant. The transcript of the Crown Court hearing of 24 June was exhibited. The declaration was asked for on the basis that 'Mrs Norris has been heard, cross-examined and failed in an attempt to persuade a court of competent jurisdiction that she has an interest in the property'. This was the basis upon
- c which the Customs and Excise applied to strike out the application of Mrs Norris as an abuse of the process of the court. They did not apply on the basis that she had no interest in making her application; she patently did have such an interest. They do not have any evidential basis for suggesting that she is making her application in bad faith. Nor do they say that the facts stated in her affidavit, corroborated by the documents which she exhibits and which are presently
- d uncontradicted, do not, if accepted, provide a good arguable case that she has at least some interest in 7 Berryfield Close. In her affidavit she has been able to exhibit independent corroboration for the fact that at the time of her purchase of the Prince Consort Drive property in July 1984, she had borrowed £20,000 from each of her sister and brother-in-law, sums which were subsequently repaid when the property was remortgaged in December of that year. Similarly she has been able to find evidence that the £35,000 cash deposit which she paid when purchasing Berryfield Close in 1988 had been borrowed from a Mr Thompson, whose address is given and whom she describes as a family friend, and subsequently repaid out of the proceeds of the sale of 'Northwood'. The
- e Customs and Excise simply submitted that it was an abuse of process to raise in subsequent civil proceedings a case which had earlier been rejected in the criminal proceedings, notwithstanding that she had not been a party to those proceedings and had had no right to be represented and had simply been called as a witness. She says in her affidavit that she had never been independently advised about her own legal position.
- f

- g [21] Latham J accepted the argument of the Customs and Excise. He followed an earlier decision of Buxton J in *Re K* (3 July 1995, unreported), that the Crown Court decision was conclusive and bound even unrepresented third parties who had had no opportunity to present contrary arguments: 'It is not intended in enforcement proceedings ... to reopen findings made by the Crown Court as to whether property is realisable and the ownership of it.' He applied a dictum in *R v Robson* (1990) 92 Cr App Rep 1 at 5:
- h

- j 'It is a striking and extraordinary consequence of the Drug Trafficking Offences Act that in a case such as the present the court's powers are so draconian that it seems able to deprive the legal owner of property of some or all of his or her beneficial interest in it without he or she having any opportunity to present the arguments against such a conclusion.'

Latham J also referred to the fact that Buxton J had rejected the right of a third party to challenge the enforcement proceedings on the ground that the defendant's only right was to appeal the confiscation order. Latham J, apparently with some

regret, held that he should follow Buxton J and hold that she could not reopen the issue which was determined by the Crown Court. He gave her leave to appeal. a

[22] In the Court of Appeal, the Customs and Excise did not seek to uphold the decisions of Buxton and Latham JJ in so far as they said that the High Court had no jurisdiction in any circumstances to reopen the findings of the Crown Court on the application of a third party (see [2000] 1 WLR 1094 at 1098). The Court of Appeal considered that this concession was rightly made and the judgment of Buxton J could not be supported. I agree with the Court of Appeal on this point. The argument on the construction of the Act having been abandoned, the Customs and Excise based their case on a different submission that there was a spectrum of possible situations and the relevant consideration was abuse of process. Counsel submitted that Mrs Norris fell on the wrong side of the line. b
c

‘The wife’s interests were identical to those of the defendant at the hearing in the Crown Court where the wife had the opportunity to give her evidence and have her case argued by counsel. The fact that she was not formally a party to the proceedings or represented is unimportant.’ (See [2000] 1 WLR 1094 at 1098.) d

He relied upon *Hunter v Chief Constable of West Midlands Police* [1981] 3 All ER 727, [1982] AC 529 and *Ashmore v British Coal Corp* [1990] 2 All ER 981, [1990] 2 QB 338. Tuckey LJ accepted this argument. He considered ([2000] 1 WLR 1094 at 1100) that ‘[i]f the third party has had a fair opportunity to put his or her case at the earlier hearing there is nothing unfair’ in preventing him or her relitigating an issue which had been decided in proceedings to which he or she was not a party. Referring to s 11(8) he said: e

‘The requirement will obviously be satisfied if having been given notice of the application a third party chooses not to appear. If the third party does appear, he or she is entitled to make representations including a request to reopen issues decided by the Crown Court. But the subsection does not require the court to accede to such a request. It may do so if, for example, it is persuaded that there is fresh evidence which entirely changes the aspect of the case or that the Crown Court’s decision was wrong in law.’ (See [2000] 1 WLR 1094 at 1100–1101.) f
g

Tuckey LJ (at 1101) distinguished this from the situation where the third party has had a ‘fair opportunity to put his or her case to the Crown Court and is asking to relitigate issues decided in the Crown Court on the same or substantially the same evidence and submissions’. He described this as an abuse of process. h

‘... I do not attach great importance to the fact that the third party is not a party to the criminal proceedings. Where the third party participates in the Crown Court hearing the likelihood is that he or she will be making common cause with the defendant. The typical case will be that of husband and wife. In such a case the third party’s interests are fully represented through the defendant. True it is that the defendant has a right of appeal against any confiscation order which is made to the Criminal Division of the Court of Appeal and the third party does not. However, in practice, the defendant has little or no prospect of appealing against findings of fact made by the Crown Court ...’ (See [2000] 1 WLR 1094 at 1101.) i
j

- a Applying this reasoning to the facts of the case, he concluded that the interests of Mrs Norris were 'adequately represented' by leading counsel for the defendant. She and the defendant were making common cause about their respective interests in the house. The evidence she gave in the Crown Court was substantially the same as that she wants to give in the High Court; she was disbelieved in the Crown Court. The Court of Appeal dismissed Mrs Norris's
- b appeal from the order of Latham J refusing to entertain her case that she had an interest in 7 Berryfield Close.

- [23] My Lords, the reasoning and decision of the Court of Appeal depends upon the view which they took of the breadth of the principle of abuse of process and their assessment of what had occurred in the Crown Court. I consider that
- c neither can be supported. Underlying their reasoning on both aspects was their failure fully to respect the view they had rightly taken of the legislation. Once the view taken by Buxton J was shown to be erroneous and the requirement of the High Court to hear the representations of interested parties recognised, the Court of Appeal should have given effect to the division of responsibility and function between the Crown Court exercising the criminal jurisdiction and the
- d High Court exercising the civil jurisdiction. The criminal jurisdiction is concerned alone with what order to make under ss 1 to 4 of the Act. The procedure of the criminal court is solely concerned with the parties before it, the prosecution and the defendant. In some situations the Crown Court may also make compensation or restitution orders in favour of third parties who are given a right to apply (eg under ss 148 and 149 of the Powers of Criminal Courts
- e (Sentencing) Act 2000), order property to be forfeited (eg vehicles used in the commission of the relevant crime) or to be returned to the loser (eg under the Theft Acts). But it is well established that these powers are only to be used where there is no disputed civil law right or similar issue which needs to be determined (eg s 148(5) of the 2000 Act). If there is such an issue, the proper course for the
- f Crown Court to take is to leave the relevant person interested to pursue his or her civil remedy in the civil courts (see *R v Ferguson* [1970] 2 All ER 820, [1970] 1 WLR 1246 and *R v Calcutt* (1985) 7 Cr App Rep (S) 385). The English system of criminal justice does not itself confer any civil jurisdiction upon the criminal courts and it takes a clear and express provision in a statute to achieve that result. The 1986 Act does not contain any such provision; indeed, as already explained,
- g its clear intention is to preserve the distinction between the respective jurisdictions. The time and place for Mrs Norris to assert her civil law rights over 7 Berryfield Close was when the Customs and Excise attempted in the High Court to deprive her of her interest. It is at this stage that she becomes directly affected and has the right to invoke the remedies of the court in the defence of her civil law rights. In the
- h criminal court she was a mere witness with no right of representation and no control of the proceedings and no right of appeal. It is relevant to observe that Lord Hoffmann remarked upon the same division of jurisdiction between the criminal and civil courts in *United States Government v Montgomery* [2001] UKHL 3, [2001] 1 All ER 815, [2001] 1 WLR 196.

- j [24] It was wrong to say that her interests were identical with those of her husband. Indeed their proprietary interests were in principle opposed to each other. They were competing rights of property giving rights to one spouse against the other. It was in the interest of the defendant to put forward in the Crown Court the interest of his wife because he could use it to get a reduction in the confiscation order which was going to be made against him. But the wife's interests were not and are not the same as those of her husband. She wishes to

preserve for herself and her children her right to live at Berryfield Close against her husband if necessary and against anyone claiming through him. The defendant also had an interest in mitigating the sentence of imprisonment which he was going to receive. The proceedings in the Crown Court were for the benefit of the defendant and the Customs and Excise, not Mrs Norris.

[25] These points are further reinforced by the reasons given by Judge Brown (which I have quoted in para [19]) and in particular by the parts I have italicised. Judge Brown placed the burden of proof upon the defendant to satisfy him that the amount that might be realised was less than the assessed proceeds (s 4(3)). He treated himself as entitled to make presumptions against the defendant. He took into account the whole of the evidence which had been given in the course of the criminal trial. He discredited Mrs Norris as a witness because the defendant's counsel had elicited from her her belief in her husband's innocence. In the civil proceedings the starting point is that Mrs Norris is the registered freehold owner of the property and in occupation of it. Her apparent title has to be displaced by evidence. If she is considered to have only a partial interest, which she recognises is a possible view, the extent of that interest has still to be determined. No presumptions are to be made against her. The burden of proof is upon the Customs and Excise. The only case now being made against her is the claim to 7 Berryfield Close. In order to identify what are the beneficial interests in that property, it will be necessary to trace where possible the history of the contributions made to the sequence of properties which preceded the purchase of 7 Berryfield Close. It appears from the affidavit she has now sworn and the exhibits to it that at least some of the presumptions made by Judge Brown may be wrong and that his wholesale rejection of her evidence may have been unjustified. She has evidence to raise an arguable case that she has at least an interest in 7 Berryfield Close and it would appear that what happened in 1984 when Oakdene Road was sold and Prince Consort Drive purchased may arguably have involved a contribution from the defendant as low as £18,750 or 15% of the purchase price of £120,000. The evidence admissible against her will be the evidence adduced in the High Court proceedings. Judge Brown was not engaged in an exercise of determining her rights in accordance with the civil law. Because of this, she was never given, nor was it intended that she should be given, the right in the Crown Court to place before Judge Brown, through counsel representing her and supported by the documentary and other evidence which she chose, her civil case. The issues to be determined in the Crown Court and in the High Court are related but are not the same. To adapt the language of Lord Diplock in *Hunter's case* [1981] 3 All ER 727 at 729, 733, [1982] AC 529 at 536, 541, the question decided in the Crown Court was not on any view 'identical' to that to be decided in the High Court nor was the Crown Court a 'competent court' to decide against Mrs Norris what are her rights. Mrs Norris is not 'misusing' the procedure of the High Court; she is making the proper use of the civil jurisdiction of the High Court to protect her proprietary rights as the 1986 Act contemplates that she should.

[26] The principles applied in *Hunter's case* and *Ashmore v British Coal Corp* [1990] 2 All ER 981, [1990] 2 QB 338 do not apply. In *Hunter's case* the plaintiff was engaged in trying to relitigate in a civil court a factual issue which had already been decided against him in a criminal case in which he had been a party. It involved a collateral attack upon a decision in previous proceedings to which he had been a party, fully represented and with complete control over the evidence he wished to put before the court. The plaintiff had 'had a full opportunity of contesting the decision in the court by which it was made' (see [1981] 3 All ER 727

a at 733, [1982] AC 529 at 541 per Lord Diplock). The present case does not have those features. *Ashmore's* case is essentially a case of the marshalling of litigation. Where a civil court (or tribunal) is faced with an incident for which a defendant may be liable and which injured a large number of people or some situation where a large number of people similarly placed wish to make a contested claim against another, as was the case with the sex discrimination claim against the British Coal Board being made in *Ashmore's* case, the court, as a necessary part of the administration of justice, has to be prepared to make orders requiring the interested parties to come forward so that appropriate cases can be selected for trial and the parties can address the court upon whether their case raises any different issues from those selected. Each party has an opportunity to persuade the court that its case requires special treatment and should not follow the result of the selected cases. Any aggrieved party may seek to appeal such a procedural order. Where some interested party has been content not to intervene and awaits the outcome of the substantive trial, he must abide by the result, even if adverse, save possibly for seeking belatedly to intervene in order to support an appeal against the substantive decision. Simply to seek to relitigate the whole thing over again is an abuse of process and will not be allowed, as is more fully explained in the judgment of Stuart-Smith LJ in that case (see [1990] 2 All ER 981 at 982–990, [1990] 2 QB 338 at 345–355). These are illustrations of the principle of abuse of process. Any such abuse must involve something which amounts to a misuse of the litigational process. Clear cases of litigating without any honest belief in any basis for doing so or litigating without having any legitimate interest in the litigation are simple cases of abuse. Attempts to relitigate issues which have already been the subject of judicial decision may or may not amount to an abuse of process. Ordinarily such situations fall to be governed by the principle of estoppel per rem judicatem or of issue estoppel (admitted not to be applicable in the present case). It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse. As previously explained, the present case does not involve such relitigation nor is there evidence to support the more simple types of abuse. Your Lordships were also referred to the recent decision of the Court of Appeal in *Gokal v Serious Fraud Office* [2001] EWCA Civ 368, a case under the comparable provisions of the Proceeds of Crime Act 1995. The Court of Appeal distinguished between the position of the defendant who in the Crown Court, with the burden of proof resting upon him, could seek to satisfy that court that the amount which might be realised at the time the confiscation order is made would be less than the amount of benefit he had from the relevant offence or offences, who had a right of appeal and was thereafter bound by the outcome (para [17]) and the position of a third party such as Mrs Norris (para [41]). For the defendant to seek to reopen the decision by which he is bound was an abuse of process.

[27] A different procedural remedy might have been available to the Customs and Excise if the case had justified it. This is best illustrated by CPR Pt 24. If a party to litigation is pursuing a case with no real prospect of success, the court can recognise that situation and proceed to give judgment in accordance with the inevitable outcome of the litigation. If a case is patently and inevitably not going to succeed, the court is empowered to cut out the later formalities and proceed straight to judgment. A predecessor of CPR Pt 24, RSC Ord 14, followed a similar logic of adopting procedures which enable justice to be done without undue delay and expense. There are some similarities between these remedies and striking out for abuse of process but they are not the same. Before your Lordships,

the Customs and Excise have urged your Lordships to dismiss this appeal since to fail to uphold the judgment of the Court of Appeal would be to create an inappropriate hindrance in the way of the enforcement of confiscation orders through the civil courts. But this is not so. If the third party is seeking to resist enforcement on grounds which can be seen to be bound to fail, then there is no reason why enforcement should be held up. If, on the other hand, there is something in the third party's defence in the civil proceedings, it should be determined in accordance with the normal civil procedures. In the present case, the Customs and Excise sought to treat the previous decision of the Crown Court as conclusive of any question which Mrs Norris might raise in the High Court. They did not at all enter upon the merits of what she was deposing to in her affidavit. The Customs and Excise were wrong in the stand that they had taken, as they had to concede in the Court of Appeal. But this does not mean that in other cases where the third party's case is manifestly without substance, summary procedures under CPR 24 may not meet the needs of speedy justice.

[28] My Lords, I consider that the appeal should be allowed and that Mrs Norris be allowed to proceed with her defence to the claim which the Customs and Excise are making against her. The Customs and Excise must prove their case against her.

[29] Before concluding, I should add a number of footnotes. The 1986 Act has been repealed and replaced by revised and more comprehensive legislation. It is not appropriate to discuss the current legislation but, although some aspects have been changed, like the requirement that the confiscation order should be made at the same time as the defendant is sentenced, and greater flexibility has been introduced, the treatment of third party rights and the role of the civil courts does not appear to have materially altered. The law and the criminal procedure in Scotland is not in all respects the same as that in England and Wales. Aspects of the Scottish law were considered in *McIntosh v Lord Advocate* [2001] UKPC D1, [2001] 2 All ER 638, [2001] 3 WLR 107. It would have been necessary to refer to this authority had the present appeal turned upon arguments under the Human Rights Act 1998. However, although such arguments were addressed to your Lordships on this appeal, the appeal has been decided upon the consideration and application of well-established principles of English law and the natural, and I believe, clear meaning of the 1986 Act. Had the position been different, it would have been necessary to consider whether the appeal should be allowed on the basis that Mrs Norris's rights under the 1998 Act would have been infringed.

Appeal allowed.

Dilys Tausz Barrister.

a Newspaper Licensing Agency Ltd v Marks and Spencer plc

[2001] UKHL 38

b HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD MACKAY OF CLASHFERN, LORD HOFFMANN,
LORD HOPE OF CRAIGHEAD AND LORD MILLETT

18, 19 JUNE, 12 JULY 2001

c *Copyright – Infringement – Typographical arrangement – Newspaper – Cuttings agency providing defendant with photocopies of relevant newspaper articles – Defendant making further copies of cuttings and distributing them to individuals in its organisation – Whether copyright in typographical arrangement of newspaper in whole newspaper or in individual articles – Whether copying amounting to copying of substantial part – Copyright, Designs and Patents Act 1988, ss 1(1)(c), 8(1), 16(3), 17(5).*

d

The defendant, M&S, subscribed to a press cutting service which provided it with a daily supply of photocopies of items of interest appearing in national and daily newspapers. The cuttings agency paid a fee for a licence to copy the cuttings to the claimant, NLA, the body which dealt with copyright licensing on behalf of the newspapers and which held the copyright in 'the typographical arrangements of published editions' of the newspapers for the purposes of s 1(1)(c)^a of the Copyright, Designs and Patents Act 1988. Section 8(1)^b of the Act defined 'published edition' as the whole or any part of one or more literary, dramatic or musical works, while s 17(5)^c defined copying, in relation to the typographical arrangement of a published edition, as 'making a facsimile copy of the arrangement'. After receiving the cuttings, M&S made further copies of some of them and distributed them to individuals within its organisation. It had no licence to make those further copies. In proceedings against M&S, NLA contended that the making of such copies infringed its copyright in the typographical arrangement of the published editions of the newspapers. In giving judgment for NLA, the judge held that each separate article in a newspaper was a literary work and that accordingly the typographical arrangement of each article was a copyright work. The Court of Appeal disagreed and also held that none of the copies constituted the copying of a 'substantial part' of a copyright work within the meaning of s 16(3)^d of the 1988 Act. Accordingly, it allowed M&S's appeal, and NLA appealed to the House of Lords.

h

Held – For the purposes of s 1(1)(c) of the 1988 Act, the term 'typographical arrangement of published editions' did not refer to the typographical arrangement of each article published in a newspaper. The definition of a 'published edition' in s 8(1) showed that there was no necessary correlation between the concept of a literary, dramatic or musical work and the concept of a published edition. The frame of reference for the term 'published edition' was the language of the publishing trade. The edition was the product, generally between covers, which the publisher

j

a Section 1, so far as material, is set out at [7], below
b Section 8, so far as material, is set out at [7], below
c Section 17, so far as material, is set out at [7], below
d Section 16, so far as material, is set out at [7], below

offered to the public. There might be borderline cases in which two or more distinct products were offered simultaneously at a single price, such as a newspaper with typographically distinct supplements or inserts. As regards the question of substantiality, the matter was one of quality rather than quantity, and it had to be answered by reference to the reason why the work had been given copyright protection. Moreover, in the case of the copying of a typographical arrangement, nothing less than a facsimile copy would do. It was in that context that it was necessary to ask whether there had been copying of sufficient of the relevant skill and labour. For that purpose, it was necessary to form a view about the skill and labour involved in a typographical arrangement. In the case of a modern newspaper, the skill and labour devoted to that arrangement was principally expressed in the overall design, and it was difficult to think of it being expressed in anything less than a page. The particular fonts, columns, margins and so on were only the typographical vocabulary in which the arrangement was expressed. The question was whether the copy could be said to have appropriated the presentation and lay out of the edition. It was therefore unlikely to matter whether the supplements or inserts in a newspaper were separate published editions. In the instant case none of the press cuttings had sufficiently reproduced the lay out of any page so as to amount to a substantial part of its typographical arrangement. Accordingly, the appeal would be dismissed (see [1], [2], [13], [14], [19]–[21], [23], [25], [27]–[29], below).

Decision of the Court of Appeal [2000] 4 All ER 239 affirmed.

Notes

For copyright in the typographical arrangement of published editions and infringement in relation to a substantial part of a work, see 9(2) *Halsbury's Laws* (4th edn reissue) paras 93–94, 320.

For the Copyright, Designs and Patents Act 1988, ss 1, 8, 16, 17, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 408, 424, 433, 435.

Cases referred to in opinions

British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd [1986] 1 All ER 850, [1986] AC 577, [1986] 2 WLR 400, HL.

Designers Guild Ltd v Russell Williams (Textiles) Ltd [2001] 1 All ER 700, [2000] 1 WLR 2416, HL.

Ladbroke (Football) Ltd v William Hill (Football) UK Ltd [1964] 1 All ER 465, [1964] 1 WLR 273, HL.

Machinery Market Ltd v Sheen Publishing Ltd [1983] FSR 431.

Nationwide News Pty Ltd v Copyright Agency Ltd (1996) 34 IPR 53, (1996) 136 ALR 273, Fed Ct of Aus; *affg* (1995) 30 IPR 159, (1995) 128 ALR 285.

Appeal

The claimant, the Newspaper Licensing Agency Ltd (the NLA), appealed with permission from the decision of the Court of Appeal (Peter Gibson and Mance LJ, Chadwick LJ dissenting) on 26 May 2000 ([2000] 4 All ER 239, [2001] Ch 257) allowing an appeal by the defendant, Marks and Spencer plc, from the order of Lightman J on 19 January 1999 ([1999] RPC 536) giving judgment for the NLA in its claim for copyright infringement against Marks and Spencer. The facts are set out in the opinion of Lord Hoffmann.

- a* Geoffrey Hobbs QC (instructed by Herbert Smith) for the NLA.
Michael Silverleaf QC and Mark Vanhegan (instructed by Robert Ivens) for Marks and Spencer.

Their Lordships took time for consideration.

- b* 12 July 2001. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

- [1] My Lords, I have had the opportunity of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, and with which I agree, I would dismiss this appeal.

LORD MACKAY OF CLASHFERN.

- [2] My Lords, I have had the opportunity of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, and with which I agree, I would dismiss this appeal.

LORD HOFFMANN.

- [3] My Lords, Marks and Spencer plc subscribes to a press cutting service. It has contracted with an agency called the Broadcast Monitoring Co for the daily supply of photocopies of items of interest appearing in national and daily newspapers. The agency pays a fee for a licence to copy the cuttings to the Newspaper Licensing Agency Ltd (the NLA), which deals with copyright licensing on behalf of the newspapers. Marks and Spencer makes further copies of some of the cuttings and distributes them to individuals within its organisation. It has no licence to make these further copies. The question in this appeal is whether making such copies infringes the copyright in the typographical arrangement of the published editions of the newspapers which has been assigned by the publishers to NLA.

- [4] There are several copyrights which may simultaneously subsist in the contents of a newspaper. Each of the articles is a literary work in which, if it is original, copyright may subsist under s 1(1)(a) of the Copyright, Designs and Patents Act 1988. Similarly, the drawings and photographs are artistic works. In addition, the publisher is entitled to a copyright in the typographical arrangement of the published edition (see ss 1(1)(c) and 9(2)(d)). In this appeal, we are concerned only with this last form of copyright. The NLA makes no claim based upon literary or artistic copyright in the articles or photographs which have been copied.

- [5] Copyright in a typographical arrangement is of relatively recent origin, having been created by the Copyright Act 1956. It can be traced to two developments in the publishing industry, one of them artistic and the other technological. The first was the great improvement in typographical design which is associated with the arts and crafts movement in the last two decades of the nineteenth century and the first two of the twentieth. A new font could be registered as a design but the typographic layout of a particular book, which may have taken considerable skill and effort, was not as such protected. The second was the development since the 1914–18 war of the technique of photo-lithography, which enabled printing plates to be made by photographic means. Publishers were concerned that the skill and labour which had gone into the typographical design

of fine editions of classical works (out of literary or musical copyright) could be appropriated by other publishers who used photo-lithography to make facsimile copies. a

[6] In 1935 the Publishers' Association made representations to the Departmental Committee on International Copyright, asking them to recommend that a copyright in typography should be created by amendment to the Berne Convention of the International Union for the Protection of Literary and Artistic Copyright 1886. b
The committee recommended accordingly (see its report of May 1935 (Board of Trade Misc Reports 1919-37) para 21) but nothing came of it. After the 1939-45 war the Publishers' Association renewed their representations to the Copyright Committee under the chairmanship of Sir Henry Gregory which had been appointed to consider the law of copyright. Again the proposal was accepted. c
The committee recommended in the following terms:

'306. The Publishers Association have suggested that there should be a copyright in typography. By this they did not mean that particular type designs or founts should be protected by the Copyright Act; new type designs are registrable under the Registered Designs Act and they were not asking for any change in that respect. They were seeking protection for typographical arrangements so that a particular edition of a literary or musical work printed by or for a publisher could not be directly and exactly copied by an unscrupulous competitor by photo-lithography or similar means ... [I]n certain foreign countries the law of unfair competition prevented this kind of copying by competitors but no such remedy is available in this country ... d
e

308. Although we have already indicated our view that the Copyright Act could not and should not be extended to cover all unfair competition in the nature of copying of industrial articles, we are impressed by the case made by the Publishers' Association and agree that typographical arrangements might reasonably be protected by the Act. The protection which we recommend should relate only to exact copying by photo-lithographic or similar means.' (See *Report of the Copyright Committee* of October 1952 (Cmd 8662) pp 110-111.) f

[7] These recommendations were carried into effect by s 15 of the 1956 Act, which has been replaced by substantially similar provisions in the 1988 Act: g

'1.—(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work ... (c) the typographical arrangement of published editions ...

8.—(1) In this Part "published edition", in the context of copyright in the typographical arrangement of a published edition, means a published edition of the whole or any part of one or more literary, dramatic or musical works ... h

9.—(1) In this Part "author", in relation to a work, means the person who creates it. j

(2) That person shall be taken to be ... (d) in the case of the typographical arrangement of a published edition, the publisher.

15. Copyright in the typographical arrangement of a published edition expires at the end of the period of 25 years from the end of the calendar year in which the edition was first published ...

- a 16. ... (2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.
- (3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—(a) in relation to the work as a whole or any substantial part of it, and (b) either directly or indirectly ...
- b 17.—(1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows ...
- (5) Copying in relation to the typographical arrangement of a published edition means making a facsimile copy of the arrangement.'
- c [8] The cuttings supplied by the agency were facsimile copies of parts of the typographical arrangement of the newspapers. By copying the cuttings, Marks and Spencer indirectly copied the same parts. The question is whether they copied the whole or a substantial part of the typographical arrangement of the published edition. This raises the question of what is meant by the 'published edition'. Is it the whole newspaper or does each of the literary works comprised in the newspaper constitute a separate 'published edition' of that work? If the latter is the correct analysis, the photocopy is frequently a facsimile copy of the whole typographical arrangement of the work. Not in all cases, because often the agency has to rearrange the text to fit onto the A4 sheets on which the cuttings are supplied. In such cases, the original typographical arrangement is altered.
- d But in many cases there will be an infringement. On the other hand, if the 'published edition' is the whole newspaper and the copyright work the typographical arrangement of the whole, there arises the further question of whether the arrangement copied in any particular cutting is a substantial part.
- e [9] Lightman J, who tried the action, said ([1999] RPC 536 at 542) that an edition meant a 'version' of a literary work and that 'In the case of a newspaper made up of a number of different articles, each separate article is in my view a literary work and the typographical arrangement of each separate article is accordingly a copyright work.'
- f [10] 'Accordingly' suggests a necessary congruence between the concept of a literary work and that of a published edition. Mr Hobbs QC, who appeared for the NLA, supported this reasoning and said that copyright in typographical arrangement 'mapped onto' the copyright in the underlying literary works. He drew an analogy with copyright in a sound recording, defined in s 5(1)(b) of the 1988 Act as 'a recording of the whole or any part of a literary, dramatic or musical work'. The sound recording copyright was congruent with, for example, the
- g musical copyright in the work which had been recorded. A CD might comprise recordings of performances of a number of different musical works, in each of which a separate musical copyright and sound recording copyright could subsist. Likewise, said Mr Hobbs, in the case of a newspaper containing the typographical arrangement of a number of literary works.
- h [11] In my opinion the analogy is unsound. There is an important difference between the ways in which the two copyrights are defined. A 'sound recording', in which copyright subsists under s 1(1)(b), is defined by s 5(1)(b) as 'a recording of the whole or any part of a literary, dramatic or musical work'. Thus a sound recording of one musical work is by definition different from the recording of another, even if they are issued on the same CD. But for copyright to subsist in a typographical arrangement, it must be the arrangement of a 'published edition'.
- j

A 'published edition', as we have seen, is defined by s 8 as 'a published edition of the whole or any part of one or more literary, dramatic or musical works'. The words 'or more' show that one may have a single published edition of more than one literary work and that there is no necessary congruence between the concept of an edition and the underlying works. The language seems to me so clear on this point that I do not think that the meaning is called into question, as Mr Hobbs suggested, by the fact that the fair dealing exceptions in Ch III of the 1988 Act are framed in the same terms for typographical copyright as they are for literary copyright. It seems to me that the legislature had the limited objective of ensuring that a fair dealing with the literary copyright did not fall foul of the typographical copyright. Nothing more about the scope of typographical copyright can be inferred.

[12] The judge said that he found support for his view in the decision of Walton J in *Machinery Market Ltd v Sheen Publishing Ltd* [1983] FSR 431. This was an unreserved judgment given on a motion for judgment under RSC Ord 14. It certainly proceeded upon an assumption that there may be a separate copyright in the typographical arrangement of an individual advertisement in a journal. But the contrary does not appear to have been argued and the point was not discussed. Mr Hobbs acknowledged that it was not in the circumstances a very strong authority.

[13] On the other hand, Lightman J does not appear to have been referred to the judgment of Wilcox J, sitting in the General Division of the Federal Court of Australia, in *Nationwide News Pty Ltd v Copyright Agency Ltd* (1995) 30 IPR 159, (1995) 128 ALR 285, which reached the opposite conclusion. Lightman J did see the judgment of the Federal Court ((1996) 34 IPR 53, (1996) 136 ALR 273) on appeal from Wilcox J, but the appellants seem to have found the latter's judgment on this point so persuasive that they did not challenge it on appeal, where the only question was whether the typographical arrangement of the copied articles amounted to a substantial part of the typographical arrangement of the newspaper as whole.

[14] In my opinion there is no answer to the reasoning of Wilcox J. The definition of a 'published edition' shows that there is no necessary correlation between the concept of a literary, dramatic or musical work and the concept of a published edition. In my opinion the frame of reference for the term 'published edition' is the language of the publishing trade. The edition is the product, generally between covers, which the publisher offers to the public. There may be borderline cases in which two or more distinct products are offered simultaneously at a single price, such as a newspaper with typographically distinct supplements or 'inserts'. The present appeal does not raise such a question and in any case, for reasons which I shall develop later, I doubt whether it will matter whether they are regarded as one or more published editions.

[15] All the members of the Court of Appeal ([2000] 4 All ER 239, [2001] Ch 257) appear to have agreed that the statutory definition of a 'published edition' meant that copyright could subsist in the typographical arrangement of the newspaper as a whole. But Chadwick LJ (differing on this point from Peter Gibson and Mance LJ) said that there was no reason why the same newspaper should not contain 'published editions' of the individual literary works as well. If the literary work had been published separately, it would have been a published edition with its own typographical copyright. Why should its typographical arrangement not be protected when it was published as less than a substantial part of a larger work?

a [16] I find the notion of a 'published edition' of a literary work forming part of a larger publication very difficult to reconcile with the statutory language, which, as I have said, was intended to refer to what a publisher would understand by an edition. One may have, for example, a new edition of the *Oxford Book of English Verse*. The editor's work of compilation is itself a literary work, giving rise to its own copyright separate from the copyright (if any) which attaches to the individual poems. The edition may be new because the editor has dropped some poems and added others (giving rise to a new literary copyright) or simply because it has been set in a new typographical arrangement, giving rise to a new typographical copyright. But, in either case, I do not think that anyone would say that the Oxford University Press had published not only a new edition of the book but also a new 'edition' of the Ode to a Nightingale.

c [17] It is also difficult to see why Parliament should have wished to create a number of simultaneous overlapping copyrights in the typographical arrangement of a composite work. It is true, as I have said, that one may have separate literary copyright in individual works published as a compilation and a separate literary copyright in the compilation as a whole. But such a scheme makes sense because the copyrights will arise at different times and may vest in different people who have contributed different kinds of work and skill. But the overlapping copyrights envisaged by Chadwick LJ will all arise at the same time (when the edition is published) and vest in the same person (the publisher).

e [18] The reason why Chadwick LJ espoused his theory of overlapping copyrights appears to have been his view that one should not distinguish between a typographical arrangement which would have been protected if it had been a separate publication and one which was part of a composite edition. It would be illogical if a typographical arrangement was denied protection because it was not a substantial part of the published edition when it would have attracted protection on its own. I quite understand his concern that the law should not expose itself to a charge of inconsistency. But I do not think that the answer lies in giving an unnatural meaning to the statutory term 'published edition'. It must rather lie in a proper application of the term 'substantial part'. I therefore turn to the question of whether the copies made by Marks and Spencer amounted to substantial parts of the newspaper editions from which they had been extracted.

g [19] The House of Lords decided in *Ladbroke (Football) Ltd v William Hill (Football) UK Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273 that the question of substantiality is a matter of quality rather than quantity. The relevant passages are too well known to require citation (see [1964] 1 All ER 465 at 469, 473, 477, 481, [1964] 1 WLR 273 at 276, 283, 288, 293 per Lord Reid, Lord Evershed, Lord Hodson and Lord Pearce respectively). But what quality is one looking for? That question, as h it seems to me, must be answered by reference to the reason why the work is given copyright protection. In literary copyright, for example, copyright is conferred (irrespective of literary merit) upon an original literary work. It follows that the quality relevant for the purposes of substantiality is the literary originality of that which has been copied. In the case of an artistic work, it is the artistic originality j of that which has been copied. So, in the recent case of *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2000] 1 WLR 2416, the House decided that although not the smallest part of a fabric design had been reproduced with anything approaching photographic fidelity, the copying of certain of the ideas expressed in that design which, in their conjoined expression, had involved original artistic skill and labour, constituted the copying of a substantial part of the artistic work.

[20] In my opinion the question of substantiality in relation to typographical copyright must be decided according to the same principles. There is, however, an important difference in the definition of copying typographical arrangements which has to be taken into account. In relation to a literary, dramatic, musical or artistic work, copying means 'reproducing the work in any material form' (see s 17(2) of the 1988 Act). In relation to the typographical arrangement of an edition, it means 'making a facsimile copy of the arrangement' (see s 17(5)). The notion of reproduction, as demonstrated by the *Designers Guild* case, is sufficiently flexible to include the copying of ideas abstracted from a literary, dramatic, musical or artistic work, provided that their expression in the original work has involved sufficient of the relevant original skill and labour to attract copyright protection. In the case of a typographical arrangement, however, nothing less than a facsimile copy will do. It is in this context that one must ask whether there has been copying of sufficient of the relevant skill and labour to constitute a substantial part of the edition's typographical arrangement.

[21] For this purpose it is necessary to form a view about the nature of the skill and labour involved in a typographical arrangement. Ideally this should perhaps have been a matter of expert evidence, such as was called to explain the relevant artistic skill in the *Designers Guild* case and such as there was in the *Nationwide News* case (1996) 34 IPR 53 at 72, (1996) 136 ALR 273 at 291. It is however a matter of common knowledge that typographical arrangement at the time of the 1956 Act involved skill in designing the pages and labour and capital in setting up the type and keeping it standing. This was what the Publishers' Association said that they wanted to protect for the statutory period of 25 years.

[22] Having regard to this objective, I should think it highly unlikely that anyone in 1956 thought that newspaper publishers would be the beneficiaries of the new copyright. The Gregory Committee had in mind an edition of Jane Austen or Beethoven which could be dribbled out by the publisher, perhaps reprinting from time to time, over a long period. The purpose of the copyright was to protect the publisher against competition from pirate photo-lithographic copies of his own edition. But no one would want to sell photo-lithographic copies of a rival's newspaper. Nevertheless, copyright is a right to prevent copying and not merely to restrain unfair competition. It sometimes affords protection in unexpected situations. In *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* [1986] 1 All ER 850, [1986] AC 577 certain provisions in the 1956 Act as amended which were inserted to protect the designs of Birmingham jewellers were held to create a copyright in the design of the exhaust pipe of a motor car. If, as a matter of construction, the work is protected, then (subject to any special defences) the copyright owner is entitled to enforce it. But I think that the purpose of the copyright is something which can be taken into account in deciding the kind of skill and labour which will attract protection.

[23] In the case of a modern newspaper, I think that the skill and labour devoted to typographical arrangement is principally expressed in the overall design. It is not the choice of a particular typeface, the precise number or width of the columns, the breadth of margins and the relationship of headlines and strap lines to the other text, the number of articles on a page and the distribution of photographs and advertisements but the combination of all of these into pages which give the newspaper as a whole its distinctive appearance. In some cases that appearance will depend upon the relationship between the pages; for example, having headlines rather than small advertisements on the front page. Usually, however, it will depend upon the appearance of any given page. But I

a find it difficult to think of the skill and labour which has gone into the
typographical arrangement of a newspaper being expressed in anything less than
a full page. The particular fonts, columns, margins and so forth are only, so to
speak, the typographical vocabulary in which the arrangement is expressed.

[24] I would therefore agree with the general approach of the Federal Court
of Australia in the appeal from the decision of Wilcox J in *Nationwide News Pty Ltd v*
b *Copyright Agency Ltd* (1996) 34 IPR 53, (1996) 136 ALR 273, where the question of
substantiality is discussed in greater depth than in the court below. Sackville J
said ((1996) 34 IPR 53 at 72, (1996) 136 ALR 273 at 291): 'In relation to a published
edition, the quality of what is taken must be assessed by reference to the interest
protected by the copyright. That interest ... is in protecting the presentation and
layout of the edition ...'

c [25] In the Court of Appeal in this case, Peter Gibson LJ ([2000] 4 All ER 239 at
246, [2001] Ch 257 at 267) recorded a common submission by Mr Silverleaf QC
and Mr Garnett QC (then appearing for Marks and Spencer and the NLA
respectively) that the test of substantiality was quantitative rather than
qualitative because copyright in a typographical arrangement is 'not dependent
d on originality'. I am not sure that this is right. The test is quantitative in the sense
that, as there can be infringement only by making a facsimile copy, the question
will always be whether one has made a facsimile copy of enough of the published
edition to amount to a substantial part. But the question of what counts as enough
seems to me to be qualitative, depending not upon the proportion which the part
taken bears to the whole but on whether the copy can be said to have
e appropriated the presentation and lay out of the edition. That is why I said earlier
that I do not think it is likely to matter whether the supplements or inserts in a
newspaper are separate published editions.

[26] I think that this approach avoids the paradox which Chadwick LJ had in
mind, namely that a given typographical arrangement might be protected if
f published alone but not amount to a substantial part of a published edition of a
larger work into which it was incorporated. The answer is a 'published edition'
which consists of a single article on an otherwise blank sheet has a strikingly
different typographical arrangement from a 'published edition' which consists of
a newspaper (or even a page of a newspaper) including the same article in the
same type but juxtaposed with other articles on the page. The presence of other
g material on the page and the spatial relationship of the articles to each other are
important parts of its typographical arrangement. So I see no paradox in the
proposition that a facsimile copy of the single sheet is a copy of the whole of its
typographical arrangement but a copy of the article on the page, which gives no
indication of how the rest of the page is laid out, is not a copy of a substantial part
h of the published edition constituted by the newspaper.

[27] Your Lordships have been shown specimens of the press cuttings of
which complaint has been made. I agree with the majority of the Court of Appeal
that none of them sufficiently reproduces the lay out of any page to amount to a
substantial part of its typographical arrangement. In many cases, as I have
j mentioned, the changes in lay out which have been made to fit the article to an
A4 sheet mean that they do not even reproduce the layout of the article itself.
As Mance LJ said ([2000] 4 All ER 239 at 265, [2001] Ch 257 at 288) Marks and
Spencer had not 'reproduced anything that could be regarded as either resembling
the newspaper concerned or having newspaper-like qualities'. For these reasons, I
would dismiss the appeal. Marks and Spencer also claimed that they came within
the defence of fair dealing but as your Lordships were all of opinion that there had

been no infringement, no argument on the point was heard and I say nothing about it. a

LORD HOPE OF CRAIGHEAD.

[28] My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he has given I too would dismiss the appeal. b

LORD M'LETT.

[29] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons he gives I too would dismiss the appeal.

Appeal dismissed.

Celia Fox Barrister.

a Trustor AB v Smallbone and others (No 2)

CHANCERY DIVISION

SIR ANDREW MORRITT V-C

28 FEBRUARY, 1, 16 MARCH 2001

b

Company – Corporate personality – Lifting corporate veil – Restitution – Knowing receipt – Circumstances in which company's receipt to be treated as individual's receipt.

c

The first defendant, S, was the managing director of the claimant company. In 1997 almost £39m were paid out of one of the claimant's accounts on the signatures of S and one other director, without reference to the claimant or its other directors. Of those funds, some £20m were received by the second defendant, I Ltd, which paid part of that sum (£426,439) to S. In proceedings for recovery of the misappropriated funds, the claimant obtained summary judgment against I Ltd in the sum received by it. On I Ltd's appeal, the judge also heard an

d

application by the claimant for summary judgment against S. In the course of his judgment, the judge concluded that I Ltd was controlled by S, that the payments from the claimant's account to I Ltd had been effected by S or on his instruction, that I Ltd was simply a vehicle used by S for receiving money from the claimant, that the payments to I Ltd were unauthorised and that they involved an

e

inexcusable breach by S of his duty as the claimant's managing director. The judge dismissed I Ltd's appeal, and gave summary judgment against S for £426,439, ie the sum that he had received from the claimant via I Ltd. In subsequently dismissing the defendants' appeals, the Court of Appeal expressed the view that S's liability was not limited to the judgment against him, but extended to a joint and several liability for the larger amount for which I Ltd had been found liable, ie some £20m. The court did not, however, extend the judgment against S to the

f

larger amount because his counsel had lacked adequate opportunity to deal with some of its conclusions. Accordingly, the claimant brought a fresh application for summary judgment, contending that the receipt by I Ltd was to be treated as S's receipt and that he should be ordered to repay all of the claimant's money received by I Ltd on the basis of knowing receipt. The court was therefore required to

g

determine the circumstances in which it could pierce the corporate veil and treat a company's receipt as that of an individual.

h

Held – The court was entitled to pierce the corporate veil and recognise the receipt of a company as that of the individual in control of it if the company had been used as a device or facade to conceal the true facts, thereby avoiding or concealing any liability of that individual. It was, however, insufficient that the company had been involved in some impropriety, not linked to the use of the company structure to avoid or conceal that liability. Nor could the court pierce the corporate veil merely on the grounds that it was necessary to do so in the

j

interests of justice and no unconnected third party was involved. In the instant case, S was bound by the findings of fact made by the judge and the Court of Appeal. On those findings, the court was entitled to recognise the receipt of the claimant's money by I Ltd as the receipt by S too. I Ltd was a device or facade in that it was used as the vehicle for the receipt of the claimant's money. Its use was improper as it was the means by which S had committed unauthorised and inexcusable breaches of his duty as a director of the claimant. S had no real

prospect of successfully defending that part of the claim, and accordingly the claimant's application would be granted (see [21]–[25], [27], below). a

Adams v Cape Industries plc [1991] 1 All ER 929 and *Ord v Belhaven Pubs Ltd* [1998] BCC 607 applied.

Dictum of Cumming-Bruce LJ in *Re a Company* [1985] BCLC 333 at 337–338 not followed. b

Notes

For piercing the corporate veil, see 7(1) *Halsbury's Laws* (4th edn reissue) para 93.

Cases referred to in judgment

Adams v Cape Industries plc [1991] 1 All ER 929, [1990] Ch 433, [1990] 2 WLR 657, Ch D and CA. c

Barnes v Addy (1874) LR 9 Ch App 244.

Barney, Re, Barney v Barney [1892] 2 Ch 265.

Company, Re a [1985] BCLC 333, CA.

Cowan de Groot Properties Ltd v Eagle Trust plc [1992] 4 All ER 700.

El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717; *rvsd* [1994] 2 All ER 685, CA. d

Gencor ACP Ltd v Dalby [2000] 2 BCLC 734.

Gilford Motor Co Ltd v Horne [1933] Ch 925, [1933] All ER Rep 109, CA.

H (restraint order: realisable property), Re [1996] 2 All ER 391, CA.

Jones v Lipman [1962] 1 All ER 442, [1962] 1 WLR 832.

Mubarak v Mubarak (2000) Times, 30 November, CA. e

Ord v Belhaven Pubs Ltd [1998] BCC 607, CA.

Salomon v A Salomon & Co Ltd [1897] AC 22, [1895–9] All ER Rep 33, HL.

Westpac Banking Corp v Savin [1985] 2 NZLR 41, NZ CA.

Woolfson v Strathclyde Regional Council 1978 SC (HL) 90.

Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia, The Rialto (No 2) [1998] 4 All ER 82, [1998] 1 WLR 294. f

Case also cited or referred to in skeleton argument

Creasey v Breachwood Motors Ltd [1993] BCLC 480.

Application for summary judgment g

By application notice dated 12 September 2000, the claimant, Trustor AB, applied under CPR 24 for summary judgment against the first defendant, Lindsay James Trevor Smallbone, in the same amount as the liability of the second defendant, Introcom (International) Ltd, under a judgment of the Court of Appeal (Scott V-C, Buxton LJ and Gage J) on 9 May 2000. That judgment had been given on an appeal from the decision of Rimer J on 25 June 1999 in which he had (i) dismissed an appeal by Introcom from the order of Master Bowman on 13 October 1998 giving summary judgment against it, and (ii) gave summary judgment against Mr Smallbone in the sum of £426,439. Master Bowman had given judgment against Introcom for SKr 166·7m, £404,100 and Fmk 75·5m, a sum equivalent to approximately £20m. Rimer J had varied Master Bowman's order in respect of the quantum of the judgment against Introcom, but the master's order was restored by the Court of Appeal which also expressed the view that Mr Smallbone's liability was joint and several with that of Introcom. The facts are set out in the judgment. h
j

- a *Stephen Smith QC* (instructed by *Allen & Overy*) for Trustor.
Mr Smallbone appeared in person.

Cur adv vult

16 March 2001. The following judgment was delivered.

b **SIR ANDREW MORRITT V-C.**

- [1] On 25 June 1999 Rimer J gave summary judgment under RSC Ord 14 for the claimant Trustor AB against the first defendant, Mr Smallbone, for £426,439 and interest. At the same time he dismissed an appeal of the second defendant, Introcom (International) Ltd (Introcom), from the order of Master Bowman giving summary judgment under the same rule in favour of Trustor for SKr 166·7m, £404,100 and Fmk 75·5m. On 9 May 2000, on appeal from the orders of Rimer J, the Court of Appeal indicated that, in their view, Mr Smallbone's liability was not limited to the amount of the judgment against him but extended to a joint and several liability for the much larger amount for which Introcom had been found to be liable. They did not then extend the judgment against Mr Smallbone to the larger amount because counsel for Mr Smallbone had not had adequate opportunity to deal with some of the conclusions of the Court of Appeal. This application was made by Trustor on 12 September 2000 seeking judgment for the additional relief the Court of Appeal had suggested.

- [2] Trustor is a company incorporated in Sweden. Formerly it held major investments in the steel, engineering and automotive parts industries. On about 23 May 1997 Lord Moyne acquired voting control of Trustor. On 13 June 1997 Lord Moyne, Mr Smallbone and others were appointed to the board of Trustor. At a directors meeting held on the same day Mr Smallbone was appointed to be the managing director and it was resolved that Trustor's bank accounts might be operated on the signature of any two directors.

- [3] Without having obtained the approval of the board, on 18 June 1997 Lord Moyne and Mr Smallbone opened an account for Trustor with Barclays Bank plc, Cheapside and procured the transfer to the credit of that account of moneys of Trustor amounting to SKr 779m. The only signatories to that account were Lord Moyne and Mr Smallbone. Between mid-June and early November 1997 SKr 486m (£38·88m) was paid out of that account on the signatures of Lord Moyne and Mr Smallbone without reference to Trustor or its other directors. The recipients included Mr Smallbone (£33,334·34) and Introcom (SKr 166·7m, £404,100 and Fmk 75·5m). Of the sums received by Introcom SKr 43,335 and £327,509 were applied for the benefit of Mr Smallbone in payments to his wife and Cove Investments Ltd, a company incorporated in the Turks and Caicos Islands and controlled by Mr Smallbone.

- [4] Trustor was wound up by the court in Stockholm on 23 December 1997. The writ in this action was issued by Trustor on 17 March 1998. The statement of claim, which has been amended twice, sets out the relevant facts. In paras 16–22 it alleges that SKr 486m of Trustor's money was misappropriated in the manner and in the amounts I have summarised. In paras 23–27 Trustor sets out its allegations of knowledge and complicity. In the case of Mr Smallbone it is alleged that all transfers from the account of Trustor with Barclays were made on the instructions of Mr Smallbone. In addition it is alleged that Mr Smallbone was the controlling mind of Introcom and knew of and gave instructions for all transfers to or from Introcom. In paras 31–35 Trustor alleges that the various transfers constituted a

breach of duty. In the case of Mr Smallbone it is alleged that he acted fraudulently and dishonestly and in breach of duty as a director of Trustor. Paragraphs 36–39 contain allegations concerning claims to trace at law and for money had and received, paras 40–42 relate to a claim for damages for conspiracy and para 43 seeks equitable compensation. For present purposes the relevant claims are for knowing receipt (paras 44–46) and knowing assistance (paras 47–49).

[5] The first application of Trustor was for summary judgment against Introcom. It was pursued in respect of all the causes of action relied on in the statement of claim. This application came before Master Bowman. It was successful in respect of the claims for money had and received and knowing receipt. It was unsuccessful in respect of the claims for knowing assistance and conspiracy. By an order made on 13 October 1998 Master Bowman ordered Introcom to pay to Trustor SKr 166·7m, £404,100 and Fmk 75·5m.

[6] Introcom appealed. Its appeal was heard by Rimer J in conjunction with the application for summary judgment against Mr Smallbone issued by Trustor on 28 August 1998. The hearing took seven days. Rimer J gave judgment on 25 June 1999. In summary he dismissed the appeal of Introcom and gave judgment against Mr Smallbone for (1) £426,439 and interest for knowing receipt, (2) damages and equitable compensation to be assessed for breach of duty and (3) payment of £1m by way of interim payment on account of his liability for damages or compensation.

[7] Rimer J made a number of findings to which I should refer. First, he found that Introcom was controlled by a Liechtenstein trust called the Lindsay Smallbone Trust of which Mr Smallbone is a beneficiary. He considered that the directors of Introcom were nominees acting on the instructions of Mr Smallbone so that Introcom could be regarded as Mr Smallbone's company and his knowledge could be treated as Introcom's knowledge. Second, he found that the payments into and out of the Trustor account at Barclays, Cheapside and the account of Introcom at the same bank and branch were made by Mr Smallbone or on his instructions without the authority of Trustor. Third, he concluded that Introcom was simply a vehicle Mr Smallbone used for receiving money from Trustor and that the payments to Introcom 'were unauthorised and involved an inexcusable breach of his duty as managing director of Trustor'. Fourth, he rejected a submission of Mr Smallbone to the effect that the payments to Introcom were justified by an agreement dated 8 August 1997. Fifth, in the light of those conclusions he found that 'the payments to Introcom were unauthorised and improper ones, being payments to Mr Smallbone's own company which was then going to and did devote itself to further unauthorised and improper dissipations of the money'. Sixth, in relation to the claim against Introcom based on knowing assistance Rimer J considered that Mr Smallbone did act dishonestly 'for there was no sensible explanation for the payment of a single penny to Introcom or for the onward payments which Introcom made and Mr Smallbone could not have believed that he was entitled to make them'. However as there was some doubt whether English law applied to that claim and as that cause of action added nothing to the claims against Introcom Rimer J refused to grant summary judgment in respect of the knowing assistance claim.

[8] With regard to the summons against Mr Smallbone Rimer J considered there was no defence to the claim by Trustor to recovery of that part of its money which Mr Smallbone paid to himself and retained. With regard to the claim for knowing assistance Rimer J considered that it was artificial to regard Mr Smallbone as having

a dishonestly assisted Lord Moyne in the breach of Lord Moyne's duties rather than being in breach of his own.

[9] Both Trustor, Mr Smallbone and Introcom appealed with the permission of the judge or of the Court of Appeal. In his judgment Scott V-C, with whom Buxton LJ and Gage J agreed, recorded (paras 21 and 22) that it had not been disputed that the circumstances in which £38.88m left Trustor's Barclays, b Cheapside account constituted an unlawful misappropriation of Trustor's money and a breach of duty by Mr Smallbone so that Mr Smallbone and Introcom were accountable for the sums of Trustor's money they had respectively received. The issues on the appeal were whether by virtue of other recoveries their liabilities would be reduced to nothing. Each of those contentions was rejected. In paras 57 and 58 Scott V-C pointed out that Trustor had two types of claim against c Mr Smallbone, namely, compensation for breach of duty and claims based on what happened to its money, more specifically the misappropriation arising from the payment out from the Trustor account with Barclays, Cheapside. In his summary of the result of the appeal Scott V-C upheld the order of Rimer J regarding the liability of Mr Smallbone for the sum of £426,439 received by him d from the money of Trustor paid to Introcom.

[10] Scott V-C then considered the order for an interim payment of £1m. He posed the question whether it was clear that Trustor would establish a liability on the part of Mr Smallbone for compensation of at least that amount. He thought that it might be premature to reach that conclusion and continued:

e '97. There is, however, a further point to consider. Introcom is liable, as constructive trustee, to account for and repay to Trustor the Trustor moneys that were paid to it. Hence the order for repayment to Trustor of the SKr 166.7m, the £404,000 and the Fmk 70.45m (the whole totalling some f £20m in value). In respect of £426,439, the Trustor money received by Mr Smallbone from Introcom, Mr Smallbone, as well as Introcom is accountable. But what of the balance? Introcom was the creature of Mr Smallbone. He owned and controlled Introcom. The payments out by Introcom of Trustor money were payments made with the knowing assistance of Mr Smallbone. Rimer J, on several occasions in his judgment, characterised Mr Smallbone's participation in the steps taken to extract g Trustor's money and pay it out to various recipients without the authority of Trustor's board as being dishonest ... Mr Hollington's [counsel for Mr Smallbone] skeleton argument ... protested that these findings of dishonesty were unnecessary and should not have been made. He did not, however, before us persist in that contention. It would follow, it seems to h me, from the judge's finding of dishonesty on Mr Smallbone's part in respect of the payments out made by Introcom of Trustor's money, that Mr Smallbone would be liable jointly and severally with Introcom for the repayment of that money with interest thereon. Mr Smallbone's joint and several liability would not be confined to the part that he personally received.

j 98. In my judgment, the judge's order for an interim payment by Mr Smallbone of £1m was not justified as an interim payment on account of damages or compensation for loss caused by breach of duty as a director. The amount of that loss is still too uncertain. But Mr Smallbone is, in my view, clearly liable, jointly and severally with Introcom, for the whole of the sums for which Introcom is accountable. It may be, therefore, that para 4 of the judge's order could be left undisturbed save for the deletion of the words

“by way of interim payment” and the substitution of the words “on account of the sums to be paid by Introcom”. To do so, however, would be to change the basis on which the judge ordered Mr Smallbone to pay the £1m. Since no respondent’s notice on this point has been served and since Mr Hollington has had no opportunity on Mr Smallbone’s behalf to argue against the conclusions expressed in para 97, it would not, I think, be right at this stage of the litigation to allow the order for the interim payment to stand.’

The result was that the order against Mr Smallbone for payment of £1m was set aside but otherwise the order of Rimer J stood save that the liability of Mr Smallbone for £426,439 was declared to be joint and several with Introcom.

[11] The judgment of the Court of Appeal was provided to counsel in draft in advance of the proposed date for handing it down, then fixed for 12 April 2000. On 11 April 2000 counsel for Mr Smallbone wrote to Scott V-C with comments on, amongst others, para 97. Counsel pointed out that it had been common ground in the Court of Appeal that the findings of dishonesty made by Rimer J against Mr Smallbone were academic. For this reason he had not pursued them in oral argument particularly when invited to do so late on the last day of the hearing. He emphasised that in the statement of claim and the argument before Rimer J the only basis on which Trustor had sought to make Mr Smallbone jointly and severally liable with Introcom for the money paid to Introcom was conspiracy to defraud and knowing assistance. He pointed out that Mr Smallbone had succeeded on these issues and that Trustor had not appealed. He submitted:

‘It is not open to the Court of Appeal to revisit this finding without further argument ... nor to make a finding of joint and several liability on the part of Mr Smallbone on some other basis.’

No alteration to the draft judgment was made before it was handed down on 9 May 2000; the Court of Appeal indicated that Trustor would have to make a further application for summary judgment on which Mr Smallbone would be able to raise any contrary arguments he chose. Mr Smallbone’s petition for leave to appeal was dismissed by the House of Lords on 18 December 2000.

[12] The application now before me seeks a further order against Mr Smallbone pursuant to CPR 24.2 or CPR 25. The order sought is for payment by Mr Smallbone to Trustor (after giving credit for net recoveries received from Mr Smallbone or Introcom) of SKr 166.7m, £404,100 and Fmk 75.5m with interest thereon at the rate of 8% from 1 November 1997 until payment, such liability to be joint and several with Introcom. Trustor accepts that it cannot obtain summary judgment for damages or compensation for breach of duty for all the reasons given by Rimer J and the Court of Appeal. Thus the claim for summary judgment is necessarily advanced on a restitutionary basis only. Two such bases were raised in the statement of claim, namely knowing receipt and knowing assistance.

[13] Paragraph 21 of the witness statement of Mr Wilkes made in support of the application led Mr Smallbone to believe that the application was pursued on the basis of knowing assistance. He protested that the apparent findings of dishonesty made against him by Rimer J were unnecessary to the orders of either Rimer J or the Court of Appeal and could not justify the grant of summary judgment against him. However, the oral argument of counsel for Trustor made it clear that Trustor’s contention was that the receipt by Introcom was, in the circumstances, to be treated as the receipt by Mr Smallbone too. He submitted that as there could be no question but that Mr Smallbone had the requisite

a knowledge he should be ordered to repay all the money of Trustor received by Introcom on the basis of knowing receipt.

[14] Counsel for Trustor submitted that the circumstances were such as to warrant the court 'piercing the corporate veil' and recognising the receipt by Introcom as the receipt by Mr Smallbone. He suggested that the authorities justified such a course in three, potentially overlapping, categories, namely
b (1) where the company was shown to be a facade or sham with no unconnected third party involved, (2) where the company was involved in some impropriety and (3) where it is necessary to do so in the interests of justice and no unconnected third party is involved. I was referred to *Gilford Motor Co Ltd v Horne* [1933] Ch 925, [1933] All ER Rep 109, *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832, *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, *Re a Company* [1985] BCLC 333, *Adams v Cape Industries plc* [1991] 1 All ER 929, [1990] Ch 433, *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia, The Rialto (No 2)* [1998] 4 All ER 82, [1998] 1 WLR 294, *Ord v Belhaven Pubs Ltd* [1998] BCC 607 and *Mubarak v Mubarak* (2000) Times, 30 November.

[15] Counsel suggested that the facts, as found by Rimer J, brought this case
d within each of the three categories. He pointed out that Introcom, a company incorporated in Gibraltar, has only nominee directors and is controlled by a Liechtenstein Anstalt of which Mr Smallbone is a beneficiary. He relied on the findings of Rimer J that Introcom acted on the instructions of Mr Smallbone, that Mr Smallbone was its directing mind and will and that Introcom had no independent business, third-party directors, creditors or shareholders.

e [16] Mr Smallbone, who appeared in person, told me that there was a sensible justification for the payment of Trustor's money to Introcom. He explained that Introcom had been formed in connection with an earlier scheme, having no connection with Trustor, as a vehicle for his remuneration. He contended that Introcom was not a sham, device or facade but a genuine company having its
f own separate existence. He submitted that the fact that Introcom was controlled by him was well known to the other directors of Trustor. He contended that there was no finding or evidence of impropriety sufficient to justify the order sought by Trustor.

[17] It appears to me that the argument for Trustor raises a point of some general importance. In cases of knowing receipt attention is usually focused on
g the extent of the knowledge required and whether the recipient of the trust property had it. In this case there is no doubt that Mr Smallbone had the requisite knowledge because the liability of Introcom, upheld by the Court of Appeal, depended on the imputation of the knowledge of Mr Smallbone to Introcom. The issue is whether the court is entitled to regard the receipt by Introcom as the
h receipt by Mr Smallbone.

[18] Liability arising from the knowing receipt of trust property stems from the speech of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251–252 that—

j 'strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers ... unless those agents receive and become chargeable with some of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.'

In *White & Tudor's Leading Cases in Equity* (9th edn, 1928) vol 2, p 595 in relation to that passage from the speech of Lord Selborne LC the editors say on the authority

of the judgment of Kekewich J in *Re Barney, Barney v Barney* [1892] 2 Ch 265 at 273 that there is no liability 'unless he has the trust property vested in him, or so far under his control that he can require it should be vested in him'. a

[19] The only modern work of which I am aware which deals with the problems of receipt in any detail is *Lewin on Trusts* (17th edn, 2000) pp 1348–1350 (paras 42.32–42.34). The editors suggest that there is a sufficient receipt if, in accordance with the normal rules of tracing in equity, the trust property can be identified in the hands of the defendant. They point out that receipt by a subsidiary company will not count as a receipt by the parent if the subsidiary is acting in its own right, not as agent or nominee, at any rate in the absence of a want of probity or dishonesty. These propositions are supported by the authorities to which the editors refer, namely *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 762 and *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 738. It is also necessary that the receipt by the defendant should be for his own benefit or in his own right in the sense of setting up a title of his own to the property so received (see *Westpac Banking Corp v Savin* [1985] 2 NZLR 41 at 69). b
c

[20] I should also refer to some of the cases relied on by counsel for Trustor. In *Gilford Motor Co Ltd v Horne* [1933] Ch 925, [1933] All ER Rep 109 an individual bound by a non-solicitation covenant after the termination of his employment set up in business through a limited company. The individual was held to be in breach of covenant, notwithstanding the interposition of the company, because the company was formed as the device, stratagem or mask to 'the effective carrying on of a business of' the individual (see [1933] Ch 925 at 956, 965, 969, [1933] All ER Rep 109 at 114, 119, 121). In each of the passages to which I have referred it was made plain that the conclusion was one of fact. In *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832 an individual had contracted to sell land. Wishing to avoid his liability he transferred the land to a company he had acquired for the purpose. A decree of specific performance was made against both the individual and the company on two grounds. The first was that the individual had sufficient control of the company to compel it to perform the contract. The second, following the principle applied in the *Gilford Motor* case, was that the company was the creature of the first defendant, 'a device and a sham, a mask which he holds before his face in an attempt to avoid recognition in the eye of equity' (see [1962] 1 All ER 442 at 444, [1962] 1 WLR 832 at 836). In *Woollfson v Strathclyde Regional Council* 1978 SC (HL) 90 at 96 Lord Keith of Kinkell pointed out that it was appropriate to pierce the corporate veil 'only where special circumstances exist indicating that [the company] is a mere facade concealing the true facts'. This principle was applied by the Court of Appeal in *Adams v Cape Industries plc* [1991] 1 All ER 929 at 1024, [1990] Ch 433 at 542. *Adams's* case was followed by the Court of Appeal in *Re H (restraint order: realisable property)* [1996] 2 All ER 391 which was applied by Rimer J in *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734. These authorities plainly establish the first proposition of counsel for Trustor I referred to in [14] above. d
e
f
g
h

[21] The third proposition is said to be derived from the decision of this court in *Re a Company* [1985] BCLC 333. In that case a complicated structure of foreign companies and trusts was used to place the individual's assets beyond the reach of his creditors. Cumming-Bruce LJ described (at 336) the structure as a facade but (at 337–338) expressed the principle to be that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. The latter statement is j

a not consistent with the views of the Court of Appeal in *Adams's* case [1991] 1 All ER 929 at 1019, [1990] Ch 433 at 536 where Slade LJ said:

b '[Counsel for Adams] described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22, [1895–9] All ER Rep 33 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'

c In *Ord v Belhaven Pubs Ltd* [1998] BCC 607 at 614–615 Hobhouse LJ expressed similar reservations. It does not appear from the reports that in either of those cases the court was referred to *Re a Company* [1985] BCLC 333. In those circumstances
d I consider that I should follow the later decisions of the Court of Appeal in *Adams's* case and *Ord's* case and decline to apply so broad a proposition as that for which counsel for Trustor contends in the third principle referred to in [14] above.

e [22] The second proposition also appears to me to be too widely stated unless used in conjunction with the first. Companies are often involved in improprieties. Indeed there was some suggestion to that effect in *Salomon v A Salomon & Co Ltd* [1897] AC 22, [1895–9] All ER Rep 33. But it would make undue inroads into the principle of *Saloman's* case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.

f [23] In my judgment the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s). On the facts of this case it is unnecessary to decide whether the dictum of Kekewich J in *Re Barney, Barney v Barney* [1892] 2 Ch 265 at 273 referred to in [18] above, is applicable where the recipient is a wholly-owned corporate body. The dictum suggests that complete control of the actual recipient may be enough. But this was not said in relation to a limited company and predates the decision of the House of Lords in *Saloman's* case.
g

h [24] Mr Smallbone is bound by the findings made by Rimer J and the Court of Appeal in relation to the issues before them. Thus it is established that Introcom was and is controlled by Mr Smallbone, the payments from the Trustor account with Barclays, Cheapside to the account of Introcom at Barclays, Cheapside were effected by Mr Smallbone or on his instructions and, in the words of Rimer J, 'Introcom was simply a vehicle Mr Smallbone used for receiving money from
j Trustor.' Rimer J also concluded that the payments to Introcom were unauthorised and involved an inexcusable breach by Mr Smallbone of his duty as managing director of Trustor 'being payments to Mr Smallbone's own company which was then going to and did devote itself to further unauthorised and improper dissipations of the money'.

[25] In my view these conclusions are such as to entitle the court to recognise the receipt of the money of Trustor by Introcom as the receipt by Mr Smallbone

too. Introcom was a device or facade in that it was used as the vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed unauthorised and inexcusable breaches of his duty as a director of Trustor. Mr Smallbone has no real prospect of successfully defending this part of the claim because he is bound by the findings of Rimer J to which I have referred. a

[26] I have reached this conclusion from a consideration of the facts as found by Rimer J and the principles to be derived from the cases independently from the passage in paras 97 and 98 of the judgment of Scott V-C which I have quoted earlier. I have been concerned whether that passage was referring to a liability based on knowing receipt or knowing assistance. Liability for the former would be consistent with the Court of Appeal's conclusions regarding the liability of Introcom but liability for the latter would not. Paragraph 97 seems to be dealing with the payments out of the Introcom account and so understood refers prima facie to knowing assistance. But para 98 recognises joint and several liability for 'the whole of the sums for which Introcom is accountable'. The judgment of the Court of Appeal recognised liability on Introcom for knowing receipt but not at that stage for knowing assistance. Accordingly my conclusion is consistent with the decision of the Court of Appeal whether or not I was bound by that decision to reach the same conclusion. b
c
d

[27] For all these reasons I make an order under CPR 24.2 for payment by Mr Smallbone of the sums set out in and on the terms of the draft order accompanying the application notice.

Order accordingly.

Celia Fox Barrister.

**a R (on the application of the Director of
Public Prosecutions) v Havering
Magistrates' Court**

**b R (on the application of McKeown) v Wirral
Borough Magistrates' Court**

QUEEN'S BENCH DIVISION, DIVISIONAL COURT

LATHAM LJ AND POOLE J

c 12, 15 DECEMBER 2000

Criminal law – Bail – Magistrates' court – Arrest of bailed person for absconding or breaking bail conditions – Proceedings to determine whether bailed defendant should be remanded in custody following breach of bail condition – Whether such proceedings subject to right to fair hearing in determination of criminal charge under human rights convention – Whether breach of bail condition having to be proved by oral or other admissible evidence and to criminal standard of proof – Bail Act 1976, s 7 – Human Rights Act 1998, Sch 1, Pt I, arts 5, 6.

e In two conjoined applications for judicial review, issues arose as to the effect on the Bail Act 1976 of the right to liberty and the right to a fair hearing in the determination of a criminal charge under arts 5^a and 6^b respectively of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In the first application, P was charged with threatening to kill C, and was given bail on condition that he did not

f contact C. Subsequently, C alleged that P had assaulted and threatened her in breach of the bail condition. As a result, P was arrested under s 7(3)^c of the 1976 Act for breach of the bail condition and brought before the justices under s 7(4). Section 7(5) provided that a justice before whom a person was brought under sub-s (4) could remand that person in custody if he were of the opinion that he

g had broken or was likely to break any condition of his bail. At the hearing, C was not in court to give evidence. P contended that the prosecution were required to call C to give evidence in person and that in her absence the breach of the bail condition could not be proved. In so contending, he relied on arts 5 and 6 of the convention which, it was said, entitled him to have the opportunity to cross-examine C. The justices held that both arts 5 and 6 were engaged, that a

h breach of bail was akin to a criminal offence and that accordingly P enjoyed the rights under art 6(3) which provided that everyone charged with a criminal offence was entitled, inter alia, to examine and have examined witnesses against him. Since the consequence of that ruling was that the prosecution were required to call C, the proceedings for breach of bail were withdrawn. The Director of Public

j Prosecutions (DPP) applied for judicial review, contending that the justices had been wrong to hold that art 6 of the convention had any relevance to any issue under the 1976 Act and wrong to conclude that oral evidence from C was

a Article 5, so far as material, is set out at p 1003 *g* to *j*, post

b Article 6 is set out at p 1004 *a* to *e*, post

c Section 7, so far as material, is set out at p 1002 *c* to *f*, post

required in the circumstances of the case. P contended that even if, contrary to his primary submission, art 6 were not of direct relevance, art 6(3) applied by analogy in defining the procedural safeguards necessary where the court's conclusion in relation to a disputed past fact might expose a defendant to the risk of imprisonment. a

In the second application, M was charged with burglary and was granted bail on condition that he did not enter a particular street. He was subsequently arrested by the police on the basis of an allegation that he had breached that condition. At a hearing before the justices, the prosecution sought M's remand in custody on the basis of the breach of the bail condition, relying on a statement of one witness who claimed to have seen M in the street. The justices concluded that art 6 of the convention had no application, that the contents of the statement were sufficiently cogent for them to be of the opinion that there had been a breach of the bail condition, but that bail should be granted nevertheless. Despite the grant of bail, M applied for judicial review of the decision that he had been in breach of the bail condition. On both his application and that of the DPP in P's case, the court was required to determine whether art 5 of the convention imposed procedural requirements which differed from those applied by justices in compliance with the domestic case law on s 7(5)—in particular, whether art 5 required oral evidence or some other admissible evidence to prove the breach of a bail condition, and whether such proof had to be on the criminal standard. b
c
d

Held – (1) Article 6 of the convention had no direct relevance to proceedings under s 7(5) of the 1976 Act. Section 7 did not create any criminal offence so as to give an accused all the rights in art 6 and in particular those in art 6(3). Rather, s 7 was intended to provide the means whereby the purposes of imposing bail conditions could be achieved. The liability of the defendant to be detained in the events specified in s 7 was therefore consequent upon his liability to be detained by reason of the charge which he faced in order to secure those purposes. It was not to be equated to the imposition of any form of punishment or sanction which would justify the conclusion that proceedings under s 7(5) were equivalent to his facing a criminal charge. It followed that art 6 had no direct relevance to the instant cases (see p 1005 *h* to p 1006 *a* and p 1012 *j*, post). e
f

(2) Although art 5 of the convention was clearly applicable to the decision of a justice under s 7(5) of the 1976 Act, it did not impose any procedural requirements different from those hitherto applied. In proceedings under that provision the justice was simply required on the material before him to come to a fair and rational opinion. In doing so, he had to bear in mind the consequences to the defendant, namely the fact that he was at risk of losing his liberty in the context of the presumption of innocence. Article 5 did not require any different approach. It did not include a requirement that the underlying facts relevant to the detention were to be proved to the criminal standard of proof. Nor would art 5 be breached merely by reliance on material other than evidence which would be admissible at criminal trial. Rather, the justice was required, when forming his opinion, to take proper account of the material upon which he was asked to adjudicate, and his procedural task was to ensure that the defendant had a full and fair opportunity to comment on, and answer, the material before the court. If that material included evidence from a witness who gave oral testimony, clearly the accused had to be given an opportunity to cross-examine. Likewise, if he wished to give oral evidence, he should be entitled to give such evidence. If hearsay were relied upon by either side, the justice had to take into account the fact that it was g
h
j

- a* hearsay and had not been the subject of cross-examination. Applying those conclusions of law to the instant cases, the DPP's application would be allowed and M's application would be dismissed (see p 1009 *h* to p 1011 *d* and p 1012 *f* to *j*, post); *R v Liverpool City Magistrates' Court, ex p DPP* [1992] 3 All ER 249 approved.

Notes

- b* For the right to liberty and the right to a fair trial, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 127, 134, and for liability to arrest for breaching bail conditions, see 11(2) *Halsbury's Laws* (4th edn reissue) para 911.

For the Bail Act 1976, s 7, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 650.

For the Human Rights Act 1998, Sch 1, Pt I, arts 5, 6, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 522, 523.

c

Cases referred to in judgments

- Campbell and Fell v UK* (1984) 7 EHRR 165, [1984] ECHR 7819/77, ECt HR.
De Wilde v Belgium (No 1) (1971) 1 EHRR 373, [1971] ECHR 2832/66, ECt HR.
Engel v Netherlands (No 1) (1976) 1 EHRR 647, [1976] ECHR 5100/71, ECt HR.
d Farmakopoulos v Belgium (1992) 16 EHRR 187, E Com HR and ECt HR.
Kemmache v France (No 3) (1994) 19 EHRR 349, [1994] ECHR 17621/91, ECt HR.
Lamy v Belgium (1989) 11 EHRR 529, [1989] ECHR 10444/83, ECt HR.
Moles, Re [1981] Crim LR 170, DC.
R v Liverpool City Magistrates' Court, ex p DPP [1992] 3 All ER 249, [1993] QB 233, [1992] 3 WLR 20, DC.
e R v Mansfield JJ, ex p Sharkey [1985] 1 All ER 193, [1985] QB 613, [1984] 3 WLR 1328, DC.
R v Newton (1982) 77 Cr App R 13, CA.
Sanchez-Reisse v Switzerland (1986) 9 EHRR 71, [1986] ECHR 9862/82, ECt HR.
Shiesser v Switzerland (1979) 2 EHRR 417, [1979] ECHR 7710/76, ECt HR.
f Toth v Austria (1991) 14 EHRR 551, [1991] ECHR 11894/85, ECt HR.
Winterwerp v Netherlands (1979) 2 EHRR 387, [1979] ECHR 6301/73, ECt HR.

Cases also cited or referred to in skeleton arguments

- A v UK* (1998) 5 BHRC 137, ECt HR.
g Adolf v Austria (1982) 4 EHRR 313, [1982] ECHR 8269/78, ECt HR.
Benham v UK (1996) 22 EHRR 293, [1996] ECHR 19380/92, ECt HR.
Clooth v Belgium (1991) 14 EHRR 717, ECt HR.
Deweere v Belgium (1980) 2 EHRR 439, [1980] ECHR 6903/75, ECt HR.
Eckle v Germany (1982) 5 EHRR 1, [1982] ECHR 8130/78, ECt HR.
h Letellier v France (1991) 14 EHRR 83, [1991] ECHR 12369/86, ECt HR.
Nikolova v Bulgaria [1999] ECHR 31195/96, ECt HR.
Osman v UK (1998) 5 BHRC 293, ECt HR.
R v Governor of Brockhill Prison, ex p Evans (No 2) [2000] 4 All ER 15, [2001] 2 AC 19, HL.
j R (McCann) v Crown Court at Manchester [2001] 1 WLR 358, DC.

Applications for judicial review

R (on the application of the DPP) v Havering Magistrates' Court

The claimant, the Director of Public Prosecutions (DPP), applied with permission of Scott Baker J granted on 8 November 2000 for judicial review of the decision

of justices sitting at Havering Magistrates' Court on 3 October 2000 that oral evidence was required under s 7(5) of the Bail Act 1976 to prove the breach of a bail condition by the interested party, Mark Palmer. The facts are set out in the judgment of Latham LJ.

R (on the application of McKeown) v Wirral Borough Magistrates' Court

The claimant, Mark Paul McKeown, applied with permission of Newman J granted on 30 November 2000 for judicial review of the decision of justices sitting at Wirral Borough Magistrates' Court on 10 October 2000 that the prosecution were not required under s 7(5) of the Bail Act 1976 to call evidence to prove that he had breached a bail condition. The facts are set out in the judgment of Latham LJ.

David Perry (instructed by the *Crown Prosecution Service*, Stratford and Birkenhead) for the DPP.

Julian Knowles (instructed by *David Charney & Co*, Romford) for Mr Palmer.

Henry Blaxland (instructed by *Bell, Lamb & Joynson*, Liverpool) for Mr McKeown.

Cur adv vult

15 December 2000. The following judgments were delivered.

LATHAM LJ.

1. These two applications raise important questions as to the effect of the Human Rights Act 1998 on the Bail Act 1976. These questions are causing considerable difficulty in magistrates' courts up and down the country. This court has therefore been urged to give as much guidance as it sensibly can on the facts of the two instant applications.

2. The first is an application by the Director of Public Prosecutions which asks this court to quash a decision of the Havering Magistrates' Court on 3 October 2000 when proceedings against Mark Palmer for breach of the conditions of his bail were withdrawn. The circumstances were that on 15 September 2000, Mark Palmer appeared before the justices charged with two offences, namely making threats to kill contrary to s 16 of the Offences Against the Person Act 1861, and having a bladed article in a public place contrary to s 139(1) of the Criminal Justice Act 1988. Both offences are triable either way and are punishable with imprisonment. The alleged offences arose out of events which occurred on 6 August 2000, when it was said that Mark Palmer threatened to kill Yvette Cash. Mark Palmer was arrested and admitted to conditional bail, the relevant condition being that he should not contact Yvette Cash either directly or indirectly.

3. Yvette Cash subsequently alleged to the police that Mark Palmer had assaulted and threatened her in breach of the condition of his bail. He was accordingly arrested on 2 October 2000 by police officers who brought him before the magistrates' court on 3 October. Yvette Cash was not at court to give evidence. It was submitted on behalf of Mark Palmer that the prosecution were required to call Yvette Cash to give evidence in person and that in her absence the breach of the bail condition could not be proved. The basis of the submission was that the justices were required to apply the provisions of art 5 and art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) (as set out in Sch 1 to the Human Rights Act 1998) which, it was said, entitled Mark Palmer

a to have the opportunity to cross-examine Yvette Cash. The magistrates' court decision was as follows:

b 'We are satisfied that art 5 is engaged with respect of this application. We are further satisfied that art 6 is engaged and that the breach falls within limits of the article. We have considered the case of *R v Liverpool City Magistrates' Court, ex p DPP* [1992] 3 All ER 249, [1993] QB 233 but feel that this case law is not compatible with the Human Rights Act 1998. If proved breach of bail is akin to a criminal offence and therefore the defendant should have the rights as defined in art 6(3).'

c 4. Because the consequence of this ruling was that the prosecution were required to call Yvette Cash, and she was not present the prosecution, as we have indicated, withdrew the proceedings in relation to the breach of bail. We should record that at trial Yvette Cash did not appear to give evidence; and Mark Palmer was accordingly acquitted.

d 5. In this application, it is submitted on behalf of the Director of Public Prosecutions that the justices were wrong in holding that art 6 of the convention had any relevance to an issue under the 1976 Act, and wrong to conclude that oral evidence from Yvette Cash was required in the circumstances of that case.

e 6. The second application is made by Mark McKeown in circumstances which, on their face, might appear as though he was looking a gift horse in the mouth. On 9 October 2000, he was charged with an offence of burglary and granted bail on condition, inter alia, that he did not enter a particular road, Ridgeview Road, Noctorum, in the Wirral. Having been released from custody on those conditions at about 12 noon, he was arrested by police officers at 7.30 pm, on the basis of an allegation that he had breached his bail conditions by going to Ridgeview Road at approximately 1.30 pm that same day. He was brought before the justices on 10 October 2000 and the prosecution sought his remand in custody on the basis f of the breach of the bail conditions. In support of that submission, the prosecution relied on the statement of one witness who claimed to have seen Mark McKeown in Ridgeview Road at that time.

g 7. At a hearing on the morning of 10 October, the justices, having heard the prosecution submission based upon the statement, and having heard evidence from Mark McKeown and two witnesses, directed themselves that they were only concerned with art 5 and not art 6, but were unable to agree as to whether or not they were of the opinion that there had been any breach of the bail condition. The matter was then adjourned to the afternoon to be dealt with by a bench of three justices. As in the morning, the justices heard a submission by the prosecution based upon the statement which they had, and evidence from h Mark McKeown and his witnesses. The justices concluded the contents of the statement were sufficiently cogent for them to be of the opinion that there had been a breach of the bail condition. They directed themselves, in accordance with advice from their clerk, that art 6 of the convention did not apply; none the less, they concluded that bail should be granted.

j 8. It may seem surprising that, in these circumstances, Mark McKeown is seeking to challenge the decision. But the justices' conclusion that he had been in breach of his bail condition is capable of having an effect in the future. It is accepted by all parties that these two cases disclose the fact that there are differing views amongst those dealing with questions under the 1976 Act in the context of the 1998 Act, particularly in the magistrates' courts, and can properly be dealt with together.

9. The central provisions of the 1976 Act are as follows. Section 4, as amended by s 168(2) of and para 33 of Sch 10 to the Criminal Justice and Public Order Act 1994, provides: a

'General right to bail of accused persons and others.—(1) A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.

(2) This section applies to a person who is accused of an offence when—(a) he appears or is brought before a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offence, or (b) he applies to a court for bail or for a variation of the condition of bail in connection with the proceedings.' b

Section 7 provides: c

'Liability to arrest for absconding or breaking conditions of bail ... (3) A person who has been released on bail in criminal proceedings ... may be arrested without warrant by a constable—(a) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody; (b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions ... d

(4) A person arrested in pursuance of subsection (3) above—(a) shall ... be brought as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace for the petty sessions area in which he was arrested ... e

(5) A justice of the peace before whom a person is brought under subsection (4) above may, subject to subsection (6) below, if of the opinion that that person—(a) is not likely to surrender to custody, or (b) has broken or is likely to break any condition of his bail, remanded him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions, but if not of that opinion shall grant him bail subject to the same conditions (if any) as were originally imposed.' f

10. Paragraphs 2 and 6 of Pt I of Sch 1 to the 1976 Act set out the exceptions to the right to bail in cases punishable with imprisonment as follows: g

'2. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—(a) fail to surrender to custody, or (b) commit an offence while on bail, or (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person ... h

6. The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance to section 7 of this Act.' j

11. The effect of s 7(5) of the 1976 Act was considered by this court in *R v Liverpool City Magistrates' Court, ex p DPP* [1992] 3 All ER 249, [1993] QB 233, which established five propositions which are accurately set out in the notes to the 1976 Act in *Stone's Justices' Manual* (132nd edn, 2000) vol 1, p 150 (para I-1566) as follows:

- a* (a) The section contemplates the constable who has arrested the person bailed bringing him before the justice, and stating his, namely the constable's, grounds for believing that the defendant has broken or is likely to break a condition of his bail; this may well involve the giving of "hearsay evidence".
- b* (b) In the proceeding before the justice, even where the defendant disputes the ground on which he was arrested, there is no necessity for the giving of evidence on oath or providing an opportunity to the person arrested, or his legal representative, to cross-examine, or give evidence himself. Nevertheless, the justice should give the defendant an opportunity to respond to what the constable alleges. (c) The justice has no power to adjourn the proceeding, but must consider, on the material before him, whether he is able to form one of the opinions set out in s 7(5), and if he does so, go on to decide whether to remand the defendant in custody or on bail on the same or more stringent conditions. (d) If the justice feels unable to form one of the opinions set out in s 7(5), he must order the person concerned to be released on bail on the same terms as were originally imposed. (e) A proceeding under s 7(5)
- d* does not preclude a defendant who is remanded in custody from making an application for bail to the justices, or to the Crown Court or to a judge, as appropriate. The presumption in favour of granting bail under s 4 of the Act will be subject not only to the exceptions of the right to bail in Part I, para 2 of Sch 1 to the Act, but also to the exception in para 6 of that Schedule.'

- e* 12. The questions which arise directly in these applications are the extent to which the procedures under s 7(5) and the provisions of para 6 of Pt I of Sch 1 to the 1976 Act are compatible with arts 5 and 6 of the convention. By s 6(1) of the 1998 Act, it is the duty of those exercising jurisdiction under the 1976 Act not to do so in a way incompatible with the convention; and by s 3(1) of the 1998 Act
- f* it is this court's duty to read and give effect to the legislation in a way which is compatible with the convention.

13. Article 5 reads as follows:

'Right to liberty and security

- g* 1. Everyone has the right to liberty and security of person. No one should be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when
- h* it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ...

- j* 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

14. Article 6 provides as follows:

'Right to a fair trial'

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine and have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf on the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

15. The most far-reaching submission made on behalf of the individuals with whom we are concerned today in particular by Mr Knowles on behalf of Mark Palmer is that proceedings under s 7(5) of the 1976 Act amount to charging the arrested person with a criminal offence, so as to give him all the rights in art 6 in particular those set out in para (3). This submission is based upon the proposition that, although it is not in form in domestic law treated as a criminal offence, the convention requires the substance of the procedure to be examined. It is submitted that the constable bringing the arrested person before the justice is effectively charging him, and the consequence of the charge, if established, could be imprisonment. It follows, it is said, that the procedure has all the characteristics required to engage art 6.

16. It is clear that the word 'criminal' in art 6 has an autonomous meaning. In deciding whether proceedings are criminal, the European Court of Human Rights has adopted three criteria based on the judgment of the court in *Engel v Netherlands (No 1)* (1976) 1 EHRR 647: (a) the classification of proceedings in domestic law; (b) the nature of the offence or conduct in question; (c) the severity of any possible penalty.

17. The jurisprudence of the court makes it clear that if the proceedings are criminal under domestic law, then this will determine the question. However, the court has consistently held that if the proceedings are not so classified, the court must itself look at (b) and (c), and come to its own conclusion.

18. An example of that approach is the case of *Campbell and Fell v UK* (1984) 7 EHRR 165, in which the court had to consider whether disciplinary proceedings in prison were criminal proceedings. Although it was argued on behalf of the United Kingdom government that they were classified in domestic law as disciplinary proceedings, the court concluded that art 6 applied on the basis that

a the range of conduct involved could include criminal conduct, and the fact that the penalty that could be awarded was loss of days of remission, in other words loss of liberty. It held that, whilst the fact that the offences could amount to criminal offences was not of itself sufficient to lead to the conclusion that the applicant was facing criminal charges, the scale of the loss of remission to which the applicant was subject was such as to justify the conclusion that he was subject to penalties
b which rendered the charges criminal in nature.

19. Mr Knowles, on behalf of Mark Palmer, referred us to an authoritative text book, van Dijk and van Hoof *Theory and Practice of the European Convention on Human Rights* (3rd edn, 1998), in which the learned editors say (p 412):

c 'As far as the nature of the penalty is concerned, the case-law shows that imprisonment is considered to be the criminal penalty *par excellence* and, therefore, gives an otherwise disciplinary or administrative procedure a criminal character to such an extent that Article 6 must be held applicable.'

20. In order to determine the question in the present case, it is necessary to look with some care at the nature of the exercise undertaken by the justice in
d exercising his jurisdiction under s 7(5) of the 1976 Act. Section 7 is headed, as we have already identified, 'Liability to arrest for absconding or breaking conditions of bail'. This section does not create any offence. This is in contradistinction to s 6 of that Act, which makes it an offence for a person to abscond, punishable with imprisonment.

e 21. We here are concerned simply with allegations that conditions of bail were breached. The jurisdiction to impose such conditions is contained in s 3(6) of the 1976 Act, as amended by ss 27(2) and 168(3) of and Sch 11 to the 1994 Act and by s 54(2) of the Crime and Disorder Act 1998, which provides:

f 'He may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that—(a) he surrenders to custody, (b) he does not commit an offence while on bail; (c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person, (d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence; (e) before the time
g appointed for him to surrender to custody, he attends an interview with an authorised advocate or authorised litigator as defined by section 119(1) of the Courts and Legal Services Act 1990 ...'

22. These provisions therefore set out the purposes for which conditions can be imposed. It has not been suggested that these in any way contravene the
h provisions of the convention. It seems to me, therefore, that s 7 of the 1976 Act is intended to provide the means whereby these purposes can be achieved. The exercise of the powers contained in s 7 is therefore intended to secure the proper achievement of these purposes. The liability of the defendant to be detained in the events specified in s 7 is therefore consequent upon his liability to be detained
j by reason of the charge which he faces in order to secure these purposes. It is not, in my judgment, to be equated to the imposition of any form of punishment or sanction which would justify the conclusion that proceedings under s 7(5) are equivalent to his facing a criminal charge. That would, in any event, be a wholly inappropriate way of categorising a claim that the defendant was not likely to surrender to custody, or was likely to break any condition of his bail, both of which are matters which would justify the exercise of the power under s 7(5) of

the 1976 Act. In these circumstances, I do not consider that art 6 has any direct relevance to these applications. a

23. It is clear that art 5 of the convention does have direct relevance. It is also agreed that the legality of the proceedings cannot be challenged in either case. Both arrests were lawful under s 7(3); both Mark Palmer and Mark McKeown were brought before the justices within the time limit specified by s 7(4); the justices in each case were therefore properly seised of the issues under s 7(5) when they made their respective decisions. The question which this court has to consider is the extent to which art 5 imposes procedural requirements which differ from those which magistrates' courts have adopted since the decision in *R v Liverpool City Magistrates' Court, ex p DPP* [1992] 3 All ER 249, [1993] QB 233. b

24. Mr Perry, on behalf of the Director of Public Prosecutions, submits that the procedures set out in the judgment of Roch J, as he then was, in this court in *Ex p DPP* are entirely compatible with the requirements of art 5. Mr Knowles, on behalf of Mark Palmer, submits that, even if art 6 is not of direct relevance, art 6(3) applies by analogy in defining the procedural safeguards necessary where, as in this case, there is a dispute as to past fact in circumstances where the conclusion of the court as to that fact may expose a defendant to the risk of imprisonment. He submits that it is necessary for admissible evidence to be called, and for the defendant to have the opportunity to cross-examine. He further submits that the defendant must be given adequate time to prepare his defence, and if necessary is entitled to an adjournment for that purpose. The necessary corollary of this argument is that the same principles must apply to any consideration of bail whether in the first instance or at any subsequent time before the magistrates', the Crown Court or the High Court. c

25. Mr Blaxland, on behalf of Mark McKeown, submits that even if oral evidence is not required, some evidence is required, even if in the form of written statements taken under s 9 of the Criminal Justice Act 1967, and that the burden and standard of proof of a breach of a condition should be the criminal burden and standard. Both Mr Knowles and Mr Blaxland submit that the question to be determined by the justice at the end of the day, in the light of his findings of fact, is not simply whether the breach of condition has been proved, but whether or not, in the light of his findings of fact, there are substantial grounds for believing that the defendant, if released on bail, would fail to surrender to custody, commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person. They say that is the necessary question, as it falls fairly and squarely within the purposes of detention permitted by art 5. In particular, it is submitted that it would be impermissible under art 5 to detain a defendant by reason of a breach of his bail conditions simpliciter. They submit that if and in so far as the provisions of para 6 of Pt I of Sch 1 to the 1976 Act require to the contrary, those paragraphs are incompatible with the convention. d

26. There is broad agreement as to the jurisprudence of the European Court of Human Rights which is relevant to the resolution of this question. Although art 5 appears on its face to be directed to the sort of issues raised in this court by applications of habeas corpus, it is clear that its provisions are applicable to the decision of a justice under s 7(5) of the 1976 Act. The general principles applied by the European Court of Human Rights are well described in *Shiesser v Switzerland* (1979) 2 EHRR 417 at 425 (paras 30–31): e

a 'The Court views Article 5 as designed to ensure that no one should be
arbitrarily dispossessed of his liberty. This overall purpose entails, in the area
covered by paragraph 4, the necessity of following a procedure that has a
"judicial character" and gives "guarantees appropriate to the kind of
deprivation of liberty in question", without which it would be impossible to
speak of a "court" ... In addition under Article 5(3), there is both a procedural
b and a substantive requirement. The procedural requirement places the
"officer" under the obligation of himself hearing the individual brought
before him; the substantive requirement imposes on him the obligations of
reviewing the circumstances militating for or against detention, of deciding,
by reference to legal criteria, whether there are reasons to justify detention
and of ordering release if there are no such reasons.'

c 27. Article 5 therefore requires there to be in place a judicial procedure which
not only meets the criterion of being in accordance with law, but which also
provides the basic protection for a defendant inherent in the concept of judicial
proceedings. Such proceedings must ensure equal treatment of the person liable
d to be detained and the authorities, it must be truly adversarial, and there must
be 'equality of arms' between the parties. These concepts inevitably overlap.
In language more familiar to common lawyers, a person liable to detention is
entitled to natural justice. He must be treated fairly.

e 28. The cases to which we have been specifically referred make this point
clearly. In *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, the court held that there
was a breach of art 5 where a person detained for extradition was not given the
opportunity to see and respond to the submissions of the authorities in answer to
his application for release. It is to be noted that the court did not consider that
recourse to a purely written procedure was itself a breach of art 5.

f 29. In *Lamy v Belgium* (1989) 11 EHRR 529, defence counsel was not given the
opportunity to inspect the documents on the file said to provide the justification
for detaining the defendant. Not surprisingly, this was held by the court to be a
breach of the principle that there should be equality of arms, that is that both sides
should have equal access to the material upon which the court is asked to make
its ruling.

g 30. In *Toth v Austria* (1991) 14 EHRR 551, an appeal, dealt with on paper, was
held to be in breach of art 5 where the court dealt with the case in court in the
presence of a representative of the prosecution without notifying the defendant
of the hearing or offering him an opportunity to be present.

h 31. Mr Knowles and Mr Blaxland submit, however, that the requirements of
art 5 go further. They referred us to *De Wilde v Belgium* (No 1) (1971) 1 EHRR 373.
This was a vagrancy case in which the authorities had used an administrative
procedure whereby vagrants could be detained by a magistrate simply as a result
of their having been brought before a magistrate by the police as vagrants.
Having referred to the fact that art 5(4) refers to the concept of a court, the court
held (at 407–409):

j '76. ... It results, however, from the purpose and object of Article 5, as well
as from the very terms of paragraph (4) ("proceedings" ...), that in order to
constitute such a "court" an authority must provide the fundamental
guarantees of procedure applied in matters of deprivation of liberty. If the
procedure of the competent authority does not provide them, the State
could not be dispensed from making available to the person concerned the
second authority which does provide all the guarantees of judicial procedure.

In sum, the Court considers the intervention of one organ satisfies Article 5(4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question ...

79. It is therefore the duty of the Court to determine whether the proceedings for the police courts of Charleroi, Namur and Brussels satisfied the requirements of Article 5(4) which follow from the interpretation adopted above. The deprivation of liberty ... resembles that imposed by a criminal court. Therefore, the procedure applicable should not have provided guarantees markedly inferior to those existing in criminal matters in the member States of the Council of Europe.'

32. In a mental health case, *Winterwerp v Netherlands* (1979) 2 EHRR 387, the court said (at 409):

'60. ... The judicial proceedings referred to in Articles 5(4) need not, it is true, always be attended by the same guarantees as those required under Article 6(1) for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty".'

33. It is submitted on the basis of these authorities that where the complaint which is said to justify deprivation of liberty depends upon proof of a past event, then the only way in which that can properly be tested by the court is by production of the witness or witnesses necessary to establish that event, so as to give the defendant an opportunity to cross-examine and make appropriate submissions. It is submitted that further support for this can be gleaned from academic authority. (i) In Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights* (1995), the authors state (p 150): 'Article 5(4) also incorporates the principle of adversarial proceedings, which has been developed under Article 6(1). There it means that all evidence must be produced before the parties with a view to adversarial argument.' The authors refer (p 214) to the right to cross-examine as being one of the core rights inherent in adversarial proceeding under art 6(1). (ii) Starmer *European Human Rights Law* (1999) (p 236 (para 7.20)), says: 'Presumably, there must also be an opportunity for the defence to test such evidence as is adduced to justify pre-trial detention.'

34. It seems to me that care needs to be taken to ensure that the facts and decisions in given cases do not hide the principal purpose behind the provisions of art 5. It is to ensure that persons are not subject to arbitrary deprivation of liberty. That is clear, not only from the cases to which I have already referred, but also from the decision of the court in *Kemmache v France* (No 3) (1994) 19 EHRR 349. The court said (at 363-364 (para 37)):

"The Court reiterates the words "in accordance with a procedure described by law" essentially refer back to a domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any

a measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.'

35. It is clearly with this principle in mind that the court has been prepared to borrow some of the general concepts of fairness in judicial proceedings from art 6. But that does not mean that the process required for conformity with art 5 must also be in conformity with art 6. That would conflate the convention's control over two separate sets of proceedings, which have different objects. Article 5, in the present context, is concerned to ensure that the detention of an accused person before trial is only justified by proper considerations relating to the risks of absconding, and of interfering with witnesses, or the commission of other crimes. Article 6 is concerned with the process of determining the guilt or otherwise of a person who if found guilty would be subject to criminal penalties. It is in that context that the procedural safeguards required respectively under arts 5 and 6 must be viewed. In particular, it seems to me to be important to note that *De Wilde's* case and *Winterwerp's* case represent the high water mark of the argument that the procedural requirements of art 6 are to be in some way assimilated to consideration of issues under art 5. Neither decision does more, in my view, than to underline the fact that where a decision is taken to deprive somebody of his liberty, that should only to be done after he has been given a fair opportunity to answer the basis upon which such an order is sought. It seems to me that in testing whether or not such an opportunity has been given, it is essential to bear in mind the nature and purpose of the proceedings in question.

36. Under the 1976 Act, a person suspected of an offence and brought before the court for the purposes of consideration of bail, is, by virtue of s 4 of and Sch 1 to that Act, entitled to bail unless the court is satisfied that there are substantial grounds for believing that the defendant would behave in the way set out in para 2 of Pt I of the Schedule. In the case of *Re Moles* [1981] Crim LR 170, the Divisional Court stated that strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an application under the 1976 Act. And in *R v Mansfield JJ, ex p Sharkey* [1985] 1 All ER 193 at 201, [1985] QB 613 at 626, Lord Lane CJ stated: 'It is conceded that there is no requirement for formal evidence to be given (see *Re Moles* [1981] Crim LR 170). It was for example sufficient for the facts to be related to the magistrates at secondhand by a police officer.'

37. The correctness of these decisions has not been challenged before us. Similar considerations must apply to the assessment of the likelihood of a defendant absconding or breaching the conditions of his bail in an inquiry under s 7(5). But, say both Mr Knowles and Mr Blaxland, where such an inquiry depends upon proof of a past fact, for example a threat to abscond, or to breach the conditions of bail, or an allegation that a condition of bail has been breached, that is a matter which must be proved, and proved formally, that is by the production of evidence and, says Mr Knowles, the opportunity to cross-examine the appropriate witnesses. This follows, it is said, from the need to give the defendant a proper opportunity to challenge the basis upon which detention is sought; and, it is submitted, the justice can only be of the 'opinion' required to justify detention, if the matter has been proved by the prosecution to the criminal standard of proof. It is further submitted, by an analogy with criminal sentencing, where a decision has to be taken as to the appropriate course to take, and there is

a
a conflict of fact between the prosecution and the defendant, the judge should, save in obvious cases, order a trial of the issue (see *R v Newton* (1982) 77 Cr App R 13).

38. Proceedings under s 7(5) are by their nature emergency proceedings to determine whether or not a person who was not considered to present the risks which would have justified remanding in custody in the first instance, none the less does now present one or other of those risks. It is true that a literal reading of s 7(5) could lead to the conclusion that the mere fact of a breach of condition could justify detention. But it should be noted that such a finding only gives the justice the power to detain, and not the duty to detain. It seems to me that in exercising that power, the justice would not be entitled to order detention by reason simply of the finding of breach; that in itself is not a justification for the refusal of bail under para 2 of Pt 1 to Sch 1 to the 1976 Act. To hold that breach of a condition, was, ipso facto, a ground for detention, would, it is agreed by all parties, be a decision taken on a ground outside the purposes which the European Court of Human Rights has determined justify detention under art 5. The fact of a breach of condition may be some evidence, even powerful evidence, of a relevant risk arising. But it is no more than one of the factors which a justice must consider in exercising his discretion under s 7(5). b c d

39. It seems to me that the justice is simply required by the statute to come to an honest and rational opinion on the material put before him. In doing so, he must bear in mind the consequences to the defendant, namely the fact that he is at risk of losing his liberty in the context of the presumption of innocence. This was the view of this court in *R v Liverpool City Magistrates' Court, ex p DPP* [1992] 3 All ER 249, [1993] QB 233. Article 5 does not, in my judgment, require any different approach. None of the cases which have been cited to us suggest that the provisions of art 5 include a requirement that underlying facts relevant to detention are to be proved to the criminal standard of proof. This is not surprising, bearing in mind the delicate exercise on which the court is engaged in this type of jurisdiction, in seeking to provide fairness to the defendant on the one hand, but securing the objectives of justice and the protection of the public during the period up to and including trial on the other. e f

40. From the decisions in *Ex p DPP, Re Moles and Ex p Sharkey* it is clear that the material upon which a justice is entitled in domestic law to come to his opinion is not restricted to admissible evidence in the strict sense. Lord Lane CJ describes the common practice of the relevant material being presented by a police officer. I see nothing in either art 5 itself, or in the authorities to which we have been referred, which suggest that, in itself, reliance on material other than evidence which would be admissible at a criminal trial would be a breach of the protection required by art 5. It is true that the European Court of Human Rights on occasions refers to the need for evidence; but that is used in contradistinction to mere assertion. It does not seem to me that any of the authorities to which we have been referred assist in determining the nature of that 'evidence'. Bearing in mind the differences in the rules for admissibility of evidence in the different jurisdictions of the member states, it is perhaps not surprising that the court appears to have left resolution of that question to domestic law. g h

41. What undoubtedly is necessary is that the justice, when forming his opinion, takes proper account of the quality of the material upon which he is asked to adjudicate. This material is likely to range from mere assertion at the one end of the spectrum which is unlikely to have any probative effect, to documentary proof at the other end of the spectrum. The procedural task of the justice is to ensure that the defendant has a full and fair opportunity to comment j

a on and answer, that material. If that material includes evidence from a witness
who gives oral testimony, clearly the defendant must be given an opportunity to
cross-examine. Likewise, if he wishes to give oral evidence he should be entitled
to. The ultimate obligation of the justice is to evaluate that material in the light
of the serious potential consequences to the defendant, having regard to the
b matters to which I have referred, and the particular nature of the material, that is
to say taking into account, if hearsay is relied upon by either side, the fact that it
is hearsay and has not been the subject of cross-examination, and form an honest
and rational opinion. If his opinion is that the defendant has broken a condition
of his bail, he must then go on to consider whether or not, in view of that opinion,
and in all the circumstances of the case, he should commit the defendant in
c custody or grant bail on the same or other conditions, applying the principles set
out in ss 3(6) and 4 of and para 2 of Pt I of Sch 1 (in para 2 of Pt II) to the 1976 Act.
If that course is taken, I cannot see how the procedure could be said to be in
breach of art 5.

42. It seems to me, therefore, that the general principles established in *Ex p DPP*
remain good law subject to what I have said at [41] above.

d 43. A possible problem arises out of the fact that in that case this court held
that there was no power in the justice to adjourn the hearing once the defendant
had been brought before him under s 7(4). The issue does not arise in either of
the cases before us. But Mr Knowles submits that this could, in certain
circumstances, result in a breach of art 5. He referred us to *Farmakopoulos v*
Belgium (1992) 16 EHRR 187. This is a decision of the European Commission of
e Human Rights. The claim related to the claimants' detention pending extradition.
He was entitled to appeal against an extradition order within 24 hours from the
service of the order. But the order itself made no mention about the possibility
of an appeal. The commission held that a combination of the shortness of the time
limit imposed and the lack of information made any appeal against the enforcement
f notice purely theoretical. Whilst accepting that it may be appropriate for very
short time limits to be imposed, it stated (at 194 (para 51)): 'The existence of such
limits is intended to ensure the proper administration of justice. Even so, the period
must not be so short as to restrict the availability and tangibility of the remedy.'

44. As I have said, this is an issue which is not raised in either of these cases.
g We would simply observe that the section does not itself provide for the
opportunity of adjournment; and even if the justice were to be held to have a
power to adjourn, contrary to the views of this court in *Ex p DPP*, there is clearly
no power to detain for the purposes of the adjournment. A solution is likely to
be that, Parliament having determined that there should be a swift and relatively
informal resolution of the issues raised, the justice must do his best to come to a
h fair conclusion on the relevant day; if he cannot do so, he will not be of the
opinion that the relevant matters have been made out which could justify
detention.

45. The next matter which does not strictly arise for consideration in these
cases but can usefully be dealt with is the question of whether or not para 6 of Pt I
j of Sch 1 to the 1976 Act is compatible with art 5. This paragraph is not happily
drafted. On its face, it appears to entitle a court to deny a defendant bail, simply
on the basis that he has been arrested under s 7(3) of the 1976 Act, whether or not
the justice comes to the conclusion under s 7(5) that he is likely to abscond, or has
breached a condition, or is likely to breach a condition of bail. The Law Commission,
in *Bail and the Human Rights Act 1998* (Law Com Consultation Paper no 157), has
pointed out in paras 8.4 and 8.5 (p 64) that this provision would, if interpreted

literally, be a clear breach of art 5, in that it would apparently justify detention in circumstances which could not properly be said to be within the purpose for which detention is justified under art 5. a

46. In effect, it would appear to be a deeming provision. The same language is used in Pt II of Sch 1, relating to arrest for non-imprisonable sentences. If read literally, its application to those arrested for non-imprisonable offences would appear to be even more objectionable. The circumstances of an arrest or a finding against the defendant under s 7(5) are clearly capable of providing good reason for the conclusion that one of the grounds for denying bail exists; neither can properly be a ground in itself. Paragraph 8.8 (p 65) in the Law Commission consultation paper states: b

‘It may be arguable that the provisions create this exception to the right to bail are not *inherently* incompatible with the Convention, because they do not *prevent* the court from granting bail in an appropriate case. The court might, for example, construe them as meaning only that the arrest under section 7 is a possible reason for thinking that a ground for refusing bail applies, not a ground in itself. If this is a possible interpretation then under section 3 of the Human Rights Act it must be the correct interpretation. But in that case the relevant provisions would be misleading; they certainly give the impression that bail can properly be refused on this ground alone. They appear to serve no purpose which is both independent of the other exceptions and permissible under Article 5.’ c

47. It is our duty to construe the 1976 Act in accordance with the convention, if we can. In our judgment, para 6 of Pt I and para 5 of Pt II to Sch 1 to the 1976 Act are to be construed as providing that such an arrest is capable of being taken into account in determining whether or not any of the grounds for refusing bail set out in para 2 of Pt I or para 2 of Pt II exist. d

48. As far as the two cases before us are concerned, the result of the conclusions that I have reached on the law is that the justices of the Havering Magistrates’ Court were wrong to conclude that the provisions of art 6(3) applied to the hearing before them, and the decision must be quashed. As far as the justices for the Wirral Borough are concerned, they were entitled to consider the statement submitted on behalf of the prosecution. There is nothing to suggest that they failed to take into account, when considering its weight, the fact that Mark McKeown had not had an opportunity to cross-examine the witness. They heard evidence from Mark McKeown. The decision which they reached was a rational decision. The application for judicial review of that decision therefore fails. e

POOLE J.

49. I agree and would add only this. Counsel who have addressed us here have drawn a clear and proper distinction between their citations from statute and from case law on the one hand, and from academic commentary and footnotes on the other. It is a distinction that is well made, not least in these early days of the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998), when commentary, though often valuable, can sometimes be venturesome as well. f

- a *DPP's application allowed. Mr McKeown's application dismissed. Permission to appeal refused, but court certifying that the following points of law of general public importance were involved in its decision: '(1) In a hearing under s 7(5) of the Bail Act 1976, do arts 5(3) and 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms require the justice (or justices) to make a decision on the basis of evidence which would be admissible in a criminal trial? (2) Does art 6 of the convention apply to hearings under s 7(5) of the Bail Act 1976?'*

Dilys Tausz Barrister.

Prudential Assurance Co Ltd v McBains Cooper (a firm) and others

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, BROOKE AND ROBERT WALKER LJJ

4, 23 MAY 2000

Judgment – Handed down judgments – Judgments in advance of hearing – Judge sending draft judgment to parties’ lawyers – Parties compromising dispute before judgment formally handed down – Whether judge having discretion to hand down judgment notwithstanding settlement agreement.

After the trial of a surveyors’ negligence action in the Technology and Construction Court, the judge completed a draft written judgment and sent copies to the parties’ lawyers on a confidential basis in accordance with a recent practice statement. The judgment dealt partly with factual matters which were of no real interest to anyone other than the parties, but also with three disputed issues of law which could have been of wider interest and application. Shortly before the judgment was due to be handed down, the parties compromised their dispute and asked the judge to adjourn the hearing with a view to his making a Tomlin order. He agreed to do so, and the next day the parties duly lodged the order. After reflection, the judge concluded that there were grounds for handing down the judgment formally in open court. At a subsequent hearing, the parties asked him not to do so. The judge held that he had a discretion to hand down judgment, and that there were strong public interest grounds for doing so which overrode all other considerations. The defendants appealed with the support of the claimants, contending that, once parties knew what a judge intended to say in his judgment, they were at liberty to compromise their dispute and make it a term of the compromise that the judge would not publish the judgment.

Held – Where, under the new practice, a judge circulated a draft judgment to the parties’ legal advisers, he had begun the process of delivering judgment and, providing that a lis was in being at that stage, he then had a discretion whether to continue the process by handing down the judgment or to abort it at the parties’ request. There might well be a public interest in the judge continuing the process, notwithstanding the parties’ wishes that he should not do so, and there could be no question of a judge being deprived of the power to decide whether or not to do so simply because the parties had decided to settle their dispute after reading the judgment which had been sent to them in confidence. A conclusion to the contrary would mean that parties could prevent a judge from delivering judgment even if it contained findings of serious fraud, if a defendant was willing to pay a claimant large sums of money to suppress them. In the instant case, the judge had been correct to rule that he had a discretion, and there were no grounds on which the court could interfere with his exercise of that discretion. Although the parties might now face ancillary litigation on the question whether their compromise was binding, or the expense and inconvenience of an appeal if it were accepted or held that it was not, they had placed themselves in that position by making a compromise agreement on the mutual understanding that, as a consequence of their compromise, the judgment would not be handed

- a down. That understanding was unenforceable, in that public policy dictated that the judge should have an independent discretion to decide whether or not to deliver his judgment. The wishes of the parties were just one factor, but not an overriding factor, which a judge should take into account in deciding how to exercise his discretion. Accordingly, the appeal would be dismissed (see p 1022 c to e, p 1023 d, e to g and p 1024 c d, post).
- b *HFC Bank plc v HSBC Bank plc* [2000] CPLR 197 distinguished.
Practice Statement (Royal Courts of Justice: judgments) [1998] 2 All ER 667 considered.

Notes

For judgment on trial or hearing generally, see 26 *Halsbury's Laws* (4th edn) para 532.

c Cases referred to in judgments

- Ainsbury v Millington* [1987] 1 All ER 929, [1987] 1 WLR 379n, HL.
Bruce v Worthing BC (1993) 26 HLR 223, CA.
Grovit v Doctor [1997] 2 All ER 417, [1997] 1 WLR 640, HL.
- d *HFC Bank plc v HSBC Bank plc* [2000] CPLR 197, CA.
Holtby v Hodgson (1889) 24 QBD 103, CA.
Knowles v Roberts (1888) 38 Ch D 263, CA.
Medcalf v Mardell [2000] CA Transcript 334.
Noel v Becker [1971] 2 All ER 1186n, [1971] 1 WLR 355, CA.
- e *Plumley v Horrell* (1869) 20 LT 473.
Practice Note (Court of Appeal: reserved judgments) [1995] 3 All ER 247, [1995] 1 WLR 1055.
Practice Statement (Royal Courts of Justice: judgments) [1998] 2 All ER 667, [1998] 1 WLR 825.
R v Secretary of State for the Home Dept, ex p Salem [1999] 2 All ER 42, [1999] 1 AC 450, [1999] 2 WLR 483, HL.
- f *Secretary of State for Trade and Industry v Rogers* [1996] 4 All ER 854, [1996] 1 WLR 1569, CA.
St Nazaire Co, Re (1879) 12 Ch D 88, CA.
Suffield and Watts, Re, ex p Brown (1888) 20 QBD 693, CA.
Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469, [1944] AC 111, HL.

g Cases also cited or referred to in skeleton arguments

- Gouriet v Union of Post Office Workers* [1977] 1 All ER 696, [1977] QB 729, CA; *rvsd* [1977] 3 All ER 70, [1978] AC 435, HL.
Johnson (B) & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395, CA.

h Appeal

The defendants, McBains Cooper, a firm of surveyors, and 16 of its partners, appealed with permission of Judge Richard Havery QC from his decision, sitting in the Technology and Construction Court on 5 November 1999, that he would formally hand down judgment in open court in an action brought against the defendants by the claimants, Prudential Assurance Co Ltd, notwithstanding that the parties had reached an agreement compromising their dispute after the judgment had been circulated in draft to the parties' lawyers. The claimants supported the appeal. The facts are set out in the judgment of Brooke LJ.

David Holland (instructed by *Hammond Suddards*) for the defendants.
Duncan McCall (instructed by *Lovells*) for the claimants.

23 May 2000. The following judgments were delivered.

BROOKE LJ (giving the first judgment at the invitation of Peter Gibson LJ).

1. This is an appeal by the defendants, which is supported by the claimants, against a ruling by Judge Richard Havery QC sitting in the Technology and Construction Court on 5 November 1999 to the effect that he would hand down his written judgment in this action notwithstanding the fact that the parties had compromised their dispute shortly before he was originally due to hand down his judgment on 18 October 1999.

b

2. This is a surveyors' negligence action arising out of a survey carried out for the claimants by Mr Ney, the sixth defendant, who is a partner in the firm of McBains Cooper, the first defendants. The action was tried by the judge on five days between 22 and 29 June 1999. The judge completed his written judgment in draft on 14 September. He signed and dated it, and then sent copies of it to the parties' lawyers on a confidential basis in accordance with the procedure prescribed by the *Practice Statement (Royal Courts of Justice: judgments)* [1998] 2 All ER 667, [1998] 1 WLR 825. The day for handing down the judgment in open court was fixed for Monday 18 October 1999. The judge imposed an embargo on the notification of the terms of the judgment to the parties until 4 pm on Friday 15 October 1999.

c

3. Just before the judge was due to hand down his judgment on 18 October he was asked by the parties to adjourn that hearing with a view to his making a Tomlin order on a paper application they would be making to him in due course, and he agreed to do so. In his judgment under appeal the judge said that counsel asked for an adjournment, rather than any other disposal of the hearing, on the ground that there was a possibility, expressed to be a small one, that the settlement would unravel. In the event a Tomlin order was signed by the representatives of both parties and lodged on 19 October.

d

e

4. Following these events it seemed to the judge on reflection that there were grounds which would justify handing down his judgment formally in open court. He therefore fixed a hearing, which took place on 5 November, in order to give counsel the opportunity to make submissions to him on this issue. At that hearing both counsel invited him not to hand down the judgment in open court for substantially the same reasons. Before describing the judge's conclusions I will first say something about the underlying proceedings.

f

5. The action related to a structural survey of a commercial property in Guildford. In April 1995 the claimants had offered to buy the building from the vendors of the property for £6.9m subject, among other things, to a structural survey. This offer was accepted on 3 May, and the defendants were instructed by the claimants to carry out the survey as soon as possible. Mr Ney inspected the building within seven days, and prepared an executive summary report in accordance with his instructions, which he sent to the claimants on 24 May. The executive summary was, in accordance with the agreement made between the claimants and the defendants, to be an overview of the recommendations and conclusions in the eventual report, and had to include major defects. Contracts were exchanged between the vendors and the claimants on 12 June, and the sale was completed on 23 June, the day when Mr Ney's condition survey report reached the claimants. In these circumstances the latter report played no part in the proceedings.

g

h

j

a 6. The claimants' complaint which was at the centre of this litigation was that the defendants had been negligent in failing to warn them of the true condition of the roof, which had numerous defects, so that major remedial works had to be carried out. These were completed in December 1996 at a total cost of £174,684.77.

b 7. The judge considered the issues of negligence that arose in the case, and made adverse findings against the defendants. He found that if the defendants' survey had put the claimants on notice about the condition of the roof, they would not have proceeded to purchase the property for £6.9m. They would have tried to negotiate a reduction in price to reflect the perceived cost of remedying the defects, and the sale would not have gone ahead if they had not succeeded in negotiating a reduction to their satisfaction.

c 8. Much the greater part of the judgment was concerned with matters relating to the amount of damages the judge should award. It was common ground that the appropriate measure of damage was the diminution in value of the property. The judge considered the expert evidence on this issue. He preferred the evidence given on behalf of the claimants to the effect that the diminution in value was £250,000. This evidence not only took into account the roof defects which had to
d be repaired but also what was described as the stigma attached to defective properties, arising not only out of the suspicion that they had been poorly constructed in the first place but also out of the large risk factor remaining with the purchaser that the structural survey might have uncovered only half the problem.

e 9. Up to this point, the judge was concerned only with resolving issues of fact against a common background of law. He then turned to resolve some disputed questions of law.

f 10. The first was concerned with an argument by the defendants to the effect that the stigma was removed once the repairs had been carried out, and that to award the claimants £250,000 in these circumstances would be to give them an award for loss which they had not in fact suffered. After considering the effect of two leading cases the judge held that the damages were not to be reduced by reason of the carrying out of the repairs, having regard to the logic behind the prima facie rule that the measure of damage was the diminution value.

g 11. The second question of law which the judge had to resolve arose out of the defendants' argument that the claimants ought to have mitigated their damage by charging the cost of the repairs to the tenants as part of their service charges, given that the tenants' leases contained repairing covenants. The judge considered the effect of five authorities before reaching his conclusion that the claimants' non-recovery of this cost, or part of it, from the tenants did not constitute an
h unreasonable failure to mitigate their damage.

j 12. Finally, the judge considered an argument by the defendants to the effect that the damages ought to have been reduced by £40,000, being the amount the claimants recovered from the original builders pursuant to a warranty whose benefit had been assigned to them, and that because this settlement of the warranty claim was unreasonably low, a larger sum should be allowed in mitigation of damages under this head.

13. The judge considered two authorities quite briefly before concluding that the recovery of £40,000 represented a collateral benefit under a wholly independent contract which did not have to be taken into account. He then went on to consider the evidence about the level of the settlement, and concluded that the settlement of £40,000 was reasonable.

14. It will therefore be seen that the judgment was concerned partly with the resolution of issues of fact which had no real interest to anybody other than the parties, and partly with the resolution of three disputed issues of law which could be of wider interest and application. a

15. After hearing counsel on 5 November, the judge gave a short ruling in which he concluded that there were strong public interest grounds for formally delivering his judgment in open court. He immediately granted permission to appeal, and the effect of his ruling has been stayed until the conclusion of this appeal. He accepted that judgment was not given within the meaning of CPR 40.7(1) when it was sent to the parties' lawyers on 14 September, and he also accepted that it was open to parties to settle their case at any time, whether before or after judgment was handed down. He observed that a judgment for damages only has no effect unless it is incorporated in an order of the court, which must be sealed by the court (CPR 40.2(2)(b)). It was not the practice to seal written judgments, whether formally handed down in open court or not, and oral judgments could not of course be sealed. It was always open to the parties, after hearing or reading a reasoned judgment, to invite the court to make a consent order in some other terms at any time before an order of the court was perfected in pursuance of the judgment. b
c
d

16. After considering the arguments addressed to him by counsel the judge concluded:

'The general point in favour of not handing down the judgment is that to do so could lead to further costly litigation. In my judgment, I have a discretion whether to hand down the judgment. The risk of further costly litigation is certainly a weighty matter to hold in the balance. Nevertheless, I think that in general, where a judgment has been finalised and notified to the parties and they enter into a settlement in the light of that judgment, there are overriding public interest considerations in favour of handing down the judgment in open court. (1) There are cases, for example, pollution cases, where the findings of fact themselves may be of public interest and importance. (2) There are other cases, such as the present, where decisions on points of law may be of public interest or may be considered worthy of being reported as authorities. If it were the case that the settlement of an action after it had become the subject of a judicial decision prevented the publication of the judgment, it would be open to the parties, or to one party by making a sufficiently attractive offer to the other, to suppress the judgment. There are various reasons why a party may wish to do that. For example, the insurer of a party may wish to suppress the publication of an authority on a point of law which it may consider to be against its interests. Clearly, a situation where there may be a bias, however slight, in the selection of the authorities which see the light of day is contrary to the public interest. I conclude that there are strong public interest grounds for formally delivering the judgment in open court. Those grounds, in my judgment, override all others. Thus, I shall now formally hand down the judgment. The judgment having been notified to the parties, I will take it as read and direct that no further transcript need be taken.'

e
f
g
h
j

17. This appeal raises a novel point of general importance. The question we have been asked to consider could not have arisen, at any rate in its present form, before the introduction of the practice by which judges made a draft of their judgment available to the lawyers for the parties (or to the parties themselves if

a unrepresented) on a confidential basis before the time fixed for formally handing it down in court. On the latter occasion it was made generally available in written form and was not read out in open court. The practice started in the Civil Division of the Court of Appeal, and in 1995 Bingham MR issued a practice note on the topic (see *Practice Note (Court of Appeal: reserved judgments)* [1995] 3 All ER 247, [1995] 1 WLR 1055). The practice proved so popular, and was so effective in
b saving time and resources, that it was then adopted, on appropriate occasions, by the Criminal Division of the Court of Appeal and by judges in the three divisions of the High Court. A fuller practice statement was issued in April 1998 by Lord Bingham of Cornhill CJ, with the authority of the other heads of division (see *Practice Statement (Royal Courts of Justice: judgments)* [1998] 2 All ER 667, [1998] 1 WLR 825).

c 18. Before I consider the terms of that practice statement, so far as they are material, it will be convenient to set out the governing principles of law which would have been applied in a case not affected by this new practice, where judgment was given orally, in the traditional manner, or was handed down in writing without any prior notice.

d 19. It is elementary that parties to private litigation are at liberty to resolve their differences by a compromise, and that an unimpeached compromise represents the end of the dispute or disputes from which it arose (see *Foskett Law & Practice of Compromise* (4th edn, 1996) p 90, citing *Plumley v Horrell* (1869) 20 LT 473 per Lord Romilly MR, and *Knowles v Roberts* (1888) 38 Ch D 263 at 272 per Bowen LJ).

e 20. The House of Lords has on occasion declined to hear an appeal in the context of private litigation once it has perceived that the original *lis* between the parties is at an end, whether by virtue of a compromise or because, as in *Ainsbury v Millington* [1987] 1 All ER 929, [1987] 1 WLR 379n, there has been such a change in the underlying factual situation that the remedy sought by the appellant no longer raises any live issues. In *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 at 470–471, [1944] AC 111 at 113–114 Viscount Simon LC
f set out the governing principles in these terms:

‘I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing
g *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties ... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the
h House undertakes to decide as a living issue.’

21. In *Ainsbury v Millington* [1987] 1 All ER 929 at 931, [1987] 1 WLR 379n at 381, after restating this principle, Lord Bridge of Harwich added:

‘Different considerations may arise in relation to what are called “friendly actions” and conceivably in relation to proceedings instituted specifically as a test case ... Again litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved.’
j

22. In the recent case of *R v Secretary of State for the Home Dept, ex p Salem* [1999] 2 All ER 42, [1999] 1 AC 450 the House of Lords recognised that different

principles applied in cases where there was an issue involving a public authority as to a question of public law. In such a case there was a discretion to hear disputes, but Lord Slynn of Hadley said ([1999] 2 All ER 42 at 47, [1999] 1 AC 450 at 457) that this discretion had to be exercised with caution. He then explained the circumstances in which there might be a good reason in the public interest for proceeding to hear an appeal even though it was 'academic between the parties'.

23. This, however, is not a public law case, and counsel argued that if at any time before judgment was entered the parties told the court that they had compromised their dispute, that was the end of the matter, unless the parties wished the court to take steps to assist them to put their compromise into effect. If they presented a consent order to the court, the court would normally not be concerned to approve or disapprove its terms before directing that it should be entered (see *Noel v Becker* [1971] 2 All ER 1186n, [1971] 1 WLR 355 and *Bruce v Worthing BC* (1993) 26 HLR 223).

24. It is clear to me that the resolution of this appeal turns on the nature of the exercise that is being performed from the moment the draft judgment is delivered to the parties in accordance with the new practice. Counsel argued that this new practice did not make any difference at all. They both submitted that once the parties knew what the judge intended to say in his or her judgment, they were at liberty to compromise their dispute and to make it a term of their compromise that the judge would not publish the judgment whose terms they had read. They accepted that one party might be so anxious to prevent publication that it might be willing to pay the other party far more than the total amount of its claim plus indemnity costs, but they submitted that such a compromise would be binding and enforceable and that a condition to the effect that the judge would not publish the judgment he or she had prepared did not offend against public policy in any way.

25. In order to consider the merits of this somewhat surprising submission it is necessary first to set out the relevant terms of the current practice statement (*Practice Statement (Royal Courts of Justice: judgments)* [1998] 2 All ER 667, [1998] 1 WLR 825). After explaining in para 1 the reasons for some changes in the previous practice, the practice statement states in para 2 ([1998] 2 All ER 667 at 667–668, [1998] 1 WLR 825 at 826–827):

'Availability of handed down judgments in advance of the hearing: new arrangements

Unless the court otherwise orders—for example if a judgment contains price-sensitive information—copies of the written judgment will now be made available in these cases to the parties' legal advisers at about 4 pm on the second working day before judgment is due to be pronounced on condition that the contents are not communicated to the parties themselves until one hour before the listed time for pronouncement of judgment. Delivery to legal advisers is made primarily to enable them to consider the judgment and decide what consequential orders they should seek. The condition is imposed to prevent the outcome of the case being publicly reported before judgment is given, since the judgment is confidential until then. Some judges may decide to allow the parties' legal advisers to communicate the contents of the judgment to their clients two hours before the listed time, in order that they may be able to submit minutes of the proposed order, agreed by their clients, to the judge before the judge comes into court, and it will be open to judges to permit more information about

a the result of a case to be communicated on a confidential basis to the client
at an earlier stage if good reason is shown for making such a direction. If, for
any reason, a party's legal advisers have special grounds for seeking a relaxation
of the usual condition restricting disclosure to the party itself, a request for
relaxation of the condition may be made informally through the judge's
clerk (or through the associate, if the judge has no clerk). A copy of the
b written judgment will be made available to any party who is not legally
represented at the same time as to legal advisers. It must be treated as
confidential until judgment is given. Every page of every judgment which is
made available in this way will be marked "Unapproved judgment: No
permission is granted to copy or use in court". These words will carry the
authority of the judge, and will mean what they say. The time at which
c copies of the judgment are being made available to the parties' legal advisers
is being brought forward 24 hours in order to enable them to submit any
written suggestions to the judge about typing errors, wrong references and
other minor corrections of that kind in good time, so that, if the judge thinks
fit, the judgment can be corrected before it is handed down formally in court.
d The parties' legal advisers are therefore being requested to submit a written
list of corrections of this kind to the judge's clerk (or to the associate, if the
judge has no clerk) by 3 pm on the day before judgment is handed down. In
divisions of the court which have two or more judges, the list should be
submitted in each case to the judge who is to deliver the judgment in question.
e Lawyers are not being asked to carry out proof-reading for the judiciary, but a
significant cause of the present delays is the fact that minor corrections of this
type are being mentioned to the judge for the first time in court, when there
is no time to make any necessary corrections to the text.'

26. This extract makes it clear that the subject matter of this practice
f statement is the judgment which the court is delivering in the case. This is the
'handed down judgment' of which copies are to be made available in advance of
the hearing 24 hours earlier than was allowed for in the previous practice. The
express purpose of these arrangements was to enable the parties' legal advisers to
consider 'the judgment' and decide what consequential orders they should seek.
The parties themselves were not ordinarily to be allowed to have the contents of
g the judgment communicated to them until an hour before the listed time for
'pronouncement of the judgment' because 'the judgment' is confidential until it
is 'given'. The document which is sent to the parties' legal advisers in confidence
is to be marked 'unapproved judgment', and the reason why the procedure is being
h elongated is to enable minor corrections to be pointed out to the judge in time
for them to be put right before the judgment is 'handed down formally in court'.

27. It is clear that when a copy of the judgment is sent to the parties' legal
advisers in accordance with this new practice, it is not at that time being given or
made within the meaning of CPR 40.7 ('A judgment or order takes effect from the
day when it is given or made ...'); compare *Holtby v Hodgson* (1889) 24 QBD 103.
j It is also clear that the judge is at liberty to alter the terms of his or her judgment
(whether to make minor corrections or for any other reason) before handing it
down formally in court. This, however, is nothing new, because it has always
been within the powers of a judge to reconsider his or her decision at any time
before it is entered and perfected (*Re St Nazaire Co* (1879) 12 Ch D 88 at 91;
Re Suffield and Watts, ex p Brown (1888) 20 QBD 693 at 697). It has also always
been within a judge's powers to alter at any time his or her judgment if it has been

delivered orally, although not so as to contradict the order made on the judgment once it has been perfected (see *Secretary of State for Trade and Industry v Rogers* [1996] 4 All ER 854 at 862, [1996] 1 WLR 1569 at 1578 and *Medcalf v Mardell* [2000] CA Transcript 334 (para 62)).

28. There is no indication in the practice statement that its purpose is to allow the parties to have more material available to them to help them to settle their dispute. Its purpose is to introduce an orderly procedure for the delivery of reserved judgments, whereby the parties' lawyers can have time to consider and agree the terms of any consequential orders they may invite the court to make and the process of delivering judgment can be abbreviated by avoiding the need for the judge to read the judgment orally in court.

29. It follows that under the new practice the process of delivering judgment is initiated when the judge sends a copy of it to the parties' legal advisers. Provided there is a lis in being at that stage, it will be in the discretion of the judge to decide whether to continue that process by handing down the judgment in open court or to abort it at the parties' request. I agree with the judge that there may well be a public interest in continuing the process, notwithstanding the parties' wishes that he should not do so, and that there can be no question of a judge being deprived of the power to decide whether or not to do so simply because the parties have decided to settle their dispute after reading the judgment which has been sent to them in confidence.

30. Counsel accepted that the logical consequence of the arguments they were both urging on the court was that the parties could prevent the judge from delivering judgment even if it contained findings of serious fraud or serious negligence, if the defendant was willing to pay the claimants large sums of money to suppress them. They also accepted that unless there was anything in the procedures of the House of Lords (which they had not researched) to the contrary it would be open on their arguments to the parties to private litigation, on reading the copies of their Lordships' opinions made available to them shortly before they were delivered in the House, to settle their dispute there and then and require that the speeches should not be delivered.

31. The longer we tested their thesis, the more fragile it appeared. When we put to counsel the point made by the judge to the effect that if they were right, powerful defendants like insurance companies could pick and choose which judgments they were happy to see published and which judgments they were willing to pay money to suppress, we were told that it has always been a characteristic of the common law that it has developed haphazardly. It was then suggested to us that there might be one rule for first instance courts and a different rule for appellate courts. For the latter, it appeared to be conceded during the course of argument that this court might have a residual discretion to hand down its judgment notwithstanding the fact that the parties had compromised their dispute, if only to correct errors in the reported judgment in the court below or to reconcile conflicting lines of authority.

32. Since the hearing ended, it has been possible to consider the procedures in the House of Lords which we discussed briefly with counsel. An appeal to the House of Lords which has been set down for hearing may only be withdrawn by order of the House on petition (Practice Directions applicable to Civil Appeals (January 1996) para 28.3). In *Grovit v Doctor* [1997] 2 All ER 417 at 424, [1997] 1 WLR 640 at 647 Lord Woolf described how an Appellate Committee of the House of Lords announced that it had not been prepared to give leave for that appeal to be withdrawn during the course of the hearing. After argument for the

- a appellant had concluded, the parties had been invited to withdraw so that the members of the committee could consider whether it was necessary to call upon the respondents. When the hearing resumed, and before the presiding law lord, Lord Goff of Chieveley, could inform the respondents that the committee did not require their assistance, counsel for the appellant told their Lordships that he had been instructed to seek leave to withdraw the appeal. Such leave was refused.
- b Since the Practice Direction gives the House an unfettered discretion whether or not to permit an appeal to be withdrawn after it has been set down for hearing, there seems to be no reason to suppose that the House would not insist, if it considered it appropriate, to give judgment on an appeal even if it was informed that both parties wished the appeal to be withdrawn in circumstances similar to those under consideration on the present case. The practice of allowing the
- c parties to an appeal to see the opinions of the Lords of Appeal shortly before judgment is given, under strict embargo terms, is described in para 21.2 of the Practice Direction.

33. In my judgment the judge was correct in the way he gave his ruling in this matter, for the reasons he gave. He did possess a discretion to decide whether or not to hand down his judgment, and there are no grounds on which this court could interfere with the way in which he in fact decided to exercise his discretion. As I have said, although much of his judgment was of interest only to the immediate parties to the dispute, there were three rulings on points of law which were potentially of wider interest, and a judge sitting in a specialist jurisdiction like the Technology and Construction Court is uniquely well placed to judge
- e whether it would be of value if his judgment was a matter of public record.

34. Of course the courts are always anxious to assist parties to resolve their disputes, and I realise that one consequence of this judgment is that the parties to the present action may now face ancillary litigation on the question whether their compromise is binding, or may face the expense and inconvenience of an appeal
- f if it is accepted or held that it is not. They have, however, placed themselves in this position by making a compromise agreement on the mutual understanding that, as a consequence of their compromise, the judgment would not be handed down. This mutual understanding is unenforceable, in that public policy dictates that the judge should have an independent discretion to decide whether to deliver his judgment or not. The wishes of the parties are just one factor, but not an
- g overriding factor, which a judge should take into account in deciding how to exercise his discretion.

35. I should make it clear that the situation I have been considering in this judgment is quite different from the situation which confronted another division of this court recently in *HFC Bank plc v HSBC Bank plc* [2000] CPLR 197. In that
- h case the court had granted an expedited hearing of an appeal at the request of the claimant, and the members of the court then gave priority to preparing their judgments over the preparation of judgments in earlier cases which were not of the same degree of urgency. At the beginning of the third week after the end of the hearing of the appeal counsel's clerks were told that judgment would be
- j given on the Thursday of that week and that copies of the draft judgments would be made available to counsel at midday on the Tuesday. Early on the Tuesday morning, however, the court was told that the parties had come to terms overnight and wished that the appeal should be dismissed. The draft judgments were therefore not made available.

36. The parties had therefore not been shown the judgments which were going to be delivered at the time they settled their dispute, and this, in my

judgment, makes all the difference. In the circumstances of that case Nourse LJ said (at 199) that the court wished to make it clear that it would always encourage the parties to settle their differences even at a late stage and nothing the court said was intended to detract from this principle. He went on to express the view of the court that it had been the duty of the parties themselves to inform the court of the possibility of a settlement at any rate on the Thursday of the previous week when arrangements were made for a meeting in the United States in four days' time between representatives of the parties' holding companies with a view to seeing whether the dispute could be compromised even at this very late stage. It was no part of the compromise agreement that the judgments of the Court of Appeal should be suppressed, since neither party had seen the draft judgments at the time they settled their differences. a

37. For the reasons I have given in this judgment I would dismiss this appeal. b

ROBERT WALKER LJ.

38. I agree. c

PETER GIBSON LJ.

39. I also agree. d

Appeal dismissed. Permission to appeal refused.

James Wilson Barrister (NZ).

End of Volume 3